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Per. L. Eng. A. 75 d. 48¹⁸⁷⁸⁽²⁾

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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1878:

COMPRISING
REPORTS OF CASES

IN
The House of Lords and in the Privy Council,
IN
The Court of Appeal, the Court for Crown Cases Reserved,
and the Court of Bankruptcy;

AND IN
THE HIGH COURT OF JUSTICE

VIZ.
Chancery; Queen's Bench; Common Pleas; Exchequer;
Probate, Divorce and Admiralty, Divisions;
And in other Divisional Courts.

MICHAELMAS, 1877, to MICHAELMAS, 1878.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the Divisions and Courts from which the Appeals respectively come. These Cases form four distinct Volumes, having separate Indexes of Subjects and Tables of Cases; viz., the Chancery Volume; the Bankruptcy Volume; the Bench, Pleas and Exchequer Volume; and the Probate, Divorce and Admiralty Volume.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY
MONTAGU CHAMBERS, ESQ., ONE OF HER MAJESTY'S COUNSEL,
FRANCIS TOWERS STREETEN, ESQ.,
AND
FREDERICK HOARE COLT, ESQ., BARRISTERS-AT-LAW.



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CASES
ARGUED AND DETERMINED
IN THE
Queen's Bench, Common Pleas & Exchequer Divisions
AND IN
Other Divisional Courts
OF THE
HIGH COURT OF JUSTICE,
REPORTED BY
J. H. ETHERINGTON SMITH AND RICHARD HOLMDEN AMPHLETT—
Queen's Bench,
WILLIAM PATERSON AND GILBERT GEORGE KENNEDY—*Common Pleas,*
W. DECIMUS I. FOULKES AND FRANCIS PARKER—*Exchequer,*
BARRISTERS-AT-LAW ;
AND ON APPEAL FROM THOSE DIVISIONS AND COURTS
IN
Her Majesty's Court of Appeal,
REPORTED BY
WILLIAM ROBERT COLLYER AND ALFRED B. KEMPE,
BARRISTERS-AT-LAW,
AND IN
The House of Lords,
REPORTED BY
L. G. GORDON ROBBINS,
BARRISTER-AT-LAW.

MICHAELMAS, 1877, TO MICHAELMAS, 1878.

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN THE

DIVISIONAL COURTS

OF THE

Queen's Bench, Common Pleas & Exchequer Divisions

OF

THE HIGH COURT OF JUSTICE,

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

MICHAELMAS 1877 TO MICHAELMAS 1878.

41 *Victoria*.

[IN THE COURT OF APPEAL.]
(Appeal from the Common Pleas Division.)

1877. { DIXON AND OTHERS v.
Nov. 2, 4. { REUTER'S TELEGRAPH
COMPANY, LIMITED.*

Telegraph Company—Duty to Recipient of Telegram—Negligence—Delivery of Message to wrong Person.

Plaintiffs, merchants at Valparaiso, received through the defendants a telegram purporting to come from London and addressed to them, ordering a large shipment of barley. No such message was ever in fact sent to the plaintiffs. The misdelivery of the message was caused by the negligence of the defendants, and occasioned heavy loss to the plaintiffs, in consequence of a fall in the market price of barley. In an action to recover the amount of this loss,—Held (affirming the decision below), that there was no duty owing by the defendants to the plaintiffs, in the matter, either by contract or law, and therefore no action would lie.

This was an appeal by the plaintiffs from the judgment of the Common Pleas Division on a demurrer to a statement of claim, reported 46 Law J. Rep. C.P. 197.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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Herschell (Benjamin and W. H. Butler with him), for the plaintiffs.—He referred to *The New York Telegraph Company v. Dryburg* (1).

Watkin Williams (H. D. Green with him), for the defendants.

Benjamin desired to add nothing in reply.

The arguments were the same as in the Court below, and as referred to in the following judgments.

BRAMWELL, L.J.—I am of opinion that the judgment of the Common Pleas Division must be affirmed. The general rule of law is clear that no statement made to another, which is untrue in fact and causes damage to that other, is actionable unless made fraudulently. But the plaintiffs' counsel says that the case of *Collen v. Wright* (2) shews that there is an exception to the general rule; and that the present case is within the principle of that exception. I do not think that *Collen v. Wright* (2) does shew that there is any exception. It establishes a separate and

(1) 35 Pennsylv. 298.

(2) 7 E. & B. 301; s. c. 26 Law J. Rep. Q.B. 147; in error, 8 E. & B. 647; s. c. 27 Law J. Rep. Q.B. 215.

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independent rule, which is this:—If a person asserting that he has authority requests another to negotiate through him a transaction with the person whose authority he says he has, then he contracts that he has such authority. If so, that case does not apply here, for I find no request either to enter into negotiations, or to contract, or to do anything else. The defendants are simply deliverers of a message, which they say is from certain persons to the plaintiffs; therefore there is no request in the case. I therefore think that there is a clear distinction between this case and that of *Collen v. Wright* (2), and that we cannot resort to that case to take the present out of the general rule.

But the plaintiffs' counsel further says that there is negligence. To that it is replied, that before you consider negligence you must make out that there is some duty on the part of the defendants towards the plaintiffs, either by contract or by law. Here there is none imposed by contract because there is no contract, and none by law, for if there were the general rule is inaccurate, and it should be:—"No action will lie for a misstatement, &c., unless it be made fraudulently or carelessly;" but no such qualification exists, therefore this point also fails.

Then as to the point that it is implied by the nature of a telegraph company's business that they must be careful and accurate. That seems to me to perhaps give to their statements a greater degree of solemnity than to those of any casual person, but that is all.

One word more. It is said that we must decide in the plaintiffs' favour on account of the enormity of the consequences if we hold the contrary. I do not think the enormity exists. We must look at the matter on general principles. If we are to say a man is to be liable for erroneous statements no one would make any statement without guarding it. The rule is not, I think, unreasonable as a general one, nor in this case. The company are under an obligation to the sender of the telegram, though here, luckily for them, the sender is a gainer by their mistake, and so is not likely to sue them. There is a sufficient guarantee in the de-

sire of the company to get business that mistakes shall not occur often. Suppose the telegraph company were to say, "We do not choose to be harassed by actions either just or unjust, and so will not guarantee our accuracy in any case," is it to be supposed that people would not deal with them just as before?

I see no likeness in this case to that of carriers. Carriers are liable to the person who employs them, and to the owner of the goods they convey. The plaintiffs in this case did not employ the defendants nor were they owners of the message. A case much nearer the present would be that of a misdelivery of goods by a carrier to one who is wronged thereby, but it is doubtful whether even in that case an action would lie. The judgment of the Court below is therefore right, and we must affirm it.

BRETT, L.J.—It seems to me that all a telegraph company undertake, and all any one can reasonably expect them to do, is to deliver messages. Therefore their contract is with the sender only. Here the telegraph company have, in effect, if not expressly, made a representation to the plaintiffs, erroneous but not so to their knowledge. Although, therefore, it was a representation on which the plaintiffs acted, and were right in acting, still there is no cause of action, because the representation was not intentionally erroneous.

But it is said that *Collen v. Wright* (2) makes an exception to the rule. I do not think it does. It is founded on an independent rule, which is this:—If you invite a person to negotiate with you on the ground that you are fulfilling a certain character, there is a guarantee on your part that you do fulfil that character, as that is the ground of the invitation to negotiate. No doubt, if you do not fulfil the character there is misrepresentation, but your liability to be sued does not depend on the misrepresentation alone but on the invitation also. If the telegraph company were mere messengers, they did not invite the plaintiffs to act with them in any character whatever, therefore the case is not within *Collen v. Wright* (2).

Then as to negligence. What we have

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heard as to that is founded on the idea that when, in any transaction, one man by words or conduct leads another to conduct himself in any manner to his prejudice, then a certain result follows. That result will be found from *Swan v. The North British Australasian Company* (3) to be an estoppel. But in order that that may operate there must be a duty towards the person or persons to whom the statement is made. Here the company owe no duty to the plaintiffs, and, moreover, here the plaintiffs are not relying on an estoppel, but are asserting that the defendants are not agents. I can see no liability on the defendants' part.

COTTON, L.J.—I am of the same opinion. The authority most relied on is *Collen v. Wright* (2). It is clear in that case that it was decided on the ground that there was a contract between the plaintiff and defendant. That is put very clearly by Willes, J.,—"The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes or promises the person who enters into such contract upon the faith of the proposed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter." Now in the present case the telegraph company were simply conveyers of a message. They said nothing except, "Here is a message;" so it cannot be said that there was any contract.

It was said that the defendants were liable on the ground of negligence. It was admitted that mere misrepresentation would not be enough to support an action for deceit, but it was said that from the nature of the business of the defendants they are bound to take extra care, and

that if there were any absence of care they would be liable. I cannot see that that is so.

Judgment affirmed.

Solicitors—G. L. P. Eyre & Co., agents for Garnett, Tarbet & Tinne, Liverpool, for plaintiffs; Johnsons, Upton, Budd & Co., for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1877. { THE STANDARD DISCOUNT
Nov. 6. { COMPANY v. OTARD DE
LA GRANGE.*

Practice—Leave to sign Judgment—Interlocutory or Final—Order XIV. rule 1—Time for Appealing—Order LVIII. rule 15.

An order giving the plaintiff leave to sign final judgment under Order XIV. rule 1, is an interlocutory order, and an appeal from such order must therefore be brought to the Court of Appeal within twenty-one days.

An order was made in this case by Master Dodgson under Order XIV. rule 1 giving the plaintiffs leave to sign final judgment. This order was confirmed by Archibald, J., at chambers, and by the Common Pleas Division on the 8th of August, 1876.

The defendant regarding this as a final order gave notice of appeal on the 11th of May, 1877.

W. G. Harrison, for the plaintiffs, took the preliminary objection that the appeal was too late. The order was interlocutory, and therefore the appeal under Order LVIII. rule 15 should have been brought within twenty-one days.

Anderson and Warmington, for the defendant.

BRAMWELL, L.J.—I am of opinion that the objection must prevail, as I am clearly of opinion that this is an interlocutory order. It is a very plain case. Unless it be final the order must be inter-

3) 2 Hurl. & C. 175; s. c. 32 Law J. Rep. Exch. 278.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

Standard Discount Co. v. Otard (App.), C.P.

locutory, for there cannot be an order which is neither the one nor the other. Well, is this final? It is not the final order of the Court in the cause, for there must be another order, although it is one that follows as a matter of course. It is not obligatory on a plaintiff to sign final judgment. It is not likely that he would not do so, but there are cases in which he might not; for example, he might be satisfied of the defendant's solvency, and might prefer to have five per cent. for his money if he had lent any, rather than the four per cent. which he would get after judgment. I only put this as an instance; it is enough to say that it is not obligatory on him to sign judgment, and a future step is necessary before it is done.

Another word. It may seem a great refinement and almost a quibble, but it is not so. If Order XIV. rule 1 had been "the Court or Judge may give judgment," such order would have been final, but the words of the rule are, "may make an order empowering the plaintiff to sign judgment," this is different and probably intentionally so. I do not see that there is any hardship in the case, the defendant has time to appeal, and if it be not long enough for the gravity of the case the Court can enlarge it. The appeal should have been brought within twenty-one days, and it is now too late.

BRETT, L.J.—I am not so clear on this point as my brother Bramwell, but I agree that the order is an interlocutory one, because it is not the last step in law to fix the *status* of the parties in the matter. I cannot help thinking that no order is final which would not finally fix the *status* of the parties whichever way it be decided.

COTTON, L.J., concurred.

Appeal dismissed.

Solicitors—Argles & Rawlins, for plaintiffs; A. G. Ditton, for defendant.

[IN THE HOUSE OF LORDS.]

1877. { SMITH (respondent) v. MUS-
July 7, 27. { GRAVE AND ANOTHER (ap-
pellants).

Trespass—Mines—Escape of Water.

The appellants were owners of mines adjoining and communicating with, but on a higher level, than mines belonging to the respondent. The appellants' mining operations had caused part of the surface of their land to give way, whereby hollows and openings were formed communicating, by means of the underground workings of the appellants' mines, with the mines of the respondent. Across the surface of the appellants' land ran a stream, which in 1865 had been diverted by them into another channel. In November, 1871, owing to a heavy rainfall, the stream burst its banks and overflowed into the hollows on the appellants' land; the water thus accumulated percolated by the openings through the appellants' mines into the respondent's mines. The respondent brought an action for the damage thereby caused, and the jury at the trial found that the rainfall was excessive, but that the flooding was caused chiefly by the improper execution and insufficient condition of the new channel, and that the stream in its diverted course was more likely to overflow and do more damage than if it had been allowed to flow in its former channel:—Held (affirming the decision of the Court of Appeal), that the appellants were liable for the damage suffered by the respondent.

This was an appeal from a decision of the Court of Appeal, affirming a decision of the Exchequer Division in favour of the respondent, the plaintiff in the original action.

The declaration in the original action contained four counts: The first, for trespass to the plaintiffs' mines. The second count stated that the plaintiff was possessed of a close called Crossgill and of the mines under the surface of the same, and that the defendants were possessed of land called Goosegreen and of mines under the same, adjoining to and in communication with but on a higher level than the mines of the plaintiff; that the defendants wrongfully made holes in the

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surface of their land, and thereby wrongfully introduced quantities of water into the plaintiff's mines. The third count stated that the defendants did wrongfully permit certain holes which had been made in the surface of the defendants' land to remain open after the holes had ceased to be required, for working the mines, and by means of such holes quantities of water got into the defendants' mines, and so into the plaintiff's mines and flooded the same. The fourth count stated that the defendants so negligently diverted a watercourse flowing through their land, without making a proper and sufficient channel and banks for preventing the watercourse from flooding the adjacent lands, that by reason thereof the watercourse burst and overflowed its banks, and flowed over the lands of the defendants and down the said holes, and thereby quantities of water got into the defendants' mines, and so into the mines of the plaintiff and flooded the same.

The defendants pleaded first, not guilty; second, not possessed; third, leave and license; fifth, to so much of the second, third and fourth counts, as relates to the water introduced into the defendants' mines by reason of the floor being impervious to water, and of the dip or inclination thereof necessarily running down from the same and passing into the plaintiff's mine as alleged, a denial of such several allegations; sixth, to so much of the second, third and fourth counts as relates to the defendants knowing as therein respectively alleged, that they had no such knowledge; seventh, as to the second, third and fourth counts, that the several grievances in those counts respectively mentioned were caused by the acts, neglects and defaults of the plaintiff and not otherwise; and eighth, the Statute of Limitations.

Thereupon issue was joined.

The case was tried at the Cumberland Spring Assizes, 1872, before Lush, J., when the defendants proposed to prove that they had taken every reasonable precaution to guard against ordinary emergencies, and that they had by diverting and improving the watercourse, and otherwise, greatly lessened the chance of water escaping from the surface of their land

into their own mines and thence into the plaintiff's mines. The learned Judge, however, ruled that on the admitted facts the defendants had by means of the hollows and cut suffered water to collect on their land to a greater extent than would have been the case if the surface had been in its normal and unbroken condition, and that they were absolutely liable for the consequences, and he rejected the evidence proposed to be adduced. A verdict was accordingly entered for the plaintiff, with leave to move to enter a nonsuit.

A rule was obtained but discharged on the 11th of June, 1872, by the Court of Exchequer, and judgment was given for the plaintiff. The defendants appealed, and on the 11th of February, 1874, the Exchequer Chamber varied the decision of the Court below, and ordered a new trial to be had.

The case is reported in the Court of Exchequer, *sub nomine Smith v. Fletcher*, in 41 Law J. Rep. Exch. 193; s. c. Law Rep. 7 Exch. 305; and in the Exchequer Chamber, in 43 Law J. Rep. Exch. 70; s. c. Law Rep. 9 Exch. 64.

The new trial was had at the Cumberland Spring Assizes, 1874, before Pollock, B., when the following facts were proved:—

The plaintiff was the lessee of hæmatite iron ore mines known as the Crossgill mines, lying under the Crossgill estate in Cumberland, and the defendants were the lessees of certain other hæmatite iron mines under lands adjoining the Crossgill estate on the east side thereof, and known as the Parkside mines.

The same stratum of ore runs through the mines of the plaintiff and of the defendants. The dip of the stratum is from east to west, or from the defendants' mines to the plaintiff's mines.

There was a communication between the mines of the plaintiff and of the defendants, so that the water in the defendants' mines could naturally find its way into the plaintiff's mines. The defendants worked their mines partly in the usual way underground, partly where the ore cropped out on the surface, by quarrying. By this mining and quarrying the defendants had made a communication between the surface and some of the underground workings in the mines of the defendants, and

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also some of the surface of the defendants' land near the communication with the surface had given way, cracked and sunk. The result of this was that a hollow and excavation in the ground was formed communicating by means of the underground workings of the defendants' mines with the mines of the plaintiff. This hollow and excavation was known by the name of "Paddy Murray's Cut," and any water which found its way into the said hollow would, by force of gravitation, flow and pass by means of the communication before-mentioned through the defendants' mines into the mines of the plaintiff. Paddy Murray's cut was finished before 1865.

Before the sinking of the surface of the defendants' land, and the formation of Paddy Murray's cut, a stream passed through the middle of the now broken ground from north to south. The stream drained the whole of the district for some distance above and to the north of the said mines, and the ground rose on each side of the original course of the stream, but the ground rose more to the east than to the west. In consequence of the sinking and cracking of the surface of the defendants' land, by reason of the mining operations carried on by the defendants, it became necessary for the defendants to divert and turn, and they accordingly on two occasions (namely) in 1861 and 1865 diverted and turned the course of the said stream and made new channels for it.

From the 14th of November to the 4th of December, 1871, there was a heavy rainfall. The water in the stream broke through the banks at the bends where the two diversions were made, and the water of the stream found its way, together with other waters which would formerly have drained or flowed into the original stream, down Paddy Murray's cut into the defendants' mines, and thence into the plaintiff's mines. There was also a heavy rainfall at the end of December, 1871, and the beginning of January, 1872, and another heavy rainfall in the middle of January, 1872, and on each of these occasions the defendants' mines were flooded in the way mentioned.

At the trial the following questions were left to the jury:—

1. Was the plaintiff's mine flooded from natural causes or from anything done by the defendants?—Done by an act of the defendants.

2a. Was the flooding occasioned in whole or in part by the diversion of the stream?—In part and chiefly by diverting the stream.

2b. Or by the deficient condition of the new channel or the banks thereof?—And by the condition of the new channel.

2c. Was the stream in its diverted course more likely to overflow in time of flood, and would its overflow do more damage to the plaintiff than if it had been allowed to flow in its former channel?—The stream in its diverted course would be more likely to overflow, and so do more damage to plaintiff.

3. Was the flooding occasioned by the failure of the diverted channel or other means to intercept the surface water on the broken ground?—Yes.

4. Was the flooding occasioned not by the insufficiency of the channel but by the result of the exceptional rainfall?—The rainfall was exceptional, but the new channel was insufficient.

5. Was what was done by the defendants done in the ordinary, reasonable and proper working of their mine?—Yes; if the diversion of the stream had been properly executed.

The learned Judge stated that the answers were a verdict for the plaintiff, but reserved leave to the defendants to enter the verdict for them.

The defendant Fletcher having died, the three surviving defendants applied to the Court of Exchequer for a rule, which was granted on 13th of February, 1875, but discharged by an order of the Exchequer Division on 22nd of November, 1875.

The defendant, James Dees, having also died, the two surviving defendants appealed to the Court of Appeal, and by an order made on the 21st of February, 1876, the Court of Appeal affirmed the decision of the Exchequer Division.

This appeal was now brought against the last-mentioned decision.

Sir J. Holker (Attorney-General) and Mr. T. H. Baylis (Mr. Howard Vincent with them), for the appellants.—The first

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question in this case is as to the liability of the defendants in respect of the damage done by the water which came upon the broken ground and percolated through it, and by gravitation found its way into the plaintiff's mine. In *Baird v. Williamson* (1) the owner of the upper mines was held liable, because he pumped up water which flowed into the lower mines; but it is now conclusively settled that when in the natural user of the land mineral workings have caused the surface to subside, and injury is thereby caused to an adjacent lower coal mine by mere gravitation and percolation, there is no valid claim for damages—*Smith v. Kenrick* (2), *Rylands v. Fletcher* (3), *Wilson v. Waddell* (4).

Secondly, as regards the overflow of the brook. The defendants as owners of the land had a perfect right to divert the watercourse, being only bound to make the diverted course as capable as the original course of carrying off water. In this case it is clearly proved that the rainfall was extraordinary, and caused an overflow of all the rivers and brooks in the neighbourhood. There can be no doubt that this brook, if still running in its old course, would have nevertheless overflowed. An owner of land is under an obligation to take reasonable care that his fences or embankments are in a secure state, so as to prevent injury to adjoining land—*Buzton v. The North-Eastern Railway Company* (5). But there is no liability attaching to landowners for the consequences of an overflow from their land, which is caused by *vis major*, or act of God—*Nichols v. Marsland* (6). The defendants have

taken all reasonable care and precaution against accident, and are thereby protected from liability—*Carstairs v. Taylor* (7). The case of *Crompton v. Lea* (8) decided that the owners of upper mines cannot be restrained from ordinary, reasonable and proper working of their mines, even though such working may cause an overflow into adjoining mines and consequent injury. According to the principle of that decision the defendants ought not to be held liable for damages in this case.

Mr. O. Crompton (*Mr. Herschell* with him) for the respondent, was not called upon to argue.

LORD PENZANCE.—The plaintiff's claim in this case was for damages in respect of the injury caused to his mine by the flood water, which he alleges that the defendants wrongfully caused to flow into it. The water in question flowed down into the defendants' own mine through certain fissures or cracks in the surface of the soil above (and particularly through a hole known as Paddy Murray's Cut), which had been caused by the defendants having removed the soil below in the course of their mining operations, and from the defendants' mine it flowed into the plaintiff's.

Your Lordships cannot be asked, after the decision of this House in the recent case of *Wilson v. Waddell* (4), to hold that the defendants are liable as for a wrongful act for thus cracking and laying open the soil above his own mine, so as to let through the rain-water which might fall thereon.

Nor indeed, although such a claim was originally made in the declaration, was it persevered in at your Lordships' bar; but the plaintiff's ground of complaint was narrowed to this, that the defendants had diverted a natural watercourse which ran across and over his mine, and that the diverted watercourse had been so inefficiently constructed, that on the occasion of certain heavy falls of rain the water flowed over the top of the artificial

(1) 15 Com. B. Rep. N.S. 376; s. c. 33 Law J. Rep. C.P. 101.

(2) 7 Com. B. Rep. 515; s. c. 18 Law J. Rep. C.P. 172.

(3) 37 Law J. Rep. Exch. 161; s. c. Law Rep. 3 E. & I. App. 330.

(4) Law Rep. 2 App. Cas. (Sc.) 95.

(5) 9 B. & S. 824; s. c. 37 Law J. Rep. Q.B. 258; Law Rep. 3 Q.B. 549.

(6) 44 Law J. Rep. Exch. 134; s. c. Law Rep. 10 Exch. 255; affirmed on appeal 46 Law J. Rep. 174; s. c. Law Rep. 2 Ex. Div. 1.

(7) 40 Law J. Rep. Exch. 129; s. c. Law Rep. 6 Exch. 217.

(8) 44 Law J. Rep. Chanc. 69; s. c. Law Rep. 19 Eq. 116.

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bank of the watercourse, carried away a part of that bank, and, thus released, poured down in large quantities through the fissures and holes in the surface, and flooded the plaintiff's mine.

The answer of the defendants to this complaint was, as presented to your Lordships in argument, that the new and diverted watercourse was as efficient for carrying off the water as the old one had been, but that the rainfall and flooding was of so unusual and exceptional a character, that neither the new nor the old watercourse, if it had been in existence, could possibly carry off the water.

The case has been before two juries. It seems to have been withdrawn from the first, but on the second occasion the learned Judge left several questions to the jury for their decision, the answers to which are now before your Lordships; and the contention of the defendants is, that upon those answers and upon such inferences of fact as your Lordships may draw from the evidence, not inconsistent with those findings, the defendants are entitled to have the verdict entered for them.

At the threshold of the enquiry as to the defendants' liability to the plaintiff lies the question, What obligations did the defendants incur when they diverted the natural watercourse? It is not a question in this case whether the defendants were bound thus to divert the watercourse before they pursued their mining operations in its neighbourhood; and, on the other hand, it is not made a ground of complaint against them that they did divert it. But in diverting it, what were their obligations?

Was it enough to make the new and artificial water as efficient, but no more so, than the old and natural one, so that whatever defects in capacity or otherwise the old one had might without responsibility be reproduced in the new one?

Or, secondly, were they bound (as they were for their own convenience making a new and artificial watercourse) to construct it in such a manner that it would be capable of conveying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality?

Or, thirdly, were they bound to make provisions for any such quantities of water as might possibly be discharged into it from any mere rainfall, however heavy and however contrary to all previous experience?

The choice between these three propositions is a question of interest capable of being very variously regarded; and before a decision is come to upon it the matter should be very carefully considered.

For my own part, I incline to think that the second proposition defines the true measure of the defendants' obligations, but I desire to express no positive opinion to that effect.

For I submit to your Lordships that you are not called upon to give your adhesion to either of these propositions on the present occasion, inasmuch as whichever of the above three propositions may properly define the defendants' obligations, it is plain from the undisputed facts of the case that they did not fulfil the last of them; and it is, I think, equally plain that the jury have found that they did not fulfil either of the other two.

I will shortly point out that this is so:—

The jury first say, generally, that the flooding was caused "by the act of the defendants, as distinguished from natural causes." In their next answer they say the flooding was caused chiefly by "diverting the stream," and "by the condition of the new channel." In other words, they affirm that it was by directing the stream into a channel, the condition of which was not sufficient, that the major part of the mischief was done.

These answers, if they stood alone, would leave it open to be contended that the "condition" which they considered insufficient was a condition which, although sufficient to meet the requirements of any rainfall which might reasonably be expected, was yet insufficient to encounter the pressure of an exceptional rainfall, such as could not be reasonably anticipated.

But this view of the meaning of the jury is no longer possible when their answer to Question 4 is considered. The

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question was pointedly put to them—*“Was the flooding occasioned not by the insufficiency of the channel, but by the result of exceptional rainfall?”* And the answer is, *“The rainfall was exceptional, but the new channel was insufficient.”* To which they add in their 5th and last answer: *“What was done by the defendants would have been done in the ordinary, reasonable and proper working of the mine, if the diversion of the stream had been properly executed.”*

These answers make it clear, I think, that the insufficient condition of the new channel to which the jury were referring was an insufficiency to cope with a rainfall *not exceptional*, or, in other words, a rainfall such as might by a reasonable man be anticipated.

The remaining point, which was chiefly if not wholly relied upon in argument before the House, was this: that the new watercourse was as capable of carrying off the waters on the occasions in question as the old one would have been. This question, it was argued, had never been presented to the jury, whereas the evidence upon it was largely if not wholly in favour of the defendants.

As regards the weight of evidence, I consider it is not open to this House upon this appeal (which is against the discharge of a rule obtained by the defendants to enter the verdict for them upon the findings of the jury) to entertain the question whether the verdict was against the weight of evidence.

And as regards the contentions that the comparative capacities of the two watercourses were never submitted to or adjudicated upon by the jury, I conceive that it is wholly untenable in the face of the following question put by the Judge and the answer given by the jury: *“Was the stream in its diverted course more likely to overflow in time of flood, and would it overflow and do more damage to the plaintiff than if it had been allowed to flow in its former channel?”* Answer: *“The stream in its diverted course would be more likely to overflow, and so do more damage to the plaintiff.”*

Nor can it be said that the attention of the jury was not called to the full meaning and understanding of this question.

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For in the summing-up the learned Judge said: *“Therefore I ask this question whether the flooding was occasioned by the diversion of the stream or by the deficient condition of the new channel or the banks thereof? To make that clear, I may also ask you was the depth of the channel such as to make it as capacious and efficient as the former channel?”*

It is clear, therefore, I think, that the jury considered the new channel not as efficient as the old one would have been. And although it seems to have been proved as a matter of measurement that the cubical capacity of the new channel surpassed that of the old, it must be borne in mind that the bends and curves in the new channel, which did not exist in the old one, may have had the twofold effect of impeding the rapid discharge of a great body of water, and of creating by a great accumulation of water an unusual strain upon the banks at the points where these bends occurred, causing the overflow of the water and the gradual destruction of the banks themselves. The jury—several of whom appeared to have viewed the spot—may well therefore have been justified in coming to a conclusion against the sufficiency of the new watercourse as compared with the old, notwithstanding the evidence as to its cubical capacity upon which the defendants' counsel so strongly relied.

For these reasons I submit to your Lordships that the decision of the Court of Appeal, affirming the decision of the Exchequer Division, should be affirmed by this House, and the appeal against it be dismissed with costs.

THE LORD CHANCELLOR (LORD CAIRNS) concurred.

LORD HATHERLEY concurred.

LORD BLACKBURN concurred.

LORD GORDON.—I also concur. I would merely add that the circumstances of this case are different from those of *Wilson v. Waddell* (4).

The contention of the appellant in this case was that the new channel was sufficient for carrying off the water, had it

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not been for the result of an exceptional rainfall, against which there was no duty imposed upon them to provide. But this matter was submitted to the jury by the learned Judge who presided at the trial, and they found that the damage was caused by the insufficiency of the new channel, and that the diversion of the stream had not been properly executed. I think the result expressed by my noble and learned friend opposite (Lord Penzance) is fully supported by the findings of the jury.

*Judgment appealed from affirmed,
and appeal dismissed with costs.*

Solicitors—Gregory, Rowcliffes & Co., agents for J. R. Musgrave, Whitehaven, for appellants; Helder, Roberts & Gillett, agents for Brockbank & Helder, Whitehaven, for respondent.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1877. } *In the matter of an arbitration be-*
Nov. 7. } *tween THE SANDBACH CHARITY*
 } *TRUSTEES AND THE NORTH STAFF-*
 } *ORDSHIRE RAILWAY COMPANY.**

Lands Clauses Consolidation Acts, 1845
(8 Vict. c. 18), and 1869 (32 & 33 Vict.
c. 18), s. 1—*Compensation for Land taken*
—*Costs of Arbitration—Taxation by Master*
—*Jurisdiction of Court to review.*

Where the costs of an arbitration, held to settle the compensation to be paid for land taken under the Lands Clauses Consolidation Act, 1845, have been taxed by a master under section 1 of the amending Act of 1869, the Court has no jurisdiction over the taxation and cannot review it.

Owen v. The London and North Western Railway Company approved.

This was a motion by way of appeal from a refusal of the Queen's Bench Division to grant a rule calling on the North Staffordshire Railway Company to shew cause why the master should not review his taxation of costs in this matter, and also state in his allocatur the grounds and reasons of his decision upon certain

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

objections made by the applicants; and for a mandamus.

It appeared on the affidavits that the railway company had taken, under compulsory powers, certain land belonging to the Sandbach Charity Trustees. These trustees claimed 6,150*l.* for the land, the railway company offered 1,500*l.*, and an arbitration was held at the request of the railway company, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), when the sum of 3,650*l.* was awarded as the price of the land taken.

Application was made to one of the masters of the Superior Courts, and he taxed and settled the costs of and incidental to the arbitration, pursuant to the provisions of 32 & 33 Vict. c. 18. s. 1 (1).

The trustees being dissatisfied with the taxation applied to the Queen's Bench Division for a rule *nisi* to review the master's taxation, and this being refused on the ground that the case was governed by *Owen v. The London and North Western Railway Company* (2), they appealed.

A. Brown, for the trustees.—The decision of the Queen's Bench Division was based on the judgment in *Owen v. The London and North Western Railway Company* (2), but since that case was decided an Act has been passed amending the Lands Clauses Consolidation Act, 1845, and section 1 of this later Act (32 & 33 Vict. c. 18) (1) has altered the position of the taxing masters. The fees are no longer taken by the masters for their own use, but are taken by the Treasury; the masters are not now *personæ designatæ*

(1) 32 & 33 Vict. c. 18. s. 1.—“Where in England under ‘the Lands Clauses Consolidation Act, 1845,’ or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and to the award shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the Superior Courts of Law, and such fees may be taken in respect of the taxation as may be fixed in pursuance of the enactments relating to the fees to be demanded and taken in the offices of such masters, and all those enactments, including the enactments relating to the taking of fees by means of stamps, shall extend to the fees in respect of the said taxation.”

(2) 37 Law J. Rep. Q.B. 35; s. c. Law Rep. 3 Q.B. 54.

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under the Act, but are officers of the Court, and therefore subject to the jurisdiction of the Court. Moreover, this case is not governed by the decision in *Owen v. The London and North Western Railway Company* (2), for that was a decision on the costs of an enquiry before a jury, whereas the present case relates to the costs of settling compensation by arbitration, so that the proceedings are really in this Court, for section 36 of the Lands Clauses Consolidation Act provides that the submission to arbitration "may be made a rule of any of the Superior Courts," and if that be so, then it must be the business of the Court to tax the costs, and the master can only act as the delegate of the Court, and his taxation is thus subject to review by the Court.

BRAMWELL, L.J.—I think that this motion must fail, and that this appeal must be dismissed. We have been asked to grant a mandamus; but the answer to that is, that the master has not declined jurisdiction. We cannot grant a *certiorari* because the master has only exercised a jurisdiction which he undoubtedly possesses. The one question, therefore, which we have to consider is, whether we have jurisdiction to review the taxation of the costs by the master in this matter. Now it is clear from the case of *Owen v. The London and North Western Railway Company* (2), that no such jurisdiction exists in the case of the costs of an enquiry before a sheriff and a jury under the Lands Clauses Consolidation Act; but it is said that, where the compensation to be paid under that Act has been settled by arbitration, the Court has jurisdiction over the proceedings, because the submission to arbitration may be made a rule of Court, and that we are, therefore, entitled in this case to review the taxation of costs made by the master in pursuance of the provisions of the Lands Clauses Consolidation Act of 1845, and the amending Act of 1869. It is true that the words in the 1st section of the amending Act of 1869 are different from those used in the original Act; but I do not think that these changes make any real difference in the position of the taxing officer; he still, I think, remains the *persona designata* under

the Act, and although the fees for taxation are now taken by the Treasury his relation to the Court is, in my opinion, unaltered. The old law still remains, and the Court has no more power now to review such a taxation as this, than it had before the amending Act of 1869 was passed. If the Legislature had intended to change the law the statute would have said so, and provision would have been made that the Court should tax the costs; but we do not find any words to this effect; it is, on the contrary, expressly enacted that the masters shall tax these costs, and that too, as I think, without any appeal to the Court. I am, therefore, of opinion that this appeal must be dismissed.

BRETT, L.J.—I also think that this application must be refused. Jurisdiction has not been declined, so there is no ground for granting a mandamus, and the master exercised the jurisdiction which he undoubtedly possessed, and therefore a *certiorari* cannot issue. *Owen v. The London and North Western Railway Company* (2) decided two points—first, that in the ordinary cases of taxation of costs, the Court itself really taxes the costs, and the masters, as the delegated officers of the Court, act in such proceedings for the Court, and carry out part of the process of the Court under the control of the Court. The second point decided was, that under the Lands Clauses Consolidation Act the master is an official appointed by that Act, to tax costs incurred under that Act, and that the master when so acting is in no sense an officer of the Court. I think that both these points were rightly decided, and I am further of opinion that the proceedings under the arbitration sections of the Act are not proceedings in the High Court; but that such proceedings stand in the same relation to the Court as does an assessment by a jury of compensation under the Lands Clauses Consolidation Act. If so, then the principle of *Owen v. The London and North Western Railway Company* (2) applies, and we have no jurisdiction in the matter. I do not think that the fact that by a later statute the fees for taxation are to be received by the Treasury instead of by the master makes any difference. Nor does

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the fact that the submission to arbitration may be made a rule of Court alter the case, as this is only done for the purpose of issuing execution, that is to say, for a ministerial purpose, and it does not give the Court any jurisdiction over the preliminary stages of the arbitration. The practice of the Chancery Division is based on reasons which are quite distinct from those which apply to this case, as there the first step is the obtaining an order of the Court to tax, so that the whole case is at once brought within the jurisdiction of the Court; whereas in cases such as the present, the parties of their own accord apply to the master to tax the costs, and the leave of the Court is not required.

COTTON, L.J.—I am of the same opinion.
Motion refused.

Solicitors—Henry Tyrrell, agent for Challinor & Co., Leek, for applicants; Burchells, agents for Keary & Marshall, Stoke-upon-Trent, for respondents.

[IN THE COMMON PLEAS DIVISION.]

1877. { TAYLOR (*respondent*) v. THE
June 8. { MELTHAM LOCAL BOARD OF
HEALTH (*appellants*).

Action—Limitation—Local Board acting as Surveyor of Highways—11 & 12 Vict. c. 63. ss. 117 & 139—5 & 6 Will. 4. c. 50. s. 109.

By s. 109 of the Highway Act, 5 & 6 Will. 4. c. 50, no action is to be brought against any person for anything done under that Act after three months after the fact committed, for which such action was brought. The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 117, constitutes the local Board of Health surveyor of highways, with all the powers of any such surveyor in England, and by section 139 of that Act every action against any inspector, or any person acting under the general Board of Health, or the officer of health, clerk, surveyor, inspector of nuisances, or officer acting under the direction of the local Board, for anything done under the provisions of that Act, is to be commenced within six months after the accrual of the cause of action, and not afterwards:—Held, that an action of trespass against a

local Board of Health for an act done by the Board as surveyor of highways, which was commenced less than six months, though more than three months after the alleged trespass, was not too late.

Appeal from the decision of the Judge of the County Court of Yorkshire, holden at Huddersfield. The action was brought on the 22nd of February, 1875, in the said County Court, by the plaintiff against the said local Board, to recover damages for a trespass committed by the defendants on the plaintiff's premises at Meltham, in Yorkshire, on the 27th of October, 1874.

The act constituting the trespass was the removal of an iron railing which the plaintiff had erected on a wall, which the plaintiff claimed to be his, but which the defendants alleged formed part of the highway. The act complained of was done by the defendants as surveyors of highways, and it was objected at the trial, on their behalf, that the action was too late, it having been commenced more than three months after the alleged trespass; and in support of this objection reliance was placed on section 109 of the general Highway Act, 5 & 6 Will. 4. c. 50, which requires actions against the surveyor of highways for acts done under the Highway Act to be brought within three calendar months after the cause of action arose. The learned County Court Judge overruled this objection, holding that the defendants were sued as a corporate body constituted under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and that the plaintiff was therefore entitled to the benefit of section 139 of that Act which fixes the period within which an action must be brought at six months. The case thereupon proceeded, and the County Court Judge having ultimately given a verdict for the plaintiff for the amount of damages claimed, the defendants appealed; and the question now before this Court was whether the action was brought in time, it having been commenced more than three months, but less than six months after the cause of action had arisen.

L. A. Smith, for the appellants.—The defendants did the act complained of as

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surveyors of highways, and the time for bringing the action is therefore governed by 5 & 6 Will. 4. c. 50. s. 109 (1). The site of the plaintiff's wall was supposed by the defendants to have formed part of the highway, and if it did the surveyor of the highways would, under 5 & 6 Will. 4. c. 50. s. 69, have had power to take down the railings, the subject of this action, as an encroachment on the highway. The Local Board, the defendants in this action, being constituted the surveyor of highways by 11 & 12 Vict. c. 63. s. 117, with "all such powers, authorities, duties and liabilities as any surveyor of highways in England," are entitled to say that they did the act complained of as such surveyor, and under the authority of 5 & 6 Will. 4. c. 50. s. 69 (which last section is by 24 & 25 Vict. c. 61. s. 26, expressly declared to apply to all encroachments on highways maintained by a local authority), and consequently the 109th section of 5 & 6 Will. 4. c. 50, limiting the time of action, applies. The learned County Court Judge was of opinion that the action was brought against the defendants as a local Board, under 11 & 12 Vict. c. 63 (The Public Health Act, 1848), and that therefore the proceedings and time for bringing them must be governed by that Act, and not by 5 & 6 Will. 4. c. 50. s. 109, and consequently the plaintiff had the six months limited by the 139th section of 11 & 12 Vict. c. 63 (2), for bringing his action. That

(1) The following is the commencement of section 109 of 5 & 6 Will. 4. c. 50: "No action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act, until twenty-one days' notice has been given thereof in writing to the justice, surveyor or person against whom such action is intended to be brought, nor, after sufficient satisfaction or tender of satisfaction has been made to the party aggrieved, nor after three calendar months next after the fact committed for which such action or suit shall be so brought."

(2) The following is the material part of section 139 of 11 & 12 Vict. c. 63: "No writ or process shall be sued out against or served upon any superintending inspector, or any officer or person acting in his aid, or under the direction of the general Board of Health nor against the Local Board of Health or any member thereof, or the officer of health, clerk, surveyor, inspector of nuisances or other officer or person whomsoever, acting under the direction of the said local board,

statute, however, does not empower the surveyor to abate an encroachment or nuisance on the highway, and the trespass therefore complained of in this action was not "anything done or intended to be done under the provisions of that Act," and consequently that 139th section does not apply here.

Morton Daniel (*Gould* with him), for the respondent.—The defendants were acting under 11 & 12 Vict. c. 63, when they did the act which is the subject of this action, because by section 117 of that Act the local Board of Health is "to execute the office of and be surveyor of highways, and have all such powers, authorities, duties and liabilities as any surveyor of highways in England." When therefore the defendants acted as surveyor of highways as they did in the present case they did so under the authority which is so given them by this section 117 of 11 & 12 Vict. c. 63. The act was, therefore, done, or intended to be done, under that Act, and the 139th section applies. The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 264, adopts the language of this 139th section of 11 & 12 Vict. c. 63, which shews that the Legislature did not consider that the 109th section of 5 & 6 Will. 4. c. 50, should be in force with respect to actions against the local board, for if it had intended that actions should be commenced against the board sooner than six months, when it had acted as such highway surveyor, it would have said so in so many words, or else have repeated the 5 & 6 Will. 4. c. 50. s. 109. As it is, that 109th section is impliedly repealed.

L. A. Smith replied.

GROVE, J.—The point in this case, though a short one, is not free from doubt. I think that the view taken of it by the learned County Court Judge was right, and that section 139 of 11 & 12 Vict. c. 63, limiting the time to six

for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing shall have been delivered to him," &c. "and every such action shall be brought or commenced within six months next after the accrual of the cause of action and not afterwards."

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months for brining an action against the local Board, applies to this case, and consequently that this action was brought in time. By the 11 & 12 Vict. c. 63. s. 117, the local Board is created surveyor of highways, and is "to execute the office of and be surveyor of highways, and have all such powers, authorities, duties and liabilities as any surveyor of highways in England." Then section 139 limits actions against the local Board to six months "for anything done or intended to be done under the provisions of this Act." It has been contended that the act complained of by the plaintiff in this case was not done by the defendants under the provisions of the Act of 11 & 12 Vict. c. 63, but under the Highway Act, 5 & 6 Will. 4. c. 50. Now I take it that when powers under the Act 5 & 6 Will. 4. c. 50, are granted to the local Board by this Act of 11 & 12 Vict. c. 63, it is not an unreasonable construction to say that the local Board act as much under the latter statute as under the former one, and to consider that the Board is as much empowered to act as surveyor of highways as if the powers given by 5 & 6 Will. 4. c. 50, were for that purpose repeated in the 11 & 12 Vict. c. 63. Moreover section 139 of 11 & 12 Vict. c. 63 enacts, "that no writ or process shall be sued out against or served upon any superintending inspector, or any officer or person acting in his aid, or under the direction of the general Board of Health, nor against the local Board of Health or any member thereof, or the officer of health, clerk, surveyor, inspector of nuisances or other officer or person whomsoever, acting under the direction of the said local Board," until after a certain notice, and the action is to be brought within six months. If it had been intended to separate the case of acting under 5 & 6 Will. 4. c. 50 from acting under 11 & 12 Vict. c. 63, and to retain the three months' time of limitation of actions for acts done as surveyor of highways (which obviously is not to apply to all the officers mentioned in this 139th section), one would not expect to find all the officers grouped together as they are in this section. It is plain that the six months' limitation is to apply to

some of these, and if the contention of the appellants is to prevail each class of officer would have a different privilege as to the time within which an action might be brought against him according as such time might be limited by some other statute, notwithstanding there is here a general clause of limitation which is to apply to all of them. It appears to me that the reasonable construction is to say that the six months' limitation is to apply to all these officers when acting under the Public Health Act, 1848, and that they are so acting when they are acting as surveyor of highways, as but for this Act they would not be empowered to do so; consequently, I think this 139th section applies to this case. I may add that The Public Health Act, 1875, to which we have been referred by Mr. Daniel is important, although not passed until after the present action was brought, since it may be regarded as a legislative interpretation of the former Act, that no different provision with regard to the limitation of actions was contemplated for the Board when acting as surveyor of highways.

DENMAN, J.—I am of the same opinion. This is one of those cases which might I think be decided either way, there being as much to be said in favour of one construction as of the other, but on the whole I think the County Court Judge was right. I think that the act, though one which would have been an act done under 5 & 6 Will. 4. c. 50, was nevertheless done under 11 & 12 Vict. c. 63, and I think in substance it was intended by the latter statute that, whether the act done was by this exercise of powers given by the 5 & 6 Will. 4. c. 50, and conferred on the Board by the 11 & 12 Vict. c. 63, or by the exercise of powers given for the first time by the latter statute, there should, in all cases, be a six months' limitation of action.

Decision affirmed.

Solicitors—Shum, Crossman & Co., agents for J. Sykes & Son, Huddersfield, for appellants; Torr, Janeway, Tagart & Co., agents for S. S. Booth, Huddersfield, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1877. { HALL AND ANOTHER v. PRITCHETT;
Nov. 7. { THE CORPORATION OF HUDDERSFIELD, garnishees.

Attachment of Debt—Garnishee—"Debts Owing and Accruing"—County Court Rules, 1875 (Order XXIV. rules 3 & 4).

Salary, payable quarterly, and not due until a future date, is not a debt "due, owing or accruing," and cannot be attached under Order XXIV. rule 4, of the County Court Rules, 1875.

The observations of WIGHTMAN, J., and CROMPTON, J., in Jones v. Thompson, approved and followed.

This was an appeal by the Corporation of Huddersfield against a decision of a County Court Judge, by motion under the County Courts Act, 1875 (38 & 39 Vict. c. 50. s. 6). The following are the material facts:—

The plaintiff, at a Court holden at Huddersfield, on the 17th of March, 1876, obtained a judgment against John Benson Pritchett, surgeon, for the sum of 21l. 2s. 2d. and costs, the whole of which was due from the defendant under such judgment. It appeared that Pritchett had been duly appointed by the Corporation of Huddersfield, with the approval of the Local Government Board, as the Medical Officer of Health, under and pursuant to the Public Health Act, 1872, for the borough of Huddersfield, at a salary of 250l. per annum, payable quarterly, on each first day of July, October, January, and April respectively; but as a matter of convenience to Pritchett, payments on account were made monthly, of monthly proportions of his salary, amounting to 20l. 16s. 8d. (1).

(1) By section 5, article 2, of the circular issued by the Local Government Board, dated the 14th of August, 1872, it is provided that the salary or remuneration of every such officer shall be payable up to the day on which he ceases to hold the office, and no longer and in case he shall die whilst holding such office, the proportion of salary (if any), remaining unpaid at his death, shall be paid to his personal representatives. By article 3 the salary or remuneration assigned to such officer shall be payable quarterly but the sani-

On the 23rd of May, 1877 (the whole of the judgment-debt due from Pritchett as aforesaid being still unsatisfied) the plaintiffs took out a garnishee summons, supported by the usual affidavit, under the County Court Rules, 1875 (2).

The garnishee summons was served on the 4th of June, 1877, on the Corporation of Huddersfield, and required them to appear at the County Court on the 15th of June, 1877, to shew cause why an order should not be made upon them for the payment of the amount of the said judgment, or so much thereof as should equal the amount of the debts due, owing and accruing, from them to Pritchett.

At the holding of the Court, on the 15th day of June, an order for attachment for salary due from the garnishees on the 30th of June then last was made, and the County Court Judge directed that "the sum of 20l. 16s. 8d., or so much thereof as should be due on the 30th of June next, be attached and be then paid to the plaintiffs in part satisfaction of the plaintiffs' judgment-debt of 21l. 2s. 2d."

A rule *nisi* was subsequently obtained to set aside the above order, and have judgment entered for the garnishees, with costs, on the ground that the debt at-

tary authority or authorities may pay to him at the expiration of every calendar month such proportion as they may think fit on account of the salary or remuneration to which he may become entitled at the termination of the quarter."

(2) By Order XXIV. rule 3, a plaintiff, having obtained judgment against a defendant, may, at any time, after such judgment, and "upon lodging with the registrar of the Court in which the judgment was given an affidavit, stating the facts of the judgment, and of its being unsatisfied, and that a third person (hereinafter called the garnishee) is indebted to the judgment-debtor, and is, *quoad* such debt, within the jurisdiction of the Court, enter a plaint to obtain payment to him of the amount of the debt due to the judgment-debtor from the garnishee. By rule 4 the summons upon such a plaint is to be personally served on the garnishee, and, when so served, it shall attach in the hands of the garnishee all debts due, owing or accruing from him to the judgment-debtor."

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tached by the said order was not a debt due, or owing, or accruing, at the time of the issuing of the summons, or at the date of the said order.

The plaintiffs did not appear, but

Holl (R. V. Williams with him), on behalf of the garnishees, supported the rule.—The whole question here is whether salary which does not become due till a future date is an "accruing debt" within Order XXIV. rule 4, of the County Court Rules, 1875. There must be a perfected debt; a mere inchoate liability cannot be an accruing debt. The remarks of Wightman, J., and Crompton, J., in *Jones v. Thompson* (3) are in point. There the question discussed was whether a verdict in an action of contract for unliquidated damages was a debt, "owing or accruing," from the garnishees to the judgment-debtor within the meaning of the Common Law Procedure Act, 1854, section 61, which enables a Judge to order that all debts owing or accruing from a third person, to the judgment-debtor shall be attached to answer the judgment-debt. In the course of his judgment, Wightman, J., remarks: "It appears to me that it is neither a debt owing or accruing; the latter word can only be applied, in my opinion, to a *debitum in presenti solvendum in futuro*. There must be a debt perfected in order to entitle a judgment-creditor to the benefit of this clause;" and Crompton, J., said: "The mere fact that it is most probable that there will be a debt is not sufficient; there must be an actual debt." Again, the attachment if allowed would have to be conditional, viz., for salary to be paid if it became due," and there would be nothing to prevent such an attachment from being extended over a considerable period. In *Tapp v. Jones* (4), there was an actual debt due, payable by instalments, and Blackburn, J., in allowing an attachment to extend to future instalments, expressly distinguished that case from one like the present.

(3) F. B. & E. 63; s. c. 27 Law J. Rep. Q.B. 234.

(4) 44 Law J. Rep. Q.B. 127; s. c. Law Rep. 10 Q.B. 591.

COCKBURN, L.C.J.—I think the observations of Wightman, J., and Crompton, J., contain a correct exposition of the law as applicable to this case. Accordingly the order of the County Court Judge must be discharged, and our judgment entered for the garnishees.

Rule absolute, with costs.

Solicitors—Van Sandau & Cumming, agents for Joseph Batley, Huddersfield, for garnishees.

[IN THE QUEEN'S BENCH DIVISION.]

1877. } LONDON v. ROFFEY.
Nov. 12. }

Practice—Case remitted for Trial to County Court—19 & 20 Vict. c. 108. s. 26—Motion for New Trial, when to be made—Order XXXIX. rules 1 and 1a.

Where an action brought in the High Court has been tried in a County Court, pursuant to a Judge's order, under 19 & 20 Vict. c. 108. s. 26, a motion for a new trial must still be made to the Divisional Court within four days from the day of trial; the old practice as to actions so remitted for trial to a County Court, not being affected by Order XXXIX. rules 1 and 1a of the Judicature Act.

This was an action brought in the Queen's Bench Division, which had been remitted for trial to the Southwark County Court, under 19 & 20 Vict. c. 108. s. 26, after issue joined. The trial took place on the 14th of June, before the County Court Judge, without a jury. On the 2nd of July the defendant moved for and obtained a rule *nisi* for a new trial, on the ground of misdirection, against which,

Cock now appeared to show cause.—There are two preliminary objections to the defendant being heard. First, the application is to the wrong Court; and, secondly, if to the right Court, it is out of time. This action, though remitted for trial to the County Court, still remains in the Superior Court—*Balmforth v. Pledge* (1).

(1) 7 B. & S. 425; s. c. 35 Law J. Rep. Q.B. 169

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That being so, Order XXXIX. rule 1 of the Judicature Act applies, and the trial having been by a Judge without a jury, the application should have been to the Court of Appeal (2).

[COCKBURN, L.C.J.—The Judge mentioned in that rule does not mean a County Court Judge.]

If so, and the Judicature Act does not apply, the defendant ought to have moved within four days, according to the old practice.

A. L. Smith, contra.—The motion is properly made to a Divisional Court, for though it must be admitted that the cause remains in this Court, though tried in the County Court, yet the trial spoken of in the rule means before a Judge of the High Court. But then rule 1a of the same Order gives until the first four days of the following sittings for motion for a new trial where the trial has taken place elsewhere than in London or Westminster. This took place in Surrey, so the defendant was in ample time (3).

[MELLOR, J.—If you are within the rules at all, are you not within rule 1, which would send you to the Court of Appeal?]

It is not necessary to read both rules together.

[COCKBURN, L.C.J.—The provision in rule 1a as to trials elsewhere than in London or Middlesex, relates to actions tried at assizes, and does not affect actions tried in County Courts.]

The same inconvenience as to moving for new trials, which arises in the case of actions tried at assizes, occurs also where actions are remitted to distant County Courts.

(2) Order XXXIX. rule 1—"Where in an action in the Queen's Bench, Common Pleas or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a Judge without a jury, the application for a new trial shall be to the Court of Appeal."

(3) Order XXXIX. rule 1a—"An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial. . . . if the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the following sittings."

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[MELLOR, J.—The old practice remains in force where it has not been interfered with by the rules of the Judicature Act.]

COCKBURN, L.C.J.—I think that, strictly speaking, the contention that the defendant cannot be heard upon this rule, is right. Order XXXIX. of the Judicature Act, as it now stands, with the new rules 1 and 1a embodied in it, does not apply to cases remitted for trial to the County Court, and while the trial of such an action before the County Court Judge without a jury is not within the meaning of the words in rule 1, so as to necessitate the application for a new trial being made to the Court of Appeal, so neither is it within rule 1a, so as to give the party moving until the first four days of the following sittings for that purpose. In this case, therefore, the time for moving had expired, and the defendant was too late; because, where not altered by the rules, the practice as it stood before the Judicature Act remains in force, and similar applications must by the old practice have been made within four days after the trial. The Court may undoubtedly modify its own rules, where it appears to be essential for justice that it should do so; but I do not think this is a case for our interference.

MELLOR, J.—I am of the same opinion. I cannot doubt that this is not within the purview of the rules which govern the procedure on application for new trials in causes in a Divisional Court, and tried before a Judge of the High Court of Justice. These cases remitted for trial to a County Court, remain therefore for this purpose subject to the old practice; and by that the defendant here was not in time. I agree in thinking that this is not a case for our interference, and as the rule has been improperly obtained, it must be discharged.

Rule discharged with costs.

Solicitors—Ingledew, Ince & Greening, for plaintiff; Plews, Irvine & Hodges, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1877. } HUDSON AND OTHERS v.
Nov. 19. } TOOTH.

Prohibition—Public Worship Regulation Act (37 & 38 Vict. c. 85), ss. 7, 8, 9—Jurisdiction of Judge—Requisition to hear at a particular Place—Requisition of Archbishop a Condition precedent to Jurisdiction.

The Public Worship Regulation Act (37 & 38 Vict. c. 85), in section 9, enacts, that when a representation against an incumbent under that Act has been transmitted by the bishop in the mode prescribed to the archbishop of the province, "the archbishop shall forthwith require the Judge" (i.e., the Judge of the Provincial Courts of Canterbury and York, appointed under section 7 of the Act) "to hear the matter of the representation at any place within the diocese or province, or in London or Westminster."

A representation under this Act having been in due course transmitted to the Archbishop of Canterbury by the Bishop of Rochester, the archbishop sent to the Judge a requisition to hear the matter of the representation "at any place in London or Westminster, or within the said diocese of Rochester as you may deem fit."

The Judge gave due notice to the defendant that the case would be heard at Lambeth. Lambeth is in the province of Canterbury, but not in the diocese of Rochester. The defendant did not appear, and the case having been heard in his absence, judgment was pronounced against him:—

Held, on motion for a prohibition, that all the proceedings before the Judge were void, on the ground that the Judge had no jurisdiction except by virtue of the requisition to him of the archbishop, and that the archbishop having limited the place for hearing, the Judge had no power to hear the case outside the limits so prescribed.

This was a rule calling upon Lord Penzance and the complainants in a cause of *Hudson and others v. Tooth*, in the Arches Court, to shew cause why a writ of prohibition should not issue to the Arches Court of Canterbury to prohibit all further proceedings in the said

cause on the ground that they were irregular and without jurisdiction.

In February, 1876, the complainants, three parishioners of St. James', Hat-cham, of which the Rev. A. Tooth was vicar, represented to the Bishop of Rochester, in the form required by section 8 of 37 & 38 Vict. c. 85 (the Public Worship Regulation Act), that the Rev. A. Tooth had, within the preceding twelve months, been guilty of certain illegal practices in the performance of divine service in his church. The bishop, under section 9, in due course (Mr. Tooth not having stated his willingness to submit to his directions), then transmitted the representation to the Archbishop of Canterbury, and the archbishop, by a requisition issued to Lord Penzance, required him to hear the matter of the representation "at any place in London or Westminster, or within the said diocese of Rochester as you may deem fit" (1).

On June 17, 1876, Lord Penzance, as

(1) 37 & 38 Vict. c. 85. s. 7.—The Archbishop of Canterbury and the Archbishop of York may, but subject to the approval of Her Majesty, to be signified under her sign manual, appoint from time to time a barrister-at-law, who has been in actual practice for ten years, or a person who has been a Judge of one of the Superior Courts of Law or Equity, or of any Court to which the jurisdiction of any such Court has been, or may hereafter be, transferred by authority of Parliament, to be, during good behaviour, a Judge of the Provincial Courts of Canterbury and York, hereinafter called the Judge. If the said archbishops shall not, within six months after the passing of this Act, or within six months after the occurrence of a vacancy in the office, appoint the said Judge, Her Majesty may, by letters patent, appoint some person, qualified as aforesaid, to be such Judge. Whenever a vacancy shall occur in the office of official principal of the Arches Court of Canterbury, the Judge shall become *ex officio* such official principal, and all proceedings thereafter taken before the Judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury; and whensoever a vacancy shall occur in the office of official principal or auditor of the Chancery Court of York, the Judge shall become *ex officio* such official principal or auditor, and all proceedings thereafter taken before the Judge in relation to matters arising within the province of York shall be deemed to be taken in the Chancery Court of York; and whensoever a vacancy shall occur in the office of Master of the Faculties to the Archbishop of Canterbury such Judge shall become *ex officio* such Master of the Faculties.

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required by the Act, gave notice to the parties of the time and place at which he would proceed to hear the matter of the representation. The place notified was the Library at Lambeth Palace. Mr. Tooth transmitted no answer to the re-

presentation, and did not appear at the time or place appointed. On July 13, 1876, the case was heard, and the evidence of the complainants taken in his absence, and Lord Penzance pronounced judgment, deciding that Mr. Tooth had been guilty of illegal practices, and issu-

Section 8.—If the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners of the parish, within which archdeaconry or parish any church or burial ground is situate, or for the use of any part of which any burial ground is legally provided, or in case of cathedral or collegiate churches any three inhabitants of the diocese, being male persons of full age, who have signed and transmitted to the bishop, under their hands, the declaration contained in Schedule (A) under this Act, and who have, and for one year next before taking any proceedings under the Act have had, their usual place of abode in the diocese within which the cathedral or collegiate church is situated, shall be of opinion—

1. That in such church any alteration in or addition to the fabric, ornaments or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church; or,

2. That the incumbent has within the preceding twelve months used, or permitted to be used, in such church or burial ground any unlawful ornament of the minister of the church, or neglected to use any prescribed ornament or vesture; or

3. That the incumbent has within the preceding twelve months failed to observe, or to cause to be observed, the directions contained in the Book of Common Prayer relating to the performance in such church or burial ground of the services, rites and ceremonies ordered by the said book, or has made or permitted to be made any unlawful addition to, alteration of or omission from such services, rites and ceremonies—

Such archdeacon, churchwarden, parishioners, or such inhabitants of the diocese, may, if he or they think fit, represent the same to the bishop, by sending to the bishop a form contained in Schedule (B) to this Act duly filled up and signed and accompanied by a declaration made by him or them under the Act of the 5th & 6th years of the reign of King William the Fourth, chapter sixty-two, affirming the truth of the statements contained in the representation. Provided that no proceedings shall be taken under this Act as regards any alteration in or addition to the fabric of a church if such alteration or addition has been completed five years before the commencement of such proceedings.

9. Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion, and such statement shall be deposited in the registry of the diocese, and a copy thereof shall forthwith be transmitted to the persons or some one of the persons who shall

have made the representation and to the person complained of), he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing, within twenty-one days, whether they are willing to submit to the direction of the bishop touching the matter of the said representation without appeal; and if they shall state their willingness to submit to the direction of the bishop, without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition.

Provided, that no judgment so pronounced by the bishop shall be considered as finally deciding any question of law, so that it may not again be raised by other parties. The parties may, at any time after the making of a representation to the bishop, join in stating any questions arising in such proceedings in a special case signed by a barrister-at-law for the opinion of the Judge, and the parties after signing and transmitting the same to the bishop may require it to be transmitted to the Judge for hearing, and the Judge shall hear and determine the question or questions arising thereon, and any judgment pronounced by the bishop shall be in conformity with such determination.

If the person making the representation and the person complained of shall not, within the time aforesaid, state their willingness to submit to the directions of the bishop, the bishop shall forthwith transmit the representation in the mode prescribed by the rules and orders to the archbishop of the province, and the archbishop shall forthwith require the Judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster.

The Judge shall give not less than twenty-eight days' notice to the parties of the time and place at which he will proceed to hear the matter of the said representation. The Judge, before proceeding to give such notice, shall require from the person making the representation such security for costs as the Judge may think proper; such security to be given in the manner prescribed by the rules and orders. The person complained of shall, within twenty-one days after such notice, transmit to the Judge and to the person making the representation, a succinct answer to the representation, and in default of such answer he shall be deemed to have denied the truth or relevancy of the representation.

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ing a monition that he should abstain from them in future. The monition was not complied with, and was consequently enforced by the inhibition and eventual imprisonment of Mr. Tooth, who had throughout all the proceedings taken no notice of any of them.

Some months after his release from prison, but while the inhibition remained in force, a rule *nisi* for a prohibition was moved for and obtained on behalf of Mr. Tooth, on the ground that Lord Penzance had no jurisdiction to hear the matter of the representation at Lambeth, that place being neither in London, Westminster, nor the diocese of Rochester.

Dr. A. J. Stephens (Jeune with him), for the complainants, shewed cause.—The question is whether, under the requisition sent by the archbishop to Lord Penzance, he had jurisdiction to hear the case at Lambeth. The requisition is exactly in the terms of the form under rule 13 of the Rules and Orders, and it is contended that "London" must be taken in the popular sense as including the places which really constitute it, and not be limited to the City of London. It was so held in *Wallis v. The Attorney-General* (2); where a bequest was to the hospitals of Paris and London. Also in 38 & 39 Vict. c. 34 (The Bishopric of St. Alban's Act) the expression South London is used as denoting Lambeth, Southwark, &c. Next, the duties of the archbishop in issuing the requisition are, so far as the place is concerned, ministerial only, not judicial. It is enough if he requires the Judge to hear. Then the Judge may appoint the place, so long as it is within the limits prescribed by the Act. Here Lambeth is in the province, and so the Act was not violated.

It was, at most, an irregularity which cannot make all the proceedings void. The form which was followed is not so wide as are the terms of the Act, because "province" is omitted; but the rules and orders cannot limit the Act, and as under the Act Lord Penzance might lawfully hear this case at Lambeth, the

omission of the word "province" in the requisition is not fatal—*The Queen v. Castro* (3).

[LUSH, J.—The rules are not imperative, but are to be followed as nearly as convenient. But the archbishop is to choose the place, and not the Judge, and here the archbishop has not chosen the province of Canterbury.]

This is really an attempt to make prohibition a mode of appeal, to obtain a rehearing; whereas every matter was fully heard, and if the proceedings were erroneous, they should be questioned on appeal to the Privy Council.

[COCKBURN, L.C.J.—An appeal implies jurisdiction. The contention is that there was no hearing from which to appeal, for this was *coram non iudice* if the objection is well founded.]

Benjamin shewed cause for Lord Penzance.—The Public Worship Regulation Act is an act of procedure only, and therefore anything under it can be an error of procedure only, and cannot be in respect of jurisdiction.

[COCKBURN, L.C.J.—Had the archbishop before the Act any jurisdiction to hear or to direct the Dean of the Arches to hear?]

He had by letters of request or by way of appeal from the bishop; but then section 5 expressly says that no jurisdiction shall be taken away. And as by section 7 Lord Penzance's appointment is provided for as Official Principal of the Arches Court, it follows that these proceedings are deemed to be taken before him as Dean of the Arches. The difference was only in procedure.

[COCKBURN, L.C.J.—The original jurisdiction, which was that of the bishop, is taken away by the Act, unless indeed it is submitted to without appeal.]

It should rather be said that it remains, unless the party desires to appeal. Then, as a matter of procedure only, it goes direct to the archbishop, and he requires the Judge to hear. The jurisdiction is the same as before. It certainly does not fail *ratione personæ* or *materiæ*, and as we contend not *ratione loci*, for the archbishop could only send the re-

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quisition when the matter was within his province, and this hearing was not outside his province. The enumeration of the places is directory only. As in the statute which directs justices to hold their sessions in the principal towns of the counties, 6. R. 2. c. 5, that is said in *Hale's Pleas of the Crown* (vol. ii. p. 39) to be "but directive and not coercive, for the Judges may, and usually have, appointed their sessions at their pleasure in other places."

[COCKBURN, L.C.J.—I should agree that if the defendant had appeared there would have been general jurisdiction at a place in the province.]

The mode of summoning the person before the Court is mere procedure. The Judge could, before the Act, have heard the same cause by way of appeal.

[COCKBURN, L.C.J.—The Dean of the Arches could not have exercised this jurisdiction but for the statute. If Sir Robert Phillimore had continued to be Dean of the Arches he could not have acted.]

It is true that it could not have been exercised in the province but only in the diocese under the Church Discipline Act (3 & 4 Vict. c. 86), but the Public Worship Regulation Act was intended to expand the former in matters of procedure, and it expressly provides for summoning the party in the province—*The Queen v. the Archbishop of Canterbury* (4). By section 9 the requisition is to the Judge to hear the case. If the requisition stopped there, then the Judge certainly might have heard at Lambeth; for the following clause says that the Judge shall give notice of the place of hearing. The 11th rule framed under the Act puts this interpretation on the section, for it says, "the registrar shall transmit the requisition to the archbishop, who shall thereupon require the Judge to hear the same." So that it would be quite sufficient if the archbishop sent the requisition to hear without mentioning a place.

[COCKBURN, L.C.J.—I should hold it to be *ultra vires*. He cannot make an authority

unconditional which the statute makes conditional.]

Suppose the party cited had appeared and pleaded to the jurisdiction, he would have had to say that the Court had not cognizance of the cause, and point out another that has. But he could not say this Court had not jurisdiction, for the objection is not to the jurisdiction but to the place of trial. The jurisdiction is in the Dean of the Arches, and on a requisition from the Archbishop of Canterbury, its exercise is limited to the province of Canterbury, but that is the only limit.

[COCKBURN, L.C.J.—It is a mere accident that the Judge is Dean of the Arches, and his jurisdiction under this Act is only by virtue of and in accordance with the requisition.]

It is a mere mistake that the word province has been omitted in the form, and it cannot be that the form should be construed so as to limit the Act. The judgment of Lord Campbell, in *The Liverpool Borough Bank v. Turner* (5), in reference to mandatory enactments, and whether they are to be considered as directory only or obligatory, points out that the duty of the Court is to look at the real intention of the Legislature by attending to the whole scope of the statute to be construed. Now it cannot be doubted that the intention was to simplify procedure, and in the present case everything that was a matter of substance was done, and at most an omission in no way affecting the merits occurred in a formal part of the proceedings.

[COCKBURN, L.C.J.—What if the archbishop purposely left out the word province?]

Still, if the Judge heard at a lawful place without objection being then raised, such hearing would be good. If it were unlawful to hear at Lambeth, still the hearing would not necessarily be invalid—*The Margate Pier Company v. Hannam* (6).

Arthur Charles and W. G. F. Phillimore, in support of the rule.—The Act is not merely an Act of procedure. The Judge appointed under it exercises a new and

(4) 6 E. & B. 546; s. c. 25 Law J. Rep. Q.B. 346.

(5) 30 Law J. Rep. Chanc. 370.

(6) 3 B. & Ald. 266.

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statutory jurisdiction, and it cannot be enlarged by the circumstance that the Judge appointed by the statute has since become official principal of the Arches Court. If, therefore, a condition precedent to the exercise of that jurisdiction has not been fulfilled, then all subsequent proceedings are void as *coram non judice*. Previously the clergy were subject to the regulations of the Church Discipline Act (3 & 4 Vict. c. 86. s. 27). Then any one permitted by the bishop to do so could institute proceedings, and he directed a commission of enquiry to report whether there was a *prima facie* case. Then the bishop himself heard the case with three assessors, and his decision was subject to review in the Court of Appeal of the province, that is, the Arches Court, or the bishop might send the case at once to the Court of Arches by letters of request. Now that Act is still in force, and only by the authority of the bishop can the Dean of the Arches hear a case in the first instance. But the Public Worship Regulation Act created a new Judge and a new jurisdiction, a new procedure and new consequences, for it is the archbishop whose requisition gives the Judge authority to hear. It must be construed, therefore, just as if the Judge were not Dean of the Arches, for it only confers on the Dean of the Arches the new statutory office. Then the archbishop has an especial discretion vested in him as to the hearing of the case when it is one which is to be tried *viva voce*, he is to name the place; and that this is so appears from the 3rd paragraph of the same section 9, where, if the parties agree in stating a Special Case, that is transmitted to the Judge by the bishop without any limitations as to place of hearing, and without the intervention of the archbishop at all. Why, then, is the archbishop brought in at all in a case to be tried with witnesses, unless it is in order that he may exercise the discretion given to him and appoint a place of hearing? His requisition is the foundation of the jurisdiction, and here he has exercised his discretion in an apparently reasonable manner, and in accordance with the old practice, and limited the place for hearing to the diocese. Generally, where a special jurisdiction is created, as to the

Court of Chancery, it must appear on the order—*Christie v. Unwin* (7). Then, as to the argument that London is used in a popular sense, it is contended that it must be construed as it is in the other statutes relating to the administration of justice. As London and Middlesex are contradistinguished in the Judicature Acts, so London and Westminster are here. The right of appeal does not bar a motion for a prohibition—*Burder v. Veley* (8). They cited also—*Darby v. Cosens* (9), *Chesterton v. Farlar* (10), *White v. Steel* (11), *Vaux v. Vollans* (12).

COCKBURN, L.C.J.—I think that this rule for a prohibition must be made absolute. I say so with the greatest reluctance and regret, because it is clear that the objection is of the most technical character, and one which has nothing on earth to do with the merits of the case. The merits of the case, being of essential importance as regards the functions of the defendant, as a clergyman, and as regards the administration of the worship of the Church of England, are not here brought into consideration at all; for the objection now taken, besides being so purely technical, is one which might, if taken at the time, have been cured in a moment by the transfer of the Judge's Court to the other side of the water. But the objection not having been raised, and the defect not having been seen at the moment, it was assumed then that these proceedings were regular, and so it comes to pass that now, so long after the hearing, an opportunity is afforded by the discovery of this omission of undoing the whole of the proceedings. Nevertheless, though the objection may seem trifling, as a matter of the purest technicality, yet if it is one which goes to the whole root of the jurisdiction, we must act upon it.

Now the form of requisition by the

(7) 11 Ad. & E. 373; s. c. 9 Law J. Rep. Q.B. 47.

(8) 12 Ad. & E. 233 at p. 256.

(9) 1 Term Rep. 552.

(10) 7 Ad. & E. 713; s. c. 7 Law J. Rep. Q.B. 66.

(11) 12 Com. B. Rep. N. S. 383; s. c. 31 Law J. Rep. C.P. 265.

(12) 4 B. & Ad. 525.

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archbishop to the Judge was in terms that he should exercise his jurisdiction "at any place in London or Westminster, or within the said diocese of Rochester," as he might deem fit; and the fact undoubtedly is that the cause was heard at Lambeth, which is not within the diocese of Rochester, nor in London or Westminster, but is within the province of Canterbury. Upon this it is argued, first, by Dr. Stephens that, as the province of Canterbury was one of the places where by the Act jurisdiction might be exercised, and Lambeth is in the province of Canterbury, "London" must be taken not in a strict and limited but in a popular sense, as including the various districts in and around the metropolis, which go in the popular acceptance of the term to make up London. I do not think it is possible to give that construction to the requisition. Even if the term had been "London" simply, I doubt very much whether it would not have been going too far to say that it could be taken to have been used in a vague and loose way as including all the precincts of this huge metropolis. But when I find that "London" is used as distinguished from Westminster, then I can have no doubt that the construction must be otherwise. I think, looking at the Act, and at the rules framed under it, that it is intended that the archbishop in giving jurisdiction to the Judge, should exercise his discretion in choosing the place where the matter should be heard. It might, in his opinion, not be expedient to try it in the diocese on account of strong feeling or excitement with reference to it there, and it might, therefore, be thought advisable to take the case to the larger sphere of the province. On the other hand, it might be advisable to send it to the diocese, because all the parties lived there, on the ground of convenience and to save expense. Or again, it might be a matter of indifference as to place, and then the convenience of the Judge and of the parties might suggest the metropolis. But why are the words London or Westminster used? I think it is because the framers of the Act thought that the sittings might be transferred as new Courts were built from the one to the other, just as the Dean of the Arches

used to sit at Doctors' Commons, though he has recently sat at Westminster; but having expressly included both by name, it is impossible to say that we are to take "London" as including Westminster, and yet if it includes anything beyond the City of London it must include it.

Next, can we say that because the case was in fact heard in the province of Canterbury the exigency of the statute is satisfied? I think not, because the requisition did not mention the province. I agree as to this in the contention that this is the creation of a new jurisdiction; and Mr. Benjamin's argument that the jurisdiction of the Court of Arches existed long before the Act and exists still, does not touch the case. It is not as Dean of the Arches that the Judge under the Act exercises this jurisdiction. The jurisdiction is the creature of the statute, and when the statute passed, that jurisdiction was to vest in a barrister of ten years' standing or a person who had been a Judge, who should be appointed by the Archbishops of Canterbury and York to the office; and it is nothing to the purpose of the consideration here, that there was a proviso that the additional office of Dean of the Arches when vacant should be conferred on the same individual. It may be that this clause was framed in order to secure the acquisition of a most distinguished and enlightened man for a post which alone might have seemed derogatory to his dignity after the high offices he had already filled. If so, it was a most satisfactory arrangement for the public which resulted in the acceptance of the office of Judge by Lord Penzance; but his office and jurisdiction was a new one.

It is also a new function which is vested in the Archbishop of Canterbury. Before the Act, the duty of adjudication upon complaint of clerical misconduct was in the bishop; the matter then came by appeal, or by letters of request, to the Arches Court, but the archbishop had nothing to do with it. Now, however, the bishop, only if the parties consent, can hear; if they do not, he must refer it to the archbishop, and the latter exercises jurisdiction over the cause. This is obviously quite a new jurisdiction, and it must

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therefore be exercised in strict conformity with the statute that creates it. How then is the archbishop to exercise it? He is "forthwith to require the Judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." Mr. Benjamin made a faint attempt, but I don't think he could seriously insist on it, to say that all that was necessary to be done by the archbishop was to require the Judge to hear, and that it was left in the discretion of the Judge where to hear, so long as he confined himself to London or Westminster, or the diocese or province. This is a most erroneous construction of the Act. It is for the archbishop and not for the Judge to decide on the place within those limits. That being so, is this requisition as to place essential to the jurisdiction of the Judge? I think it was intended to be so, and that we must take it to be so; and that it was not competent to the Judge to substitute any other place than those named in the requisition. This is a discretion vested in the archbishop, and for him merely to tell the Judge to hear, without appointing a place, would confer no jurisdiction on the Judge, and the Judge cannot dispense with such appointment. But then Mr. Benjamin says the omission in this case is merely accidental, being the omission of a word by the clerk in drawing the form under the rules. This argument, however, is shattered by the facts here; because the only jurisdiction which the Judge can exercise is that given him by the requisition of the archbishop, and we cannot say that the omission by the archbishop was not intentional. Suppose it were intentional, could we interfere? Is that which does not appear to be met by a speculation on our part that it ought to have appeared? This is manifestly impossible. I think, therefore, that the omission of the word "province" is fatal to the exercise of the jurisdiction at Lambeth. I construe the statute in its plain terms, which state an intention that not the Judge but the archbishop should determine the place of hearing. It is an essential part of the jurisdiction which in this case fails; and sorry as I am to have to give effect to

such a technical objection I must hold that it is fatal.

MELLOR, J.—I am entirely of the same opinion. I have had the advantage of hearing this point twice discussed, which has enabled me to come without hesitation to the same conclusion as that of the Lord Chief Justice. When I recollect the circumstances attending the introduction of the Act, the criticisms to which it was subjected, and the protective clauses that were supposed to be inserted in the statute to guard against anything oppressive or capricious in the exercise of the jurisdiction, I cannot doubt that this was one inserted with that view. We know how Parliament was invoked in reference to the irregularities in public worship which had crept in, and as it was felt that the then system of administering the laws ecclesiastical was not sufficient, the question was, what was to be done? What was decided was not to enlarge the jurisdiction of the Dean of the Arches, but to erect a new Court and a new tribunal, and establish a new procedure as to the mode in which that jurisdiction should be exercised. The enactment as to the representation made a loophole by which the new tribunal might be avoided; for if the parties were willing, the bishop is empowered to determine the matter himself; but if not, then the bishop has no jurisdiction at all, but must forthwith transmit the representation to the archbishop. The archbishop is thus vested with authority to send it in a particular manner to the Judge for hearing. He specifies within what limits the jurisdiction shall be exercised. The case which was cited, *The Queen v. The Archbishop of Canterbury* (4), is really a strong one against Mr. Benjamin, for the necessity of making this alteration by way of extension of the former limits is strongly against his argument that the summoning of the defendant before the Court is a mere matter of procedure and not of jurisdiction.

Then I do not think the suggestion as to the meaning of "London" can be admitted. The construction of a will is very different from that of a statute giving jurisdiction. London means, as

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in the other Acts concerning procedure in the administration of justice, the city of London, and must be understood strictly, as a jurisdiction given in one place cannot be exercised in another. The Act intended that it should not be allowable for the Judge to exercise jurisdiction in any other place than those prescribed to him by the requisition. The archbishop has here defined the place, excluding the province, and it must be taken that he intended such exclusion; at any rate we cannot speculate that he did not. This is a new jurisdiction, and must be exercised strictly on the terms of its creation. On all these grounds, therefore, having come to the conclusion that we cannot treat this merely as a question of procedure, but that it is one of jurisdiction, I am of opinion that the jurisdiction here was not founded, and the proceedings which went on in the absence of Mr. Tooth are null, and the rule must be made absolute.

LUSH, J.—I exceedingly regret that I find myself under the necessity of saying that this rule must be made absolute for a prohibition. The objection that has been taken is a technical one, but as there is nothing to shew that the defendant has precluded himself from raising it, we must give effect to it if well founded. Considering, however, that he never appeared to contest the charge against him, and that he has never appealed against the facts proved, I must say that this purely technical point, raised long afterwards, comes with a very bad grace from the defendant.

Now I cannot agree with Mr. Benjamin that the Act merely regulates procedure; on the contrary, it gives a new and summary power against clerks charged with certain breaches of ecclesiastical law under section 8; and whereas no clerk could previously be compelled to appear out of the diocese, now he can be compelled to appear anywhere in the province or in London or Westminster. But then that power is given, not to the Judge, but to the archbishop, for such is the only interpretation of that part of section 9 which says, "The archbishop shall forthwith require the Judge to hear the matter of the representation at any

place within the diocese or province, or in London or Westminster." Then comes the following clause, "The Judge shall give not less than twenty-eight days' notice to the parties of the time and place at which he will proceed to hear the matter of the said representation." So that while the archbishop appoints the limits within which the hearing shall be restricted, the Judge appoints the particular place. That is certainly a new jurisdiction, for it is a very material extension of the powers exercised over the clergy.

Unfortunately here the archbishop has adopted the form appended to the rules framed under section 19 of the Act, and that form omits the word "province." Now as the Act does not give any express authority to frame forms, I do not think the form is *per se* binding, and the archbishop might have followed the Act instead of the form, and then "province," which is within the limits contemplated by the Act, would have appeared. But he has followed the form and not the Act, and as the Judge sat at Lambeth, which is neither in the diocese of Rochester nor in London or Westminster, the authority of the Judge under the form of the requisition does not extend to Lambeth. The defendant was not, therefore, bound to appear as I construe the Act, for he was only bound to appear at a place which the archbishop had assigned, and he did not assign Lambeth. Then it is said that London includes Lambeth, but why, if so, name Westminster, if the word was not to be limited to London proper, that is the city of London? I am far from saying that if the defendant had attended at Lambeth that then the proceedings might not have been perfectly valid.

I am of opinion, therefore, that the judgment under the circumstances of this case cannot stand. It is not shewn that nothing remains to be done, and so we must presume that there is something upon which the prohibition can act. This same point arose in *Serjeant v. Dale* (13), where it became unnecessary to decide it; but now having had a full argu-

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ment, I decide, without any doubt in my own mind, that all the proceedings were *coram non judice*, on the ground that the Judge sat where he had no authority to sit, and as the defendant did not appear, the whole proceedings were null and void, and the rule for a prohibition must be made absolute.

Rule absolute.

Solicitors—Moore & Currey, for complainants;
Brooks, Jenkins & Co., for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1877. }
Nov. 27. } DOYLE v. KAUFMAN.

Practice—Renewal of Writ after twelve months—Right of Action barred by Statute of Limitations—Power to enlarge Time—Order VIII. rule 1, and Order LVII. rule 6.

Where more than twelve months has elapsed since the date of a writ, and the same has not been served on the defendant, the Court has no power under Order LVII. rule 6, to enlarge the time appointed by Order VIII. rule 1, for application to be made to renew the same, if at the date of the application the plaintiff's right to sue is barred by the Statute of Limitations.

In this case the plaintiff, a solicitor, had issued a writ against the defendant for service at Adelaide, out of the jurisdiction. The writ had never been served in consequence of the wilful misconduct of a clerk of the plaintiff, in charge of the matter, but the plaintiff did not discover this until more than twelve months after the date of the writ. When he so discovered it his right of action against the defendant had become barred by the Statute of Limitations.

W. Willis, upon affidavit of the above facts, and as to the genuine character of the claim, moved for an order for the renewal of the writ, notwithstanding the expiration of the twelve months; the application having been referred to the

Court from Chambers.—Order VIII. rule 1, provides for the renewal of a writ by leave of a Judge during its currency, but Order LVII. rule 6, enables the Court “to enlarge the time appointed by the rules for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.” And the Master of the Rolls, in *Re Jones—Eyre v. Cox* (1), has held that this rule applies to the renewal of a writ where the time has expired.

[LUSH, J.—There was no question of the Statute of Limitations there; it was a mere matter of procedure. It raises very different considerations where it is sought to bind a defendant who would otherwise be free by virtue of the statute.]

It was not merely procedure in that case, for the writ was absolutely dead.

[COCKBURN, L.C.J.—The last case under the old law, *Nazar v. Wade* (2), is very much against you.]

It is contended that the words of the rule under the Judicature Act are meant to meet the hardship under the old law, and to obviate mistakes.

COCKBURN, L.C.J.—These powers which are conferred by rule 6 of Order LVII. are not meant to supersede the effect of the Statute of Limitations. When it says a Judge shall have power to enlarge time—that must mean pending something. But here the debt, or at any rate the right to sue for it, is gone; and I think, therefore, that where the right of action is gone the power to revive the writ is also gone.

LUSH, J., concurred.

Motion refused.

Solicitors—Edward Doyle & Sons, for plaintiff.

(1) 46 Law J. Rep. Chanc. 316.

(2) 1 B. & S. 728; s. c. 31 Law J. Rep. Q.B. 5.

[IN THE QUEEN'S BENCH DIVISION.]

1877. }
Dec. 6. } WALKER v. HICKS.

Writ of Summons—Action on Bill of Exchange—Form of Special Indorsement on Writ—Rules of Court, 1875 (Order III. Rule 6).

The plaintiff claimed by indorsement on his writ of summons a stated sum from the defendant as "contribution to payment of certain bills and promissory notes in which he and the plaintiff were jointly liable," &c., without specifying any dates or giving further particulars of his claim:—Held, that the writ was not specially indorsed under Order III. rule 6 of the Rules of Court, 1875.

This was an appeal by the defendant from a decision of Denman, J., at chambers, the question being whether a certain indorsement on a writ of summons was a special indorsement within Order III. rule 6.

The indorsement in question was as follows:—"The plaintiff's claim is for three hundred and ninety-nine pounds, nine shillings and sevenpence, the defendant's share or contribution to payment of certain bills and promissory notes on which he and the plaintiff were jointly liable, and which bills and notes have been taken up by the plaintiff."

Gadsden, for the defendant (the appellant).—This is not a special indorsement within Order III. rule 6, which requires "particulars of the amount sought to be recovered" to be given. These particulars should have included dates of the notes and bills on which the plaintiff relies to support his claim of contribution. The rules provide a plaintiff with a very summary process for recovering in certain cases any sum that may be due to him. And it is only fair to a defendant that precise particulars should be given in order to enable him to determine whether or not he is in a position to defend an action.

Francis, contra.—The writ is indorsed with particulars of the amount of the plaintiff's debt, and this is all that Order III. rule 6 requires. It is, therefore, con-

tended that the nature of the claim and particulars are sufficiently disclosed, and that the dates of the instruments are neither material nor necessary.

COCKBURN, L.C.J.—I think that, in order to bring an action within the provisions of Order III. rule 6, particulars of amount, including dates, should be set out in the plaintiff's writ of summons. The rule provides in certain cases a very summary remedy; on the one hand, entitling the plaintiff to judgment in certain events, and, on the other hand, enabling a defendant to avoid, if he thinks proper, all further proceedings by payment of the amount of his debt. That being so, the latter is entitled to have, at the earliest period, sufficient particulars to enable him satisfactorily to determine whether he should pay the amount sued for or resist the claim. And the view I take of the requirements of rule 6 is much fortified by reference to the forms of special indorsements as given in the schedule (Appendix A. part ii. sec. vii.); for I find that in these instances where the claim is against a defendant on account of a promissory note or bill of exchange, particulars are given as to the person by whom such note is made, and in the case of a bill of exchange, whether the defendant is sued as drawer or acceptor, dates being also inserted. And if these preliminaries must be observed in cases where an action is brought against a defendant simply as maker of a note, or drawer or acceptor of a bill, *à fortiori*, they are necessary in one like the present where the claim is for contribution to payment of bills and notes on which it is alleged the defendant is jointly liable with the plaintiff. I think it is a condition precedent to putting a summary process like this into effect, that a defendant should have full particulars of the claim he has to meet. I am, therefore, of opinion that there was here no special indorsement within the meaning of the rule to which I have already referred.

MELLOW, J.—I am of the same opinion. What amounts to a special indorsement has perhaps hitherto been not very clearly defined; but I agree entirely with what the Lord Chief Justice has said with re-

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ference to the summary nature of the process, and the right of the defendant to be placed in such a position as to enable him clearly to determine whether he ought to defend the action or not. The examples given in the schedule fortify considerably the view we take. If in ordinary cases full particulars are considered necessary, surely they are still more essential in cases of contribution in order to enable a defendant to appreciate his position, so that he may discharge his liability or not as he may think fit.

FIELD, J.—I am of the same opinion.

Appeal allowed. Costs to be costs in the cause.

Solicitors—C. E. Withall, for appellant;
S. H. Behrend, for respondent.

[IN THE DIVISIONAL COURT FOR THE
Q.B., C.P. AND EXCH. DIVISIONS.]

1877. }
July 9. } PONTIFEX v. THE MIDLAND RAIL-
Nov. 21. } WAY COMPANY.

Costs—County Courts Act, 1867 (30 & 31 Vict. c. 142), sect. 5—Action “founded on Contract” or “founded on Tort”—Delivery by Carrier after Stoppage in Transitu.

In an action against carriers for loss of goods by delivery to an insolvent purchaser contrary to notice given by the plaintiff in exercise of a right of stoppage in transitu, the plaintiff recovered 12l. Upon objection that the plaintiff was disentitled to costs by the County Courts Act, 1867, s. 5,—Held, that this was an action “founded on tort” within the meaning of the section, and that the plaintiff was therefore entitled to costs.

Statement of claim as follows:—

1. The plaintiff is a merchant carrying on business in London.

2. On the 27th of October, 1875, the plaintiff delivered to the defendants, and the defendants received from the plaintiff as the vendor, certain goods, namely, three casks of composition pipe, as carriers thereof for reward, consigned by

the plaintiff to H. Winfield & Co., Birmingham, the intending purchasers.

3. The plaintiff subsequently discovered that Winfield & Co. were in insolvent circumstances, and thereupon on the 22nd of November, 1875, he, as unpaid vendor, gave notice to the defendants not to deliver any part of the goods to Winfield & Co., but to hold them to the plaintiff's order, and afterwards required the defendants to redeliver the same to him, but they refused and neglected to do so, and on the 17th of December, 1875, delivered them to Winfield & Co. The plaintiff has never been paid for any part of the said goods, and has wholly lost the said goods and the value thereof, namely, 12l. 16s. 6d. The plaintiff claims 12l. 16s. 6d.

The defendants paid that sum into Court, and the plaintiff accepted it in satisfaction.

The plaintiff proceeding to procure his costs to be taxed, the defendants objected that the County Courts Act, 1867, s. 5 (1), deprived the plaintiff of costs. The Master decided against the objection. Lopes, J., reversed the decision of the Master. The plaintiff appealed to the Court.

F. O. Crump (on July 9), for the plaintiff.—This is an action “founded on tort” within the meaning of the Act (1)—*Tattan v. The Great Western Railway Company* (2). The present case is distinguishable from *Baylis v. Lintott* (3).

W. G. Harrison, for the defendants.—This is an action “founded on contract” within the meaning of the Act (1). In *Tattan v. The Great Western Railway Company* (2) much stress was laid on the change from the words of the original enactment, 9 & 10 Vict. c. 95. s. 129,

(1) The County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, enacts: “If in any action commenced after the passing of this Act in any of her Majesty's superior Courts of Record the plaintiff shall recover a sum not exceeding 20l. if the action is founded on contract, or 10l. if founded on tort, . . . he shall not be entitled to any costs of suit” unless the Court or a Judge allow such costs.

(2) 2 E. & E. 844; s. c. 29 Law. J. Rep. Q.B. 184.

(3) 42 Law J. Rep. C.P. 119; s. c. Law Rep. 8 C.P. 345.

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which were, as in the present Act, "founded on contract," "founded on tort," to the words in 13 & 14 Vict. c. 61. s. 11, upon which with 19 & 20 Vict. c. 108. s. 30, that case was decided, "in covenant, debt, detinue or assumpsit," and "in trespass, trover or case," and that decision is therefore on that ground, if on no other, inapplicable. Moreover, *Legge v. Tucker* (4) was not sufficiently considered in that case. Substance, not form, is to be looked to; and this action is in substance founded on contract—*Degg v. Tucker* (4); *Baylis v. Lintott* (3).

Crump, in reply, referred to *Benjamin on Sale*, p. 719.

Our. adv. vult.

The judgment of the Court (5) was delivered (on Nov. 21) by

CLEASBY, B. (6)—In this case there was a statement of claim by which the plaintiff claims 12*l.* 16*s.* 6*d.*

The defendants paid that sum into Court, and the plaintiff took it out in satisfaction.

The question is whether the plaintiff is entitled to recover his costs. His right to them is regulated by the 30 & 31 Vict. c. 142. s. 5 (1), by which it is enacted that if the plaintiff in an action in the superior Courts shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, he shall not be entitled to any costs unless he has a certificate of the Judge or an order of the Court.

The amount recovered in this case being 12*l.* 16*s.* 6*d.*, it follows that if the action is founded on tort the plaintiff is entitled to costs; if on contract, he is not so entitled.

Formerly, when there were forms of action, there would have been little difficulty in determining whether an action was founded in contract or tort; but now that the claim is made by a narrative of facts it does not always clearly appear to which class, contract or tort, the case

properly belongs. Effect, however, must be given to the distinction made by the Act of Parliament.

If there is an express contract, and the act complained of is a breach of it, the action is clearly founded on contract; if there is no contract at all, but the act is an unauthorised intermeddling with property, it is clearly founded on tort; but the difficulty arises in a case like the present, where there is undoubtedly an unauthorised intermeddling with property, but the act is connected with a contract originally entered into, and there is ground for regarding it as founded on that contract or some new contract implied from the circumstances.

The facts of the present case are that the plaintiff had agreed to sell a quantity of composition pipe to H. Winfield & Co., and had delivered them to the defendants, as carriers, consigned to the purchasers. This appears from the statement in paragraph 2 to be the ordinary case of delivery to a carrier for a purchaser; and when that is the case, unless other circumstances appear, it is regarded as a contract made on behalf of the consignee by the consignor as his agent,—see what is said by the Judges and the Lord Chancellor in *The Cork Distillery Company v. The Great Southern and Western Railway Company* (7).

It further appears by paragraph 3 that Winfield & Co. becoming insolvent, the plaintiff stopped the goods *in transitu*.

The effect of this was no doubt to put an end to the contract of carriage and to revert the property in the plaintiff.

The plaintiff afterwards gave notice to the defendants to hold the goods to his order, but the defendants notwithstanding delivered the same afterwards to Winfield & Co. (paragraph 3).

Under these circumstances it may no doubt be said that the claim of the plaintiff arose out of the original contract of carriage, and was in that way founded on contract. But it appears to us that the words founded on contract mean directly founded on contract, and not remotely, as in the present case. In

(4) 1 Hurl. & N. 500; s. c. 26 Law J. Rep. Exch. 171.

(5) Cockburn, L.C.J., and Cleasby, B.

(6) The judgment was read by Cockburn, L.C.J., in the Queen's Bench Division, to which the action was attached.

(7) Law Rep. 7 E. & I. App. 269, at pp. 277 and 278.

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reality what the defendants did was to perform the original contract of carrying, which they had no right to do after the stopping *in transitu*.

The contract was put a stop to by an unusual and unexpected event, the stopping *in transitu*; and the question really becomes whether that event placed the plaintiff and the defendants in the relation of parties contracting with each other, or in the relation which exists where one person is, without any intention to be so, in the possession of the property of another.

In the present case the plaintiff gave notice to the defendants to hold the goods to his order. If they had agreed to do so, there would have been a contract; but they refuse to do so, and deliver the goods to the purchaser.

It appears to us that the claim of the plaintiff is not founded on any existing contract between him and the defendants, but on the wrongful act of the defendants in delivering the goods as they did.

The contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to this contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods, and the dealing with them by the defendants, became tortious.

And our conclusion, that the claim of the plaintiff is founded not on contract but on tort, agrees with the view which was always taken of such a case when the action of trover existed. For such a misdelivery after notice was always treated as a wrongful conversion. The statute, in using the words "founded on tort," may be fairly regarded as having reference to such cases as were at the time always treated as cases of tort.

Judgment for the plaintiff.

Solicitors—J. & M. Pontifex, for plaintiff; Beale, Marigold & Co., for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1877. } FOSTER (respondent) v.
Nov. 21. } USHERWOOD (appellant).*

County Court—Practice—Action ordered to be tried in the County Court—Claim reduced below 50*l.* by payment into Court—30 & 31 Vict. c. 132. s. 7.

Where the claim indorsed on a writ in an action in the superior Court is reduced below 50*l.* by a payment of money into Court, the action cannot be sent for trial to the County Court under 30 & 31 Vict. c. 132. s. 7.

The decision in *Osborne v. Homburg* (45 Law J. Rep. Exch. 65) approved.

This was an action to recover the sum of 57*l.* 11*s.*, commenced in the Sheffield district registry on the 3rd of October. On the 5th of October, the defendant paid into Court a sum of 19*l.* 7*s.* 5*d.*, thereby reducing the claim to 37*l.* 12*s.* 7*d.*

On the 12th of October the defendant took out a summons before the registrar calling on the plaintiff to shew cause why the cause should not be tried in the County Court, under section 7 of the County Courts Act, 1867, 30 & 31 Vict. c. 132 (1). To this application the plaintiff consented; and the registrar made the order. Afterwards, however, the registrar came to the conclusion that the Act gave him no jurisdiction to make the order, and he rescinded it.

The defendant then appealed to Lopes,

* *Coram* Bramwell, L.J., Brett, L.J., and Cotton, L.J.

(1) By 30 & 31 Vict. c. 132. s. 7 (incorporated with the Judicature Act, 1873, by s. 67 of that Act), "Where in any action of contract brought or commenced in any of Her Majesty's superior Courts of Common Law the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off or otherwise to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action within eight days from the day upon which the writ shall have been served upon him, if the whole or a part of the demand of the plaintiff be contested, to apply to a Judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in the County Court or one of the County Courts in which such action might have been commenced, and on hearing of such summons the Judge shall, unless there be good cause to the contrary, order such action to be tried accordingly," &c.

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J., in chambers, who affirmed the registrar's decision on the authority of *Osborne v. Homburg* (2). This decision was again affirmed by the Exchequer Division on the same ground, the Lord Chief Baron expressing a doubt as to the correctness of the judgment in *Osborne v. Homburg* (2), and the defendant then appealed to the Court of Appeal.

H. D. Greene, for the appellant.—The Exchequer Division in the case of *Osborne v. Homburg* (2) took too narrow a view of the 30 & 31 Vict. c. 132. s. 7. The words are "where such claim is reduced by payment, an admitted set-off or otherwise." The words "or otherwise" would cover a payment into Court, which now by Order XXX. may be made at any time after writ. The parties in this case have waived the objection, and this distinguishes it from *Osborne v. Homburg* (2). The case is analogous to *Tomkins v. Beard* (3), where in proceedings under 19 & 20 Vict. c. 108. s. 26, an objection of the same kind, where the order had been made before the pleadings were concluded, was disallowed after verdict. The parties were held to have waived the preliminary step of making up the record.

Forbes, for the respondent, was not called upon to argue.

BRAMWELL, L.J.—I think this appeal must be dismissed. I think the expression "or otherwise" does not refer to anything subsequent to the writ, but is meant to cover the case of a release before action or something of that sort. If we look at the earlier Act which provides for an action being remitted to the County Court after issue, we find payment into Court expressly mentioned, therefore I think "or otherwise" in that Act means by something else happening after action, but in the later Act it means by something happening before the writ.

I do not understand what is meant by an agreement that the registrar shall have jurisdiction. Where he has not, the parties cannot give it him. One effect of a trial after such a proceeding

would be that none of the witnesses could be committed for perjury, because the trial would be *coram non judice*.

I agree with the case of *Osborne v. Homburg* (2), and, with the very greatest respect, I think it is better not to express a difference from a decided case unless one is going to overrule it; it often causes fruitless litigation and much expense. As to the other case cited by Mr. Greene, I may remark that it is a very strong thing for a person to say, "I agreed that this cause should be tried as it has been; I consented to judgment being given; and now that it is against me, I say that there was no jurisdiction." In such a case the Court would struggle as far as possible to uphold the judgment. I confess I should like to see how the record was drawn up in that case. But I should not have rescinded the order if the case had come before me. I should have said, "If you want to upset these proceedings, you must take a writ of error." I remember a case (4) tried without a jury in which there had been no formal jurisdiction in the Judge, and the Court held that the parties by their consenting to appear before him had made the Judge an arbitrator, so that the judgment was good on the record. But that case does not govern this. I am of opinion that this objection of want of jurisdiction is one which cannot be waived, and the parties cannot give jurisdiction by dispensing with something which is necessary to create it. Therefore I am of opinion that the registrar was right, that Mr. Justice Lopes was right, and so were the Divisional Court.

BRETT, L.J.—I think *Osborne v. Homburg* (2) was rightly decided and on right grounds. The word "payment" in section 7 refers to something before writ or action. The word "set-off" refers to something equally before writ or action. Then we get the words "or otherwise," which must mean by something else of the same kind. If so, no lapse of time can alter the state of things. The fact relied on to reduce the claim must

(2) 45 Law J. Rep. Exch. 65; s. c. Law Rep. 1 Ex. Div. 48.

(3) 15 Law Times N.S. 363.

(4) See *Andrews v. Elliott*, 5 E. & B. 502; s. c. 25 Law J. Rep. Q.B. 1.

Foster v. Usherwood (App.), Exch.

have happened before writ. Here it was not in time, and no covenant can alter the jurisdiction.

In the other case cited the order should not have been made till after the pleadings. But lapse of time will cure the supposed deficiency in a case like that. No doubt the order was made before pleadings, and there was no jurisdiction to make it. But if the registrar had waited till afterwards, the order could have been made. Under that statute the question was one not of jurisdiction but of procedure. If it is only a question of procedure the consent of parties and their going on to trial will cure the defect. But the defect could not have been cured if it had been a question of jurisdiction. Therefore I think that case was right. I suppose that the order was made before pleadings, but that afterwards the pleadings were continued and the issue drawn up for trial, and that the only ground of objection was that an order which should have been made after the pleadings was made before, and that objection was not allowed. I therefore think that the refusal of this order was right.

COTTON, L J., concurred.

Appeal dismissed with costs.

Solicitors—H. A. Maude, agent for J. & G. E. Webster, Sheffield, for plaintiff; Rickards & Walker, agents for E. K. Binns, Sheffield, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1877. } COLLINGRIDGE v. THE ROYAL EX-
Nov. 23. } CHANGE ASSURANCE COMPANY.

Insurance against Fire—Policy—Damage by Fire—Antecedent Contract for Sale of Premises—Insurable Interest.

In May, 1868, the plaintiff insured certain houses, of which he was seised in fee, in the defendants' office against loss or damage by fire. The insurance was continued up to Lady Day, 1876. In December, 1872, the Metropolitan Board of Works, unknown to the defendants, served the plaintiff with a notice to treat in respect of certain premises, in pursuance of statutory powers enabling them so to do; and

in May, 1873, the amount of compensation to be paid was duly fixed by an arbitrator. In May, 1875, the said premises were injured by fire. At that time the plaintiff's abstract of title had been accepted by the Board of Works, and a draft conveyance to them was in course of preparation, but no purchase-money had been paid:—Held, that the plaintiff had an insurable interest in the houses at the time when the fire occurred such as would entitle him to recover from the defendants.

SPECIAL CASE stated by consent of the parties, of which the following are the material sections:—

1. The plaintiff being seised in fee of the freehold premises, Nos. 127 and 129, St. John Street, Clerkenwell, in the county of Middlesex, on the 1st of May, 1868, insured them in the defendants' office, against loss or damage by fire, in the sum of 1,600*l.* [A copy of the policy was annexed to and formed part of the case.]

2. The premises were, at the time of the insurance, and thence until and at the time of their injury by fire, as herein-after mentioned, of the value of 1,500*l.* (1)

3. The plaintiff paid the defendants the sum of 2*l.* 8*s.*, as in the said policy mentioned, up to Lady Day, 1876, but

(1) The material clause of the policy was as follows:—

"Now know all men by these presents that the capital, stock, estates and securities of the said corporation shall be subject and liable to pay, make good and satisfy unto the said assured, their heirs, executors or administrators, any loss or damage by fire to the buildings aforesaid, which shall or may happen on or before the 25th of March, 1869, not exceeding the sum of 1,600*l.*, according to the exact tenor of the articles hereunto subjoined, and shall so continue and be liable, from year to year, for so long time as the said assured shall well and truly pay, or cause to be paid, the sum of 2*l.* 8*s.* into the treasury, or to the known agents of the said corporation, within fifteen days from the 25th of March, which shall be in each succeeding year; and the said corporation shall agree to the continuation of this assurance by accepting and receiving the said payment."

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without any notice being given to the defendants of the dealings between the plaintiff and the Metropolitan Board of Works, as hereinafter mentioned.

4. On the 19th of May, 1875, the said insured premises were injured by fire.

5. The said houses and the site thereof were situated within the limits of deviation marking out and defining the property which, by the Metropolitan Street Improvement Act, 1872, the Metropolitan Board of Works was authorised to take and acquire for the purpose of the new streets and improvements by that Act authorised. The said Act is taken to be and forms part of this case.

6. On the 16th of December, 1872, the Metropolitan Board of Works, in exercise of their statutory powers, gave the plaintiff a notice, under section 18 of the Lands Clauses Consolidation Act, 1845 (which is incorporated with the said Act of 1872), that they required to purchase and take the said insured premises for the purposes of the said Act.

7. The Metropolitan Board of Works and the plaintiff not being able to agree as to the purchase-money and compensation to be paid to him by them for the purchase of his aforesaid interest in the said premises, the same were duly determined in the manner prescribed by the Lands Clauses Consolidation Act, 1845, by arbitration, and by the award of the umpire duly appointed, the sum of 2,926*l.* was, on the 9th day of May, 1873, assessed as the amount of such purchase-money and compensation.

8. In due course the plaintiff furnished to the Metropolitan Board of Works an abstract of his title to the said premises, shewing he was seised thereof in fee, subject to certain tenancies therein, and to a rent-charge issuing thereout; and the Board accepted the plaintiff's title, and the draft of the conveyance was in course of preparation at the time of the said fire.

9. The said policy never was assigned by the plaintiff, and no notice of any change of interest was given to the defendants or allowed by them under the policy.

10. The defendants objected to pay the said 1,600*l.*, or to rebuild, and alleged that if they were liable at all under the policy (which they disputed as the premises had been required and taken and agreed to be sold by a binding contract, though not formally conveyed, for the purposes of the new street and other improvements by the said Act of 1872 authorised), that as the premises would be pulled down after the conveyance to the Metropolitan Board of Works, the only sum payable under the policy would be the amount of the damage done to the buildings, considered only as old materials.

11. The said houses were purchased in order to carry out the street improvement, and they would have been pulled down by the Metropolitan Board of Works for that purpose.

12. The defendants contend that they are not liable to pay anything under the said policy, but, if they are so liable, that the loss incurred is incurred by the Metropolitan Board of Works only, and not by the plaintiff, and is restricted to the value of the damage done to the old materials of the said houses, which has been agreed upon for the purposes of this case as 125*l.*, and that the said sum, and no more, is recoverable under the said policy.

13. The plaintiff contends that the contract under the said policy is one of indemnity, and that he is entitled to have the said houses reinstated, or to be paid the full value of the houses at the time of the fire—namely, 1,500*l.* The plaintiff brings this action with the assent and concurrence of the Metropolitan Board of Works. The defendants claim, in the event of the judgment of the Court being adverse to them, to exercise their option to reinstate, pursuant to clause 10 of the policy.

The questions for the opinion of the Court are:—

1. Whether the defendants are liable under the said policy to pay anything to the plaintiff.

2. If the defendants are so liable, upon what principle and for what amount the defendants are liable, and

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judgment is to be entered with costs, according as the Court may order.

Philbrick (Biron with him), for the plaintiff.—The defendants contend that they are not liable on their policy, because the premises insured have been sold to the Board of Works. The purchase, however, has not yet been completed, nor the money paid. They cited *Reynard v. Arnold* (2).

Day (Willis with him), for the defendants.—The plaintiff had no insurable interest. The contract of insurance is a contract of indemnity. Even if the plaintiff had an interest at the time when this fire occurred, such interest has not been injured. The plaintiff could neither sell nor let these houses, and his interest, if any, was only that of an unpaid vendor. The contract of sale was in reality completed, and the purchasers are a public body, and undoubtedly solvent. No injury whatever has, therefore, accrued to the plaintiff by reason of the fire.

[LUSH, J.—The consideration whether the buyer was solvent or insolvent cannot affect the question.]

Again, the defendants can only be made liable at the most to the extent of the actual loss sustained, calculated by the value of the property insured at the time the fire occurred.

[LUSH, J.—Suppose there had been no sale, and that the property in the neighbourhood had sunk in value between the time of the effecting of a policy and the occurrence of a fire.]

In that case the defendants would have had to make good the premises as they existed at the time of the fire.

Lastly, the defendants are entitled under the policy to reinstate the premises—a right which they cannot exercise unless the plaintiff's interest continues and they have facilities for so doing.

MELLOR, J.—I think that our judgment must be against the contention put forward by Mr. Day on behalf of the defendants. It appears that the plaintiff

is in the position of a vendor whose purchase-money has not been paid, who is still, as it were, in possession of the premises, and who has done nothing to prevent his suing for the loss sustained to these buildings by reason of the damage that has been done to them by fire. Whether or not he will, when the money has been paid, become what I will call a trustee for the amount recovered is a question I need not now pause to decide; but I do not see anything in the circumstances of this case to affect his title. The plaintiff's position must be considered as if there had been no buyer at all; the bargain has not yet been carried out, and he is still an unpaid vendor, and can avail himself of the policy. Were it not so, a plaintiff might sustain considerable damage in cases where he may have depended on the solvency of parties who are really insolvent; and though in the present case, the buyer being a public body, there is no reason to doubt that the purchase-money will be paid, that circumstance cannot affect the position of the plaintiff or incapacitate him from maintaining this action. I see nothing to invalidate this policy, and I have not now to enquire whether the plaintiff will eventually become, when the moneys have been paid, a trustee for the purchasers in respect of such moneys. Accordingly I think our judgment must be for the plaintiff.

LUSH, J.—I am of the same opinion. The plaintiff has contracted to sell the premises in question to the Board of Works, though the fact that the latter is a public body can make no difference. In all probability the sale will be completed, but such has not yet been the case. The contract on the part of the defendants is to make good to the plaintiff any loss or damage by fire to these premises, and no words of qualification are contained in it.

Judgment for the plaintiff.

Solicitors—William Wyke Smith, for plaintiff;
E. J. Rickards, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1877. { THE QUEEN, *on the prosecution*
 Nov. 30. { of JAMES HOWARD, v. HOL-
 BROOK AND OTHERS.

Libel—Criminal Information—Responsibility of Proprietors of Newspapers for Libel inserted by Editor without their Knowledge—6 & 7 Vict. c. 96 (Lord Campbell's Act), s. 7.

On the trial of a criminal information for libel it was proved on the part of the defendants, proprietors of a newspaper, that they had appointed a competent editor to undertake the literary management of the paper, and that the article in question was inserted by him without their knowledge, and without any specific authority or consent of theirs; and it was sought upon such evidence to raise a defence under section 7 of Lord Campbell's Act (6 & 7 Vict. c. 96). The learned Judge at the trial ruled that upon proof of the general authority of the editor who had inserted the article, it was not open to the defendants to claim the protection of the statute, and thereupon directed a verdict of guilty:—Held, by COCKBURN, L.C.J., and LUSH, J. (dissentiente MELLOB, J.), that a new trial ought to be had on the ground that the section did apply to the case of a libel published by an editor having admittedly general authority; and that it was a question which ought to have been left to the jury whether within the words of exemption in that section the defendants were criminally responsible for his act.

By MELLOB, J., dissenting—Where partners actively engaged in the publication of a newspaper appoint an editor to whom they leave the conduct of the paper, the statute does not apply to protect them from being criminally responsible for a libel he may insert without their knowledge, because what he publishes is the discretion so delegated to him must be taken to be done with their authority or consent.

This was a rule obtained by the defendants, against whom a verdict of guilty had passed upon the trial of a criminal information for libel before Lindley, J., at the last assizes for Hampshire, held at Winchester, calling upon the prosecutor to shew cause why the verdict should not

be set aside, and a verdict entered for the defendants, or why a new trial should not be had on the ground that the learned Judge misdirected the jury in stating that the defendants were criminally responsible for the publication, although they had appointed a competent editor to conduct the newspaper and the publication was made without their actual authority, consent or knowledge, and did not arise from want of due care or caution on their part.

The article containing the libel complained of, which was in the form of a letter, appeared in the *Portsmouth Times*, of which the three defendants were the proprietors, and it substantially charged the prosecutor, who was town clerk and clerk of the peace, with having packed a jury at the Quarter Sessions. The article appeared on the 28th of October, and upon the prosecutor calling the defendants' attention to it, and demanding an apology, they replied, on the 2nd of November, through their solicitor, denying all knowledge of the article previous to its insertion, and offering their columns to him for any reply he might wish to have published. This offer was declined, and the prosecutor then moved for and obtained the rule for a criminal information.

It appeared that the three defendants all habitually resided at Portsmouth, where the paper was published, and took an active part in its management. One was styled in the letter written by their solicitor "responsible manager," another undertook the advertisement, and the third the finance department. But the literary department had been entirely entrusted by them to an editor called Green, and he inserted what he thought fit in the way of articles and correspondence. At the time this article was published one of the defendants was away in Somersetshire on account of his health, and neither he nor either of the other two had given any authority for, or consent to, its publication, or knew of its insertion until their attention was called to it after publication. There was no evidence of any sale of the paper containing the article after it had been brought to their knowledge. The defendants at the trial relied

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on section 7 of Lord Campbell's Act, 6 & 7 Vict. c. 96 (1), and desired that the jury should be asked whether the publication was not made without their authority, consent or knowledge, and without any want of due care or caution.

The learned Judge, however, ruled that as an authority had been admittedly given by the defendants to Green to edit the paper and insert what he liked, there was an actual authority proved which prevented the application of the statute, and he directed the jury to find the defendants guilty.

Arthur Charles and A. L. Smith shewed cause.—The facts here shewed an actual publication by the defendant's authority, not a mere presumption. That being so, the section did not apply. Its object was to admit of the rebutting of a presumption of agency, and does not extend to a case where the agency is a fact.

[COCKBURN, L.C.J.—If the statute admits the defendants to prove that there was no criminal responsibility where there is only a presumption of agency, it is *a fortiori* where the agency is actually proved.]

The words "by his authority" in the section must be read as "by his presumed authority," and cannot mean the actual authority committed to an editor. If that is established, the section has no application. Were it otherwise, no newspaper proprietor could ever be held criminally responsible. So also the words in the section, "without his authority," mean "without the authority presumed from proprietorship," and do not apply to actual authority proved. "Authority" cannot mean two different things in the same section.

[LUSH, J.—I should say that the obvious meaning is, in the first, the autho-

(1) 6 & 7 Vict. c. 96. s. 7, enacts, "that, whenever upon the trial of any indictment or information for the publication of a libel under the plea of not guilty evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part."

rity which the law implies from the fact of agency, and in the second actual authority.]

It is most dangerous that proprietors should not be responsible for the editors to whom they delegate their discretion, and this cannot have been intended by Lord Campbell's Act. Before it was passed proof of proprietorship amounted to proof of guilt, and no defence could be raised. This appears from the case, in 1802, of *The King v. Walter* (2), where Lord Kenyon said he was "clearly of opinion that the proprietor of a newspaper was answerable criminally as well as civilly for the acts of his servants or agents for misconduct in the conducting of a newspaper." Again, in 1829, in *The King v. Gutch* (3), Lord Tenterden said: "I tell you that the proprietor of a newspaper is criminally answerable for what appears in it." And in 1834, in *Colburn v. Patmore* (4), Alderson, B., speaks of a proprietor being "actually ignorant, but legally cognisant." Therefore it is contended that Lord Campbell's Act was passed to allow the rebutting of the liability which formerly arose upon simple proof of proprietorship. But though it thus admitted the disproving of a presumed agency, it never meant to absolve the proprietor from responsibility for the act of an actual agent.

[COCKBURN, L.C.J.—But the very words of the section presuppose the publication being by an agent, "by a person by his authority." If he were not an agent the Act was not needed to enable him to disprove that. To what can the section apply if not to such a case as the present?]

Suppose some one else, not the editor, inserted the libel; or suppose the proprietor had no voice in the appointment of the editor, or the authority to the editor had been modified or countermanded, in such cases the section would apply.

[LUSH, J.—Those cases had not, so far as we know, occurred. Is it not more probable that the Act was to meet the mischief that had occurred and to correct

(2) 3 Esp. 21.

(3) M. & M. 433.

(4) 1 Cr., M. & R. 73; s. c. 3 Law J. Rep. Exch. 317.

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the anomaly that was felt to exist in making a man a criminal where he had no actual knowledge or intention or guilty mind? COCKBURN, L.C.J.—I should certainly say that the section should be very carefully applied, and that the negating of the authority should be in each particular case fully made out; but then this would be a question for the jury, and here it was not left to them. MELLOR, J.—The word consent seems to me to include this case; for did not these defendants consent to anything which their editor chose to insert?]

As Green was the agent of the defendant for the particular purpose of publishing matter in the paper, then this article being published by him within the scope of his authority renders them responsible. In *Parke v. Prescott* (5) Byles, J., says, "A principal is not civilly liable for the acts of his agent, unless the agent's authority be by the agent duly pursued; but the principal may be criminally liable though the agent have deviated very widely from his authority." So in *Barwick v. The English Joint Stock Bank* (6), the fraud of an agent was held to be the fraud of the principal.

[LUSH, J.—That is a question of civil liability.]

The same has been held in an indictment for nuisance—*The Queen v. Stephens* (7), where a master was held liable, though the acts of his workmen were without his knowledge and contrary to his general orders.

[COCKBURN, L.C.J.—The authority to Green here was not an authority to publish a libel, and if from the facts you wished such an inference to be drawn, was it not a question for the jury?]

H. T. Cole and *Folkard* in support of the rule.—It might be argued that the law previous to the passing of Lord Campbell's Act was not as has been said on the other side to make a man criminally responsible for a libel independently of his personal knowledge of it. The

leading case on the subject is *The King v. Almon* (8), where Lord Mansfield said that although sale at the defendant's shop by his servant is *prima facie* evidence of publication by him, yet "it is liable to be contradicted where the fact will bear it by contrary evidence tending to exculpate the master and to shew that he was not privy nor assenting to it nor encouraging it." Then also in *The King v. Holt* (9), Lord Kenyon himself says, "If the defendant could have shewn that he published the paper in question without knowing its contents, or that he could not read and was not informed of its tendency till afterwards, that argument might have been pressed upon the jury." In *Lamb's Case* (10) it is said "That everyone who shall be convicted in the said case, either ought to be a contriver of the libel or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel." These cases shew what evidence even then it was open to a defendant to adduce; but it is enough here to rest upon the express words of the statute 6 & 7 Vict. c. 96 (1), which exactly apply to the case of an editor publishing libellous matter without the proprietor's actual authority, consent or knowledge. The report of the Commissioners on the subject of libel, upon which Lord Campbell's Bill was founded, shews the object of the legislation. It suggested that in order to take away the force of some former decisions which might seem to warrant a different conclusion from that which the Commissioners thought to be the law, a "declaratory enactment" should be passed, "the object of which would be to allow a defendant charged with having maliciously published a libel to shew that it was published by another without any blame attributable to himself, or, as the case may be, even against his will and contrary to his express directions" (11).

Then as to the case of *The Queen v. Stephens* (7), that being a case of nuisance is very different. The judgment

(5) 38 Law J. Rep. Exch. 105, at p. 111; s. c. Law Rep. 4 Exch. at p. 182.

(6) 36 Law J. Rep. Exch. 147; s. c. Law Rep. 2 Exch. 259.

(7) 35 Law J. Rep. Q.B. 251; s. c. Law Rep. 1 Q.B. 702.

(8) 5 Burr. 2686.

(9) 5 Term Rep. at p. 444.

(10) 9 Co. Rep. 59 b.

(11) Report of Select Committee, 1843.

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shews that it was treated as in fact a civil proceeding, though in form a criminal one; and no question of civil liability is in point here. The nuisance affected the public at large, and they could have no redress but by indictment, so as to prevent its recurrence. But in libel the prosecutor has the power of proceeding by action and it is unnecessary that he should, contrary to all principles of justice, be saddled with a criminal responsibility for the acts of his agent or servant where he had no *mens rea*.

[LUSH, J.—The distinction between libel and nuisance is the public character of the latter. Libel is a private wrong, treated as a public one only because of the supposed probability of its provoking a breach of the peace.]

It is therefore submitted that the ruling at the trial was wrong in laying down that the only matter open to the defendants, under the section, was to shew, that they had taken away the editor's authority.

[COCKBURN, L.C.J.—That was leaving it just as Lord Kenyon said the law was before the statute.]

Since the statute it must be a question for the jury whether the exemption is proved.

COCKBURN, L.C.J.—I am of opinion that the rule for a new trial in this case should be made absolute. The facts, as I understand, which were in evidence, were these: That the defendants, three in number, were the proprietors of the newspaper in which the libellous article appeared. But it appears that when they were all at Portsmouth, the place where the paper is published, the duties of managing the newspaper were divided between four persons. There was the editor, to whom the literary department was entirely left, while one partner undertook what may be called the commercial, another the advertising and another the actual printing department. Now at the time when this article was inserted one partner had gone some hundred miles away into Somersetshire for the benefit of his health, and he therefore certainly could not be cognisant of the fact of the publication of this article; the other two

partners were indeed present in Portsmouth at the place of publication, and were discharging the duties they severally undertook, but it was proved that this part of the paper being left entirely to the editor, they neither of them actually knew of the existence of the article. Then comes the question whether the defendants or either of them are criminally responsible for its insertion.

Now it is an undoubted principle of law in general that a man is only liable for what is done by himself, though the doing may be actual or constructive; but here it is the fact that the parties made defendants on the prosecution of this indictment were not actually cognisant of the libel at all; and it is not to be inferred from the employment of an editor, in my opinion, however wide may have been the discretion given to him, that they thereby gave him authority to do that which is contrary to the law of the land. Whatever he does in the conduct of their business in accordance with law, that they have sanctioned, but it cannot be said to be a sanction to commit a crime.

Although this is the general proposition of law in reference to criminal responsibility, there seems to have been an exception in practice in the particular case of libel; and, whatever may have been the true view of the law in Lord Mansfield's time, yet it is clear that in cases at Nisi Prius, before Lord Kenyon and Lord Tenterden, the ruling laid down and followed was, that where a libel was proved in a publication conducted by the agent of the proprietor, the proprietor himself was criminally liable. It is not necessary to say how far one assents to that doctrine; it is enough to say that it was considered by some of the most enlightened thinkers of the day—lawyers and others—to be an anomaly which violated the first principles of justice, and which ought to be got rid of. I cannot doubt for a moment that it was with the view of correcting that anomaly that the seventh section in Lord Campbell's Act was passed. It has been suggested that the clause was inserted in the Act to get rid of the *prima facie* presumption of proprietorship, and make it capable of disproof; and also that the

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Act passed with a view to enable the proprietor of a newspaper, where a libel had been inserted in it by some one who might naturally be thought to be his agent, but really was not, to get rid of that presumption by giving rebutting evidence that the person was not his agent. But the obvious answer in both cases is that in the then state of the law such an enabling Act was unnecessary, for a man could not be prevented from proving that he was not in fact the proprietor of the paper, nor that the stranger was not in fact his agent. So that I must hold that Lord Campbell's Act was passed to prevent a man being held criminally responsible for the acts of another person, in which he had taken no part, and of which he knew nothing, although that person was admittedly his agent.

That being so, I ask myself whether the present case is brought within the protection of the 7th section of the Act. As to one of the defendants, it certainly is, and as to the others, it, in my opinion, well may be. As to the defendant who was absent in Somersetshire, unless it were shewn that, though absent, he had given actual authority to the editor to publish libellous matter, or was taking an actual part in the management of the paper, and must have known of the article, then he is within the statute. As to the others, the case is rather different. The statute excepts from its protection cases where authority has been given or consent to the publication of the article, or where it has been done with the knowledge of the defendant, or where there has been an absence of due care or caution on his part in the manner of conducting the newspaper. As to the defendants, therefore, who were present in Portsmouth, and were concerned in the publication of this paper, this would be, in my opinion, a question for the jury, looking at the various facts, to say whether they had knowledge of the libellous article, and whether, having knowledge, they must be taken to have consented to the publication, or whether, in not seeing what the paper contained before its issue, they were wanting in due care or caution. These considera-

tions should, I think, have been left to the jury, and then, if the jury found an absence of those things, then section 7 would not apply to protect the defendants, but if otherwise, then it would. I say nothing about civil responsibility, because it stands on quite a different footing, and is governed by different considerations and principles; but as to criminal responsibility, which is what is dealt with by the Act, I can see no possible case where the section applies, if it does not apply where the party sought to be made criminally responsible for a libel, as proprietor of the publication in which it has appeared, can shew that he never gave any authority to his agent to publish the libel, or gave his consent to its being done, or knew that it was being done. I can see, I say, no case within the section, if it be not one like this.

But it is not for us to speculate whether it was wise or expedient that the Legislature should pass this section, or desirable for proprietors of newspapers to be or not to be responsible for articles which their agents might think proper to insert, without their knowledge or consent. I find that the statute was passed to cure what at the time was deemed an anomaly in the criminal law, as the previous cases shew, and I cannot see that it is applicable to any cases but those which had so been thought to be anomalous. I think, therefore, that the Judge was wrong in directing a verdict against the defendants, and in holding that the section did not apply, and that there must be a new trial.

MELLOR, J.—I regret that I am unable to concur in the view of the Lord Chief Justice, and I need hardly say that, differing from him and from my brother Lush, I feel the greatest diffidence in saying that, in my opinion, the Judge at the trial, assuming that he took the view which I take it he did—namely, that the defendants' own evidence took the case out of the protection of the statute—was right in so directing the jury that they must find the defendants guilty.

Now, the section is not confined to newspapers, but includes books and other publications, and was to meet the case of

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publishers of a variety of literature. Why, the defendants themselves are proprietors of newspaper property, not merely of this one paper, but of other ones; but, then, in reference to this one, they are living, not at a distance, but on the spot, and join in bringing out the paper, and in its actual publication, and it is for their profit and benefit.

Now, nothing is more probable than that a libel may be sent for publication, and may be published without their knowing that it was libellous; but how does that affect their position as proprietors? I cannot quite agree even as to the absent partner, for he had certain duties with regard to the publication of the paper, and if they were not performed by him, they were so by some one else for his benefit, and by his authority. Apart from the statute, it must be conceded that such publication as this would make the proprietors criminally responsible. Has the statute altered that? The Lord Chief Justice says that he knows of no case where the statute would apply to relieve of criminal responsibility, if not in one like this; but I venture to think there are some, as pointed out at the bar. The discretion which belongs to the many is vested by them in the individual man; he is to be the *alter ego* of the proprietors. They put themselves, to use Lord Bacon's words, "into another man's hands" (12). If so, they must be taken to consent to the manner in which he exercises their discretion, and so they do not come within the exemption as to consent. The object of the section being to give relief to a proprietor, enabled him, under the plea of not guilty, to prove that the publication in question was without his authority, consent or knowledge. Now, I must take it on the evidence here that this publication was without the defendants' knowledge; but then, in my view, they had given authority and consent to the publication in delegating their discretion to the editor. The prosecutor in libel has only one thing to prove, but the defendants, in order to claim exemption, must prove three things—absence of au-

thority, consent and knowledge, and, further, that the publication did not arise from want of due care or caution.

Now if these were alternatives I should have thought that my brother Lindley ought to have asked the opinion of the jury on all of them; but as he held, and as I think rightly held, that the defendants had given authority to the editor, then he was right in directing a verdict, and there was nothing to leave to the jury.

Where partners actively engaged in the publication of a newspaper appoint an editor, and do no more, they are liable for the consequences of the exercise of his discretion. But suppose he died and another undertook the duties in the absence, and without the knowledge of some of the partners, then I can see a case in which they might be exempted under the Act. Therefore I think that, as on the facts here, the defendants left the conduct of the paper entirely to the editor Green, the Judge was right in saying that the statute did not apply, because he was of opinion that the publication was with their authority or consent.

LUSH, J.—There are two questions in this case. First, what is the true construction of section 7; and, second, whether there was any evidence which ought to have been left to the jury, that the defendants brought themselves within the exception. Now, on the first question, I am constrained to differ from my brothers Mellor and Lindley. We must consider the object and purpose of the Act, and gather it from the language of the section itself compared with the state of the law at the time of its date, and which it professes to amend; we shall then see what was the mischief which it was designed to remedy, and so read the Act as to obviate that mischief.

One anomaly existing then was, that it had been accepted as settled law that a proprietor of a newspaper was criminally responsible for any libel appearing in his paper, and a bookseller for any libel in a book published by him, or on his counter for sale, although he did not authorise or consent to the insertion of the libellous

(12) Bacon's Maxims, 16.

The Queen v. Holbrook, Q.B.

matter, and did not know of its existence. It was acknowledged on all hands to be an anomaly, and felt to be a grievance as well as an anomaly, because it was different to all other principles of criminal law. The nuisance case that has been referred to (7) was quite distinct, for that was a case in which a public wrong had been committed; but a libel is a private wrong, and the law allows an indictment in the case of libel, treating it so far as a public wrong, only because of the supposed probability of its provoking a breach of the peace. Now in section 7, I find words which exactly fit this state of things, and I do not, therefore, feel at liberty to adopt the narrow construction put upon them by Mr. Charles. What is the fair meaning of the words as applied to the state of things which I have referred to? "Whosoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority"—that exactly applies to the case of a proprietor of a newspaper whose editor has published, or a bookseller whose servant has sold some libellous matter—"it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge." That cannot apply to publication or sale without knowledge, but must mean that the libel was there without his authority, consent or knowledge, "and that the said publication did not arise from want of due care or caution on his part."

That is exactly the remedy which we should expect to find applied to the anomaly felt and complained of, and I cannot doubt that this is the fair meaning of the clause. A proprietor's editor or servant inserting in his newspaper, or selling over his counter, something libellous, of which he knew nothing, and about which he was in no way negligent, is not to make the proprietor criminally responsible.

If so, was there evidence here which the Judge should have left to the jury, that this libel was inserted without the authority, consent or knowledge of the

defendants, and from no want of due care and caution on their part? I cannot read Green's evidence (the editor) without seeing that there was abundant evidence. [His Lordship then read the Judge's notes of Green's evidence.] Then there was no evidence that any paper was sold after complaint had been made, and the defendants did know: therefore there was abundant evidence for the jury, and evidence which would have justified them in finding that the defendants did not know of nor consent to the insertion of the libel, or were wanting in due care or caution.

The learned Judge held that there was no evidence; but I cannot resist my own conviction that there was evidence, which ought to have been left for the consideration of the jury, to shew that the defendants were not criminally responsible for the libel, but were entitled to the protection which this clause in the statute meant to give them.

Rule absolute for a new trial.

Solicitors—Gregory, Rowcliffes & Co., for prosecution; Ford & Ford, agents for Feltham, Portsea, for defendants.

IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1877. } GRANT AND OTHERS v. THE
June 6. } BANQUE FRANCO-EGYPTIENNE.*

Practice—Security for Costs—"Special Circumstances"—Order LVIII. rule 15.

The fact that an appellant is a foreigner not domiciled in England, and having no assets there, is a "special circumstance" which entitles the respondent to security for costs of appeal from an interlocutory order, under Order LVIII. rule 15.

In this case there was a verdict for the defendants, and the plaintiffs obtained an order for a new trial; against which the defendants appealed. The plaintiffs thereupon applied for security for costs, under Order LVIII. rule 15.

Their application was supported by an affidavit, to the effect that the defendants

* *Coram* Cockburn, L.C.J.; Bramwell, L.J.; and Brett, L.J.

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were a foreign corporation resident abroad, and having no assets in this country, and an affidavit of a French advocate, stating that in an action in France upon a foreign judgment, the French Court would review the judgment on which the action was brought, and also in considering the amount of costs to be recovered with respect to the proceedings in England, would apply the French scale of taxation, which is considerably lower than the English, the maximum allowance for counsel being only fifteen francs.

Lumley Smith (Murphy and Julian Robinson with him), for the plaintiffs.

Anderson (Sir H. James with him), for the defendants.

COCKBURN, L.C.J.—I think there ought to be an order as prayed, on the ground that the position of one of the parties in this action constitutes a "special circumstance" within the meaning of the rule.

The defendants, being foreigners resident abroad, can only be got at through the foreign tribunals. It will then be open to them, on application to the foreign Court, to go into the whole matter again, and it would be perfectly uncertain which way the foreign tribunal would decide. One party is quite safe if they get their judgment, and the other unsafe. Nor are they *in pari periculo* as to costs, for if the plaintiffs were successful here and had to sue for their costs in a French Court, they would probably have them taxed according to the lower French scale.

BRAMWELL, L.J.—I am of the same opinion, and for the same reasons.

BRETT, L.J.—I think that the fact that the defendants are foreigners not domiciled in England, is a "special circumstance" which justifies the Court in making the order under Order LVIII. rule 15.

Order accordingly.

Solicitors—G. S. & H. Brandon, for plaintiffs;
A. G. Ditton, for defendants.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1877. } HUNT v. THE CITY OF LONDON REAL
Aug. 2. } PROPERTY COMPANY, LIMITED.

Practice—Action in Chancery Division tried before a Jury—Motion for new Trial of such Action, before whom to be made—Order XXXIX. Rule 1 of December, 1876—Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17.

An action in the Chancery Division having been tried with a jury before a Judge of the Queen's Bench Division, a motion for a new trial on the ground of misdirection was made before a Divisional Court of the Queen's Bench Division:—Held, that the motion could not properly be so made.

Semble, per FIELD, J., the application might be made to the Judge before whom the trial took place.

See however this case, on appeal, 47 Law J. Rep. Chanc. 51.

This was an action brought in the Chancery Division to try the right to a piece of land with a wall thereon. The option of trial by jury given by Order XXXVI. rule 3 having been exercised, the case was set down for trial in the general list of actions for trial at the Middlesex sittings, in accordance with *Warner v. Murdoch* (1), and, having been put into a Queen's Bench list, was tried before Field, J., and a jury. A verdict was found for the plaintiff. A motion, on behalf of the defendants, was now made for a new trial on the ground of misdirection, and of the verdict being against the weight of evidence.

O. S. C. Bowen, for the defendants.

[FIELD, J.—The action being in the Chancery Division, are you well advised in coming to this Divisional Court?]

Yes. To apply to the Chancery Division, the business of which is transacted by a single Judge, to set right the alleged misdirection, cannot be the right course. And to apply to the Judge whose misdirection is complained of cannot be the right course, notwithstanding section 17 of the Appellate Jurisdiction Act, 1876 (39 & 40

(1) 46 Law J. Rep. Chanc. 121; s. c. Law Rep. 4 Chanc. Div. 750.

Hunt v. London Real Property Co., Q.B.

Vict. c. 59). That section, in directing that proceedings subsequent to trial shall be taken before the Judge before whom the trial took place, expressly says, "So far as is practicable and convenient." In giving effect to the section, the principle of section 4 of the Judicature Act, 1875, prohibiting a Judge of the Court of Appeal from sitting on an appeal from any judgment or order made by himself, should be applied. The action, having been put into a Queen's Bench list, ought to be treated as an action in the Queen's Bench Division, for the purposes of Order XXXIX. rule 1 of December, 1876, directing that "where in an action in the Queen's Bench, Common Pleas or Exchequer Division there has been a trial by a jury, any application for a new trial shall be to a Divisional Court."

THE COURT (KELLY, C.B., and FIELD, J.) refused to hear the motion. FIELD, J., intimated that, if the application should thereafter be made to himself alone as the Judge before whom the action was tried, he should be inclined to hold the application rightly made.

Motion dismissed.

Solicitors—Tathams & Pym, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1877. } STEEL AND ANOTHER v.
Dec 7. } LESTER AND LILEE.

Master and Servant—Partner—Ship-owner and Captain, Relation between—Negligence of Captain—Liability of Ship-owner—Merchant Shipping Act, 1875.

The defendant, Lester, who was the registered owner of a ship, and who was also registered as "managing owner," under the Merchant Shipping Act, 1875, traded with her for about three months, employing the defendant Lilee as captain. It was then verbally agreed between Lester and Lilee, that, on condition Lester received one-third of the net profits, Lilee should be at liberty, without being subject to any control on the part of Lester, to take the ship wherever and to whatever port he chose, to take any cargo, and to refuse any cargo. Lilee was

also to engage and pay the seamen, and to find all stores required for the ship.

Plaintiffs' wharf having been injured through the negligent management of the ship while under the control of Lilee, they brought an action against Lester and Lilee:—Held, that Lester had so far retained his ownership of the ship as not to divest himself of responsibility for the negligence of Lilee, and that he was therefore liable in the action.

Fowler v. Lock (41 Law J. Rep. C.P. 99) distinguished.

CASE stated by the County Court Judge of Lincolnshire, on appeal from judgment delivered by him against the defendants, under the following circumstances:—

This was an action brought by the plaintiffs, who are millers at Spalding, against the defendant Lester, as the owner, and the defendant Lilee, as the master of a sloop, called the *Anne*, of Goole, for damages amounting to the sum of 50*l.*, occasioned to the plaintiffs' wharf by the sloop breaking loose from her moorings, under circumstances which, in my opinion, shewed negligence by the defendant Lilee, in the management of the vessel; and evidence being given that damage, to the amount of 50*l.*, had been suffered by the plaintiffs in consequence, I gave judgment against both the defendants to that amount, with costs. From this judgment there is no appeal on the part of the defendant Lilee, but the defendant Lester alleges that he is not liable for the negligence of Lilee.

The facts bearing upon this point, proved before me, were as follows:—

The defendant Lester, who is a merchant living and carrying on business at Stoke-upon-Trent, in the county of Stafford, purchased, in the month of May, 1873, the sloop *Anne*, which was duly transferred to him, and registered in his name as the owner; he was afterwards registered as the "managing owner," under the provisions of the Merchant Shipping Act, 1875. For about three months after the defendant Lester purchased the vessel, he traded with her on his own account, employing the defendant Lilee as skipper, paying him standing wages. At the end of three months from his purchase of the sloop he

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agreed, verbally, with the defendant Lilee that he should take the ship wherever he choose, on condition that he (Lester) should have a third of the net profits. Lilee was to be at liberty to go to any port, and to take any cargo he chose, and to refuse any cargo. He was also to engage the men, and Lester had no control over the vessel. Lilee was to render to Lester accounts of his profits, from time to time, and this state of things continued till after the collision, Lester selling the vessel in October, 1876. Lester, on cross-examination, could not say what his profit was on this particular voyage. He said the account given him by Lilee was somewhere, but he had not got it with him. In the month of March, 1876, the defendant Lilee entered into a charter-party, purporting to be on behalf of himself and the defendant Lester (1).

The sloop arrived at Spalding in due course, and after partially discharging the cargo, the vessel remained several days at the said port, and whilst so remaining, the damage was occasioned to the plaintiffs' wharf, by reason of the negligence of the defendant Lilee. The defendant Lester was not consulted by the defendant Lilee as to the contract for taking the said cargo, and never saw or heard of the charter-party till after the commencement of the action. He was not present at the port of Spalding when the vessel arrived there, or at any time thereafter during her stay at the said port, and he did not take any part in the management of the said vessel during her voyage to, or whilst she remained at the said port. The men employed in navigating the said vessel on such voyage (as on all previous voyages during the existence of the agreement between the two defendants) were hired and paid by the defendant Lilee, who found all stores required for the said ship, and paid to the defendant Lester one-third of the profit

(1) The charter-party referred to commenced as follows:—

"It is this day mutually agreed between Captain Lilee, master, for and in behalf of the owner of the good ship or vessel, called the *Anne*, of Goole, now at London, and Lawes Chemical Manure Company, Limited." Then followed the terms of the charter-party, which was signed "John Lilee."

realised by the voyage. I gave judgment on the 5th of July, 1877 (2).

The question for the consideration of the Court is, whether, under the circumstances above stated, the defendant Lester is legally liable for the negligence of the defendant Lilee in the management of the said ship, whilst lying at the port of Spalding, which occasioned the damage to the plaintiffs' wharf, for which this action was brought. If he is so liable my judgment is to stand, but if he is not, then the judgment is to be against Lilee only, and judgment to be entered for defendant Lester, with costs.

F. T. Streeten, in support of the appeal for the defendant Lester.—There is no—

(2) The important part of the judgment of the County Court Judge (a considered judgment) was as follows. After stating the facts, his Honour proceeded:—

"In order that either of the defendants should be liable in this action it must be shewn that there was negligence on the part of the defendant Lilee, who had the control of the vessel, and I am of opinion, on the evidence, that he was guilty of negligence in the way in which he fastened the ship after he had removed her from her first moorings, and also because he left the ship under the charge of an incompetent man, who might have avoided the accident if he had attended to what was said to him by the witness Mitchel.

"No serious opposition was made to the amount of the damage alleged to have been caused by the ship, and I have therefore no difficulty in giving judgment in the action for the amount claimed.

"With regard to the other defendant, the owner of the vessel, it was urged in his behalf that though he was at the time of the transaction the registered 'managing owner' of the vessel, the relationship of master and servant did not then exist between him and Lilee, so as to make him liable for his misconduct; and I was pressed with the case of *Fraser v. Marshall* (13 East, 238), as supporting that view. That decision, however, when I had the opportunity of reading it over carefully, I found to have been given in reference to a state of facts widely differing from those before me. In that case the owner had actually, by a charter-party, demised the ship for a time certain, to the master at a certain rent, but here there was nothing of the kind, a verbal arrangement at the most, and that very loosely proved, and it is clear to me that the owner must be held liable in this case, either as standing in the position of Lilee's master, or else as his partner, under the peculiar arrangement he said he made with him. And for the purposes of the present action it is of no importance which position he filled, as in either case he would be responsible for Lilee's acts while in conduct of the vessel, Judgment, therefore, for 50*l.* and costs must be entered against the defendants."

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thing in the case to shew that Lester is liable in this action. There was no partnership between Lester and Lilee.

[GROVE, J.—They shared the profits.]

Yes, but that only amounts to *prima facie* evidence of a partnership, which is only a branch of the law of principal and agent, and may be rebutted. The Court must look at the agreement between the parties in order to see what relation exists between them—*Cox v. Hickman* (3); *Bullen v. Sharp* (4); *Ross v. Parkyn* (5).

[LINDLEY, J.—All those cases have been carefully reviewed by the Master of the Rolls in the recent case of *Pooley v. Driver* (6).]

By the agreement between them, Lester allows Lilee to take the ship wherever he pleases, taking what cargo he chooses, without being subject to any control on the part of Lester. The case, in fact, finds that Lester had no control over the vessel. There was no community of loss, and there was not any relation of principal and agent between them.

You cannot go beyond the person whose negligence occasioned the injury without shewing clearly that he was a servant. The relation of master and servant did not exist here. Lester relinquishes all control over the ship; he could not have recovered possession of her during the voyage. Lilee, it is true, made a charter party "for and in behalf of the owner," but Lester did not know of this. The relationship between Lester and Lilee is rather that of bailor and bailee. See the judgment of the majority of the Court in *Fowler v. Lock* (7).

[GROVE, J.—In that case my brother Byles and I held the relationship of the parties to be bailor and bailee, not master and servant. The case went to the Exchequer Chamber, where the Court were divided in opinion, but they decided there

should be a new trial on another point.] (8).

Fowler v. Lock (7) was approved of in *Venables v. Smith* (9).

Lilee was in the position of a subcontractor, he engaged the seamen; and, moreover, the County Court Judge finds that Lilee left the ship under the charge of an incompetent person (see the judgment *supra*), and Lester cannot be held liable. In *Milligan v. Wedge* (10), where a buyer of a bullock employed a licensed drover, and the drover employed an incompetent boy, through whose carelessness an accident happened, it was held the buyer was not liable. See also *Reddie v. The London and North Western Railway* (11). The case of *Fraser v. Marsh* (12) was distinguished by the County Court Judge on the ground that in that case there was a demise of the ship, but although there is no demise in the present case, there is a parting of the control amounting to a hiring and letting.

Finlay, for the plaintiff.—The question is really one of fact. If the case had been left to a jury to say whether Lilee was in the position of master, could it be contended there was no evidence on which they could so find?

[GROVE, J.—It is not open to us to review the evidence.]

Lester had registered himself as owner under the Merchant Shipping Act, 1875, (38 & 39 Vict. c. 88) (13). Lilee might have been registered had it been intended

(8) That case finally came before the Court on a motion for a new trial, when the Court refused to disturb the verdict.—*Law Rep.* 10 C.P. 90.

(9) 46 *Law J. Rep.* Q.B. 470; s. c. *Law Rep.* 2 Q.B. Div. 279.

(10) 12 *Ad. & E.* 737; s. c. 10 *Law J. Rep.* Q.B. 19.

(11) 4 *Exch. Rep.* 244.

(12) 13 *East* 238.

(13) By 38 & 39 Vict. c. 88. sub-sec. 4, "The owner of every British ship shall, from time to time, register at the Custom House of the port in the United Kingdom; at which such ship is registered, the name of the managing owner of such ship, and if there be no managing owner, then of the person to whom the management of the ship is entrusted by and on behalf of the owner, &c." This Act is now repealed, except as to anything done under it, by 39 & 40, c. 80, by section 36 of which similar requirements are substituted; by section 45, the repeal is not to affect anything done under any enactment thereby repealed.

(3) 8 *H.L. Cas.* 268; s. c. 30 *Law J. Rep.* C.P. 125.

(4) 35 *Law J. Rep.* C.P. 105; s. c. *Law Rep.* 1 C.P. 86.

(5) 44 *Law J. Rep. Chanc.* 610; s. c. *Law Rep.* 20 *Eq.* 331.

(6) 46 *Law J. Rep. Chanc.* 466; s. c. *Law Rep.* 5 *Chanc. Div.* 458.

(7) 41 *Law J. Rep.* C.P. 99; s. c. *Law Rep.* 7 C.P. 272.

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to entrust the entire management to him, therefore how can Lester escape his liability as owner?

[GROVE, J.—In *Powles v. Hider* (14) the defendant was held liable because of the Act of Parliament under which he had registered himself as proprietor.]

If the ship was unseaworthy Lester would have been liable to be indicted under the Act.

Streeten in reply.—There is no analogy between the Merchant Shipping Act, 1875, and the Hackney Carriage Acts, under which the defendant was licensed in *Powles v. Hider* (14). The object of the Hackney Carriage Acts is the collection of duty by licensing, while the object of the Merchant Shipping Act is to protect those who are on board the ship from perils of unseaworthy ships. The only liability under that Act is the owner's liability for unseaworthiness, and such liability is not inconsistent with his parting with the control of the ship.

GROVE, J.—I am of opinion the judgment of the County Court Judge was right, and should be affirmed. The action, which is to recover damages for injuries occasioned to the plaintiffs' property through the negligent management of a ship, was brought against the defendant Lilee as master, and against the defendant Lester as owner of the ship; and the question for our consideration is, whether the relation of master and servant existed between the two defendants; or whether in fact, Lester, in virtue of his ownership, was responsible for the acts of Lilee, or whoever might be managing the ship, notwithstanding he had for a term divested himself absolutely of all control and management.

The authority which at first sight appears to bear most strongly on the present case is *Fraser v. Marsh* (12); in that case there was an absolute demise of the ship by charter party, and it was held that the owner of the ship having thereby divested himself of all control, the relation of master and servant, as between him and the master of the ship, did not exist; in that case too the owner had registered himself as owner: there was not then, however, the necessity of registration,

(14) 6 E. & B. 207; s. c. 25 Law J. Rep. Q. B. 331.

which exists now, under the Merchant Shipping Act, 1875, an Act which was passed in order that there should be some person responsible for the proper equipment of the ship. The present case appears to me distinguishable from *Fraser v. Marsh* (12) on two grounds, first, as pointed out by the County Court Judge because there is no demise as there was in *Fraser v. Marsh* (12); and, secondly, because (without reviewing the facts which I am of opinion we are not at liberty to do but drawing the same inference), I consider that Lester still retained responsibility, and is therefore liable in the present instance.

Another case which has been referred to is *Fowler v. Lock* (7), but the distinction between that case and the present is manifest. It was an action brought by the cab-driver against the cab proprietor for supplying an unfit horse. The cab-driver was not in the ordinary relation of a servant towards the cab proprietor, because the cab-driver could do as he liked during the day, and simply paid the cab proprietor a certain sum *per diem*; the majority of the Court held that as between the two the relation of master and servant did not exist, but the relation of bailor and bailee, and that therefore the cab proprietor was responsible. The case was taken to the Exchequer Chamber; there the Court was divided in opinion, but no judgment was given; the Court, considering it was necessary to ascertain whether the cab-driver had taken on himself the risk of the horse's unfitness, and consequently the case was sent down for a new trial in order that this fact might be submitted to the jury. The jury having found this fact in favour of the plaintiff the Court refused, on motion for a new trial, to disturb the verdict. *Fowler v. Lock* (7) does not touch the case of an action by one of the public against the cab proprietor, and as it has never been overruled we must assume it to be good law.

If the action in the present case had been by Lilee against Lester, by master of ship in fact against owner of ship, then *Fowler v. Lock* (7) would have strongly applied; but inasmuch as the action is by one of the outer public against Lilee and Lester, the case comes within

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the express distinction which was pointed out in *Fowler v. Lock* (7), and on which *Powles v. Hider* (14) was decided. In the latter case, the action was not by the cab-driver against the cab proprietor, but by one of the outer public against the cab proprietor, who was registered as such under the Hackney Carriage Acts; and it was held that it would be unjust towards the public if such an action, brought against one who proclaimed himself to be the actual proprietor of the cab at the time it was engaged by the plaintiff, could be defeated by a secret agreement between the proprietor and the driver, with respect to the remuneration of the driver and the proprietor.

In *Venables v. Smith* (9), which was an action by one of the outer public against the proprietor, the Queen's Bench apparently assented to the *ratio decidendi* of the majority of the Court in *Fowler v. Lock* (7), but they held the Acts of Parliament so far altered the relation of proprietor and driver towards the public, that the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was entrusted to him. So far, therefore, that case is an authority rather in favour of the decision of the County Court Judge.

There was, however, one passage in the case which was relied on by the appellant's counsel, viz., "Lester had no control over the vessel," and which appeared to me to be highly favourable to the appellant, because it seemed to shew that Lester by parting with all control, brought himself within the decision of *Fraser v. Marsh* (12). But against this it was argued that though this was true in one sense, inasmuch as Lester did not select the port or the cargo or engage the men, yet that the language was capable of a fuller interpretation, and was equally consistent with the fact that Lester was to be responsible for the control and management of the ship towards the outer public. In support of this contention the Merchant Shipping Act, 1875, was referred to, by which the ship has to be registered in the name of the managing owner, and if there be no managing owner then of the person to whom the management of the ship is entrusted by and on behalf of the owner; and it was

pointed out that Lilee might have been registered, but that as Lester had registered himself he had not given up his responsibility under this Act, and consequently had not divested himself of responsibility towards the outer public.

I am of opinion that on the evidence as brought before us, Lester continued responsible to the public; he was registered as managing owner, and he never gave up his interest in the adventure, for he retained one-third of the net profits. I do not think it necessary to decide whether this division of profits constituted Lester a partner with Lilee; but it is additional evidence in support of Lester's responsibility in the action, for by retaining his share in the profits, he would suffer by the failure and benefit by the success of the adventure.

On the whole, therefore, I am of opinion that the elements of master and servant existed between Lester and Lilee, so as not to divest Lester of responsibility for the acts of Lilee.

LINDLEY, J.—I am of the same opinion. The question we have to decide is, whether on the facts stated the defendant Lester is liable for the negligence of Lilee, and I think he is. The facts appear to me to amount to this, that in May, 1873, the defendant bought this ship, and employed it on his own account, engaging Lilee as skipper. In the following July, before the Merchant Shipping Act, 1875, this arrangement was altered, and to my mind the case turns upon the true effect of the altered arrangement. By it, Lester still continues to be owner, but Lilee, instead of receiving stated wages, has two-thirds of the profits. It was contended that this amounts to a demise of the ship, throwing all the responsibility on the master; but I do not think it does amount to a demise. I look upon it either as an arrangement for paying the master for his services, the owner still retaining the control of the ship, or an arrangement by which Lester became a partner with the master. I am rather disposed to think Lester intended still to be owner, but in either view it was an arrangement for their joint benefit, and the master would be either agent or partner; and consequently, I am of opinion that the facts

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do not amount to a demise, or render the master solely responsible.

So far I have considered the case apart from the Merchant Shipping Act, 1875. That Act came into operation two years after this altered arrangement, and the fact of Lester's registering himself as owner under that Act, throws a good deal of light on the matter, shewing that Lester still intended to be owner. I do not say the registration is conclusive evidence, for as the counsel for the defendant has pointed out, the Act was passed mainly for the purpose of protecting the people on board the ships; but still it shews that Lester did not intend to relinquish his ownership. On looking further into the facts, I find, in confirmation of this view of the case, Lilee entering into a charter-party "for and in behalf of the owner."

For these reasons I am of opinion that the judgment of the County Court Judge was right.

Judgment affirmed.

Solicitors—Wedlake & Letts, agents for Keary & Marshall, Stoke-upon-Trent, for plaintiffs; Routh & Stacey, agents for Maples & Son, Spalding, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1877. { IN THE MATTER OF THE BRISTOL
Nov. 28. { AND NORTH SOMERSET RAIL-
WAY COMPANY.

Railway Company—Mandamus to comply with Order of Board of Trade—Statute 26 & 27 Vict. c. 77. s. 2—Construction of Bridge in lieu of Level Crossing—Want of Funds—Inability of Company to comply with Order.

A mandamus will not lie to compel a railway company to construct a bridge in lieu of a level crossing pursuant to an order of the Board of Trade where it appears that the company are wholly without funds, and have not the means of providing the money required for that purpose.

This was a rule calling upon the Bristol and North Somerset Railway Company to shew cause why a writ of mandamus should not issue directed to them

commanding them to comply with an order made by the Board of Trade (1) on the 25th day of August, 1875, whereby the said Bristol and North Somerset Railway Company were required and directed within eighteen months of the date of such order, to carry a certain turnpike road, in the parish of Radstock, in the county of Somerset, over the Bristol and North Somerset Railway, by means of a bridge, to be constructed in conformity with the regulations, and subject to the conditions contained in the Railway Clauses Consolidation Act, 1845, ss. 50-53.

The following facts appeared from the affidavits:—

The Bristol and North Somerset Railway is a line extending from a junction with the Great Western Railway Company, near their Bristol station, to a junction with the Wilts, Somerset and Weymouth line of the same company at the Radstock end of the Frome and Radstock branch of that line.

The Bristol and North Somerset Railway Company were originally empowered to construct their railway by the Bristol and North Somerset Railway Act, 1863, and in 1870 the company obtained from Parliament power to make a deviation of their line at Radstock, and to carry a double line of railway across and on the level of the turnpike road, in the parish of Radstock, notwithstanding that the said level crossing was opposed by the Board of Trade.

The Bristol and North Somerset Rail-

(1) By 26 & 27 Vict. c. 92. s. 7, it is enacted, "That the Board of Trade may, if it appears to them necessary for the public safety, at any time after the passing of the Special Act, require the company within such time as the Board of Trade directs, and at the expense of the company, to carry the turnpike road or public carriage road either under or over the railway by means of a bridge or arch, instead of crossing the same on the level or to execute such other works as under the circumstances of the case may appear to the Board of Trade best adapted for removing or diminishing the danger arising from the level crossing."

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way was opened for public traffic on the 4th of September, 1873. Prior to that time the company had encountered serious financial difficulties, and in 1869 an arrangement Act was obtained under which its creditors became stockholders. It appeared that not only was the whole of the company's capital and borrowing powers exhausted in the partial completion of the line, but that the line never could have been completed but for large advances made by a large landowner, for the payment of which the company were still indebted. The company, therefore, were wholly without funds, and their line was worked in perpetuity by the Great Western Company, under agreements confirmed by Parliament, and scheduled to the Great Western Railway Various Powers Act, 1867, and the Great Western Railway Additional Powers Act, 1871, respectively. By virtue of these agreements the Great Western Railway Company have the exclusive use and management of the property of the Bristol and North Somerset Railway Company, and the last named company have no power to enter between the fences of the North Somerset Railway for the purpose of making any alteration in any part of that line, the entire control thereof being in the hands of the Great Western Railway Company.

The Great Western Railway Company have worked the Bristol and North Somerset line from the date of its opening to the present time; and under a guarantee given by them they paid the interest on a portion of the debenture stock of the Bristol and North Somerset Railway. No money has ever been received by the Bristol and North Somerset Railway from the date of the opening of the line to the present time, and it was altogether out of their power to act upon the order made by the Board of Trade on the 25th of August, 1875, to construct a bridge at Radstock in lieu of the existing level crossing.

Little now shewed cause on behalf of the Bristol and North Somerset Railway Company.—The company have parted with their property to the Great Western

Railway, and have no power to provide the money required to carry out the order of the Board of Trade. [He was then stopped.]

The Attorney-General (Sir John Holker) and *Charles Bowen*, in support of the rule.—Want of funds is no answer to a mandamus to compel a company to carry out an order of the Board of Trade given in pursuance of a statutory power with a view to preserving the public safety. They referred to *The Queen v. The Eastern Counties Railway Company* (2).

COCKBURN, L.C.J.—I am of opinion that this rule must be discharged. I take it to be perfectly clear from the affidavits that have been read that the company are unable to comply with the order that has been issued by the Board of Trade. Its power of raising money has gone; its funds are exhausted; its borrowing powers no longer exist. The company has been forced to make over its railway to the Great Western, because it has no funds to go on with, and it is only by virtue of the latter company that the Bristol and North Somerset has continued to exist at all. If, therefore, the rule were to be made absolute, how could it be enforced? The Court would not put the directors into gaol for the purpose of enforcing an order which it is not in their power to execute; it is therefore idle to make this rule absolute. I cannot help regretting that the Board of Trade have put the law into action in the manner they have done; because, inasmuch as the Great Western Railway Company have practically taken to the liabilities of the Bristol and North Somerset Railway, the former ought to be the responsible parties, and if they are not, it is only because the Legislature has omitted to fix on them this liability. For these reasons I have come to the conclusion that this rule ought not to be made absolute against a company which is absolutely without money and the means of executing what is sought to be demanded of them; accordingly the rule must be discharged.

MELLOR, J.—I am of the same opinion,

(2) 10 Ad. & E. 531; s. c. 8 Law J. Rep. 340.

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and quite agree with the Lord Chief Justice that in the exercise of our discretion we ought not to grant a rule, which, if made absolute, could not be carried out.

Rule discharged without costs.

Solicitors —The Solicitor to the Board of Trade, for applicants; Frere, Forster & Frere, for the Bristol and North Somerset Railway Company.

[IN THE COMMON PLEAS DIVISION.]

(Appeal from Revising Barrister's Court.)

1877. } BALLARD (appellant) v.
Nov. 19. } ROBINS (respondent).

Parliament — County Vote — List of Voters—Name on Wrong List—Amendment under 6 Vict. c. 18 s. 40.

The appellant was duly qualified to vote for the county as occupier of a house and land rated at 12l. and upwards. The appellant's name which should have appeared on the list of voters entitled "as occupiers of the rateable value of 12l. and under 50l. rental," by mistake appeared on the list of voters entitled "in respect of property, which included occupiers at a rent of 50l. and upwards." Opposite to his name, in the third column of this list under the heading "nature of qualification" was inserted "occupier of a house and land rated at 12l. and upwards." On objection to the vote,—

Held, that under the powers of amendment granted by 6 Vict. c. 18 s. 46, the Revising Barrister had power to transfer the appellant's name to the proper list.

Consolidated appeal from the decision of the Revising Barrister for the southern division of the county of Southampton.

On the register of voters for the parish of Lyndhurst, in the Totton Polling District for the county of Southampton, under the heading "Voters in respect of

property, including occupiers at a rent of 50l. and upwards," the name of John Ballard, the appellant, appeared in its alphabetical order. In the third column, under the heading "nature of qualification," was inserted "occupier of house and land rated at 12l. and upwards."

Notice of objection was given to the name of the appellant being retained on the list, the objection being to the third column, and to the nature of his qualification. There were twelve other persons whose names appeared in this list in a similar manner, and with a qualification similar to that of the appellant, and of these six had been objected to.

It was admitted that the appellant had not, in fact, such a qualification as to entitle him to be upon this list, but he had the qualification set out in the third column.

There was an alphabetical list of the persons entitled to vote "in respect of the occupation as owner or tenant of lands or tenements of the rateable value of 12l. or upwards." In this list the names of the appellant and the other twelve persons mentioned above did not appear, nor did he or they send notice of claim to be placed thereon before August 25, as provided by 31 & 32 Vict. c. 58. s. 17.

It was contended that the appellant, possessing a qualification which would entitle him to vote, it was a mistake his name appearing in the first-mentioned list instead of in the 12l. occupiers' list; and that this was a mistake which, under 6 Vict. c. 18 s. 40, might be corrected by striking the name of the appellant out of the list in which it appeared, and inserting it in the 12l. occupier's list.

The Revising Barrister was of opinion he had no power to do this, and expunged the names of the appellant and the six other persons objected to, and refused to insert them on the 12l. occupier's list.

If the decision of the Revising Barrister is wrong, the names of the appellant and the six other persons objected to are to be inserted in the list of persons "Entitled in respect of the occupation as

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owner or tenant of lands or tenements of the rateable value of 12*l.* or upwards."

Bidley, for the appellant.—The Revising Barrister had the power, under 6 Vict. c. 18. s. 40 (1), to make the amendment asked for, though in order to do so he would have had to touch two lists. This is a mistake which could be rectified in the words of section 40, viz., "The Revising Barrister shall correct any mistake which shall be proved to him to have been made in *any* list," for the word list is not to be construed in a limited sense, but is to be construed so as to include all the lists. In 6 Vict. c. 18, the word is used in a general sense, see ss. 18, 32, 34, 36; then follows section 40, giving power to amend "any list." The 30 & 31 Vict. c. 102, extending the franchise, provides by section 30, sub-sec. 1, the machinery by which the person enfranchised by that Act is to get on to the register, and by section 59 the Act is to be read with 6 Vict. c. 18. Then by 31 & 32 Vict. c. 58. s. 19, the voters in respect of 12*l.*

(1) 6 Vict. c. 18. s. 40, enacts—"That the Revising Barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, as also the name of every person who shall be proved to him to be dead; and wherever the Christian name or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification shall, in the judgment of the Revising Barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list."

occupation, whose right to vote was conferred by 30 & 31 Vict. c. 102, are to be placed on a separate list, but such list is only a subdivision of the whole list of voters and must still be read in the same sense as the list mentioned in 6 Vict. c. 18. s. 40. If the word were to be limited, endless difficulties would arise, whereas if it is read in its natural sense, and include all the lists, no difficulty will arise.

[He was then stopped by the Court.]

Hooper, for the respondent.—By 31 & 32 Vict. c. 19 the list of 12*l.* occupiers is to be "separate" and therefore would not be included in the list mentioned in 6 Vict. c. 18. s. 40. The Revising Barrister cannot have the power to transfer a whole body of voters from one list to the other, which would be the effect of upholding the appellant's contention. It was decided in *Bennett v. Brumfitt* (2), that voters qualified to vote in respect of a 12*l.* qualification were not to be considered as claimants, and that therefore a notice of objection must specify the grounds of objection. Then, if a person intends to object to a voter claiming under the 12*l.* occupiers' list, he would naturally go to that list, and not finding the name, he would forego the objection he intended to raise, so that by this proposed transfer the voter would escape objection, and the object of the Act, so far as it is for the protection of the rights of the objectors, would be nullified. In *Mather v. The Overseers of Allendale* (3), the 12*l.* occupiers' list was headed wrongly, and the Revising Barrister held that there could not therefore have been a publication; but then it was held that the barrister might have amended the heading, because no one would be likely to be misled thereby; but in the present case an objector might be misled.

DENMAN, J.—The point here raised for our decision depends mainly upon the powers of amendment granted to the

(2) 38 Law J. Rep. C.P. 65; s. c. Law Rep. 4 C.P. 407.

(3) 40 Law J. Rep. C.P. 76; s. c. Law Rep. 6 C.P. 272.

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Revising Barrister by 6 Vict. c. 18. s. 40.

The appellant's name was on the register, and the list was made out seemingly so as to entitle him to vote in respect of a 50*l.* qualification, whereas he was in reality entitled to vote in respect of a 12*l.* occupier's qualification. It was, in fact, put on the wrong list.

It was contended that the Revising Barrister had no power to transfer the appellant's name to the 12*l.* occupiers' list, because by 31 & 32 Vict. c. 58. s. 19, that list is to be a "separate list." But such a contention appears to me to amount to a play upon words. Though the statute does enact there shall be a separate list, yet there is nothing which says it shall cease to be a portion of the list of voters for the particular district or parish; and if this were so it would confer a function on the overseers which would be unjust in its operation, namely, the power to disqualify voters by the mere act of placing them on the wrong list.

In my opinion section 40 of 6 Vict. c. 18 extends the powers of amendment to any "list." The list means the list of voters which comes before the Revising Barrister for the place or parish at which he is then exercising jurisdiction; and though a subsequent enactment splits the list into two, there is nothing in it to warrant us in holding that the voter is to be disqualified because he appears by mistake on the wrong list; and that in such a case the barrister is tied hand and foot and not entitled to transfer the name to the proper list.

The only objection to the transfer stated in this particular case is the want of power, and, without reference, therefore, to the merits of the case, or to the question of whether any one was misled, I am of opinion that the Revising Barrister had power to transfer the appellant's name to the proper list.

LINDLEY, J.—I am of the same opinion. It appears to me on the true construction of the various Acts of Parliament which have been referred to that the powers of amendment conferred by 6 Vict. c. 18. s. 40 apply to the separate list created by

31 & 32 Vict. c. 58. s. 19; not only because that particular list is to be treated as part of the other, but because the thing which the Revising Barrister has power to amend is the list which comes before him, whether it consists of separate lists or not; he is not, of course, arbitrarily to exercise the powers of amendment, but he is given power to amend where in his discretion he thinks an amendment should be made.

There is a list of persons entitled to votes in respect of the 50*l.* qualification, and in respect of the 12*l.* qualification, and unquestionably it is the duty of the overseers to keep these lists separate, and in a proper and correct condition, and the object of conferring the power of amendment on the Revising Barrister is to enable him to correct mistakes of this sort, made by the overseers (4); there are limits to the exercise of this power, and I should think, for the sake of example, he should not make an amendment when it is apparent people would be misled thereby. It was said that in the present case an intending objector would be unable to find the name, but any one who looked through the list would find the name.

It amounts to this, that there has been a mistake, and there exists a power of rectifying it. In answer to the proposal to rectify it is said that someone may be misled, but I do not think that of itself is a sufficient answer, and therefore the amendment ought to be made.

Ridley applied for costs.

PER CURIAM.—As a general rule, where the decision is reversed, it is reversed without costs.

Decision reversed without costs.

Solicitors—J. E. Coxwell, agent for W. Coxwell, Lynton, for the appellant; Bradby, Robins & Son, for the respondent.

(4) See *Bendle v. Watson*, 41 Law J. Rep. C.P. 15; s. c. Law Rep. 7 C.P. 163, per Brett, J.

IN THE COMMON PLEAS DIVISION.
(*Appeal from Revising Barrister's Court.*)

1877. } PHILLIPS (*appellant*) v.
Nov. 19. } SALMON (*respondent*).

Parliament—County Vote—Lease of Waste of Manor—Freehold Tenure.

S. claimed to be entitled, as a freeholder, to a vote for the county in respect of a lease of part of the waste of the manor of N.

The burgesses of the borough of N. had from time immemorial exercised rights of common of pasture over the manor of N., and at Courts leet holden for the borough of N., it had been the practice for 100 years past and upwards for the mayor and burgesses of the borough to present to the lord of the manor of N. individual burgesses for occupation of pieces of waste land of the manor; in all such cases the person so presented took possession of the apportioned pieces of waste, and paid rent to the lord. About one-tenth of the wastes had been thus enclosed, but a sufficiency of such land was left for the use by the Commoners of their right of pasture.

S. being duly presented for occupation of a piece of the waste land in accordance with the custom, entered into occupation thereof, and in 1861 was granted a lease by the lord, similar to leases which, since 1838, had been granted in like cases, namely, a lease for three lives, with a covenant for renewal. S. continued to occupy under this lease, and paid rent to the lord:—

Held, that S. had such a freehold interest as would entitle him to be registered as a voter for the county.

Appeal from the decision of the Revising Barrister for the county of Pembroke.

1 & 2. The respondent John Salmon claimed to be qualified to vote for the county of Pembroke in respect of a lease of house and land.

3. By the said lease, dated 28th of February, 1861, Thomas Davies Lloyd, as Lord Marcher of the Barony of Kemes, in the county of Pembroke, demised to the respondent, his heirs and assigns, the dwelling-house, &c. (the premises in question), reserving to the lessor mines and minerals. To hold to the respondent,

his heirs and assigns, during the lives of his son, daughter and grandson therein respectively named, and the survivor of them, at a yearly rent of five shillings payable to the lessor, who also thereby covenanted, that he, his heirs and assigns, would grant unto the respondent, his heirs or assigns, a lease for adding a life on to the said premises to be named by the respondent, his heirs or assigns, upon the death of such one of the lives therein named as should first drop, and also a further lease for adding a life on to the said premises upon the death of such one of the survivors of the lives therein named, and the additional life, as should first drop in manner therein mentioned.

6. The site of the dwelling-house aforesaid was formerly part of the waste manor of Newport, which manor is co-terminous with the borough and parish of the same name. The barony of Kemes comprises several manors, one of which is the said manor of Newport, and the barony comprises twenty-six parishes, of which the said parish of Newport is one.

8. The borough of Newport is governed by a mayor and burgesses, who have from time immemorial held Courts leet and Courts baron for the borough.

9. By a charter dated A.D. 1192, Nicholas Fitzmartin, then lord of the said barony and customs, confirmed and granted to the burgesses of Newport, amongst other liberties, common of pasture in his land and easement for their firing.

10. At the Courts leet and Courts baron it has been the practice of the mayor and burgesses for one hundred years past and upwards, to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases such person so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed, such rents being very small sums, varying according to circumstances. No duration of the holding was specified in such presentments, but upon the death of the person presented his

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personal representatives continued to occupy and pay rent to the lord without further reference to the Court leet.

11. In the year 1838, disputes having arisen between the lord and certain of the persons holding under the above-mentioned circumstances, as to their liability to pay the said rents, the lord took proceedings to recover such rent from one of them, and recovered the amount thereof in an action tried at the assizes.

12. Since the date of such trial the successive lords of the said barony have granted many leases similar to that under which the present claim is made. There was no evidence that such leases had been granted previously to such date.

14, 15, & 16. The original presentments to the respondent of the said lands in respect of which he claimed to vote were made in the customary way by the jury, at the Court leet duly holden. The said land was the subject of three separate presentments, namely, in 1841, 1852, 1851, the last of which was in the words following: "We present to Mr. John Salmon of, &c., all that piece or spot of land, being part of Newport Common, and situate near a house and common, the property of Thomas Davies Lloyd, Esq., the said spot or piece of land to be of the extent of sixty yards by thirty yards or thereabouts. The said John Salmon shall not encroach or stop up any public roads, and shall settle with the lord of the barony for the rent of the same spot of land. The mayor, accompanied by [three burgesses named], are hereby directed to mark out the boundaries. Mr. John Salmon has on this day paid on account of rent the sum of one shilling."

17. The lease executed by the said Thomas Davies Lloyd to the respondent included the several pieces of land referred to in the said presentments.

18. The burgesses of Newport have from time immemorial exercised rights of common of pasture over the wastes of the said manor of Newport.

Such wastes consisted originally of 3,000 acres or thereabouts within the said manor, of which in the year 1861 about 300 acres had been enclosed, and were then held in severalty under the

presentments hereinbefore referred to; but a sufficiency of such waste lands was then and still is left for the use by the commoners of their said rights of pasture. No right of turbary or estovers has been exercised by the burgesses.

19. It was contended for the respondent that the lord had a right to approve against common of pasture having sufficient waste for that purpose. And, if so, that he had also right to demise the lands so approved, and that there were no other rights of common in this manor. Moreover, that a custom so to devise was proved by the foregoing facts. It was answered for the objector that a right to demise would be incident to a right to approve, which could only be supported by the custom, and that such custom is in this case only recent, and not of legal origin.

The Revising Barrister decided that the contention of the claimant was well founded, and inserted the name of the respondent in the list.

Grantham (Vernon Smith with him), for the appellant.—The lord has no power to grant the lease, so as to give the respondent the necessary qualification, for the lord can only approve by custom, and there is no custom shewn here. In *Lascelles v. Ouslow* (1) Lush, J., at p. 343, says, "The lord and his predecessors have appropriated portions of the common, by leasing them, which is virtually taking them out of the common, and which for ever excludes the commoners from the exercise of their rights over these portions. This is not authorised by the Statute of Merton (2), and is what cannot be justified except under a custom." This is a lease for lives, with a covenant for renewal; and on the occasion of the new life dropping in, a fresh term might be interposed by which the lord might approve still further for his own benefit.

[LINDLEY, J. — It seems clear the tenancy would cease on the death of the presentee.]

The claim here is freehold, which is inconsistent with paragraph 10.

[LINDLEY, J.—The lease is good as

(1) 46 Law J. Rep. Q.B. 333; s. c. Law Rep. 2 Q.B. Div. 433.

(2) 20 Hen. 3. c. 4.

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against the lord. The tenant is at least a lessee, subject to the rights of the commoners.]

But if the commoners claim a right contrary to the grant of the lease, it then becomes no lease. The lord has granted the occupation, but he has only the soil, and nothing else. He therefore grants what he has not got to grant. *Elton on Commons*, p. 238; *Arlett v. Ellis* (3); and *The Bishop of Winchester's Case* (4), were also referred to.

Sir. H. James (Tickle with him), for the respondent.—The ownership of the soil is in the lord, subject only to the right of common of pasture, which prevents him from enclosing, and granting leases; the only persons therefore interested are the lord and the commoners. As the occupation of this piece of common has been in the respondent ever since the presentment to him of 1841, he has a right of twenty years as against the commoners; but, further, they have by their consent given up their rights. Therefore, the respondent is in possession under a lease which everyone interested treats as good, and a political objector cannot be allowed to take a valid objection that in such case the lord has no power to grant. It is for such objector to shew the custom does not exist; but the case finds the custom has existed since 1838. The custom of the commoners is to give the right to the lord. *Prima facie* the commoners are bound, and the respondent is in a stronger position than he would be by approvement.

Grantham, in reply.

DENMAN, J.—In my opinion the respondent is entitled to judgment. The arguments addressed to us have touched on many points which might have given rise to difficulty had not the facts of the case disposed of them. For it appears to me that the case turns on the statement to be found in paragraph 10. [His Lordship read it.]

As no question of value arises it must be assumed that, subject to the point of law requiring our decision, the value of

the holding was sufficient to entitle the respondent to claim a vote.

Now I construe paragraph 10 to amount to a statement that from time immemorial the usual course has been for the tenant, who has been previously agreed to by the commoners, to take the land for a period at least as long as his life. He then holds land, of the requisite value granted to him from the person in whom the freehold is vested, and, consequently, he has a qualification sufficient to entitle him to a vote for the county. The Revising Barrister has held the respondent to be legally entitled to the vote, and I am of opinion his decision should be supported.

LINDLEY, J.—I also am of opinion the respondent is entitled to the vote he claims. In order to disentitle him, it has first to be shewn that his qualification is not that of a freeholder, but in my judgment he is a freeholder, for he now holds a lease for lives from the lord of the manor, who is assumed to be the owner in fee. He therefore takes a freehold estate from the owner in fee; and all that can be said in depreciation of that estate is that it is subject to the rights of the commoners. But I do not see how that affects the qualification; it is not necessary to discuss what the respondent's rights as against the commoners may be; it is sufficient that those rights are good against anyone except the commoners, and to that extent they cannot disturb him, for they have concurred in the grant.

The case does not shew the qualification to be of insufficient value. I am therefore of opinion that the qualification is sufficient, and the decision of the Revising Barrister is right.

Decision affirmed.

Solicitors—Peacock & Goddard, agents for Jenkins & Evans, Cardigan, for appellant; Cookson, Wainwright & Pennington, for respondent.

(3) 7 B. & C. 346.

(4) Godb. 234.

[IN THE COMMON PLEAS DIVISION.]

(Appeal from Revising Barrister's Court.)

1877. } BEAL (appellant) v. FORD
Nov. 19. } (respondent).

*Parliament—Borough Vote—Freehold—
Residence within 2 Will. 4. c. 45. s. 33.*

By 2 Will. 4. c. 45. s. 33, no person qualified as a freeholder to vote for a borough, shall be registered unless he shall have resided for six calendar months previous to 31st July within the borough or seven miles thereof.

The appellant was entitled to a vote for the borough of Exeter, in respect of a freehold qualification. With the exception of two months, he had, as tenant, occupied a house within the limits of the borough for six calendar months previous to the 31st of July. For those two months the appellant with his wife and child went to reside with his mother-in-law, who occupied one of a number of almshouses, also situate within the borough. The appellant's residence there was contrary to the rules of the almshouses, but he was not disturbed, and, except for one day when he went to London on business, he and his family lived and slept as guests in the house so occupied by his mother-in-law for the two months:—

Held, that the appellant's residence within the borough was a sufficient compliance with the requirements of 2 Will. 4. c. 45. s. 33 to entitle him to be registered.

Appeal from the decision of the Revising Barrister's Court for the city of Exeter.

It was objected that the name of James Beal, the appellant, was improperly retained on the list of persons entitled to vote in the election of members for the borough of Exeter in respect of his freehold house in Albion Place in the parish of Heavitree, on the ground that the said James Beal had not resided for six calendar months next previous to the last day of July in the present year within the said borough, or within seven miles thereof, pursuant to 2 Will. 4. c. 45. s. 27.

To this part of the case the Revising Barrister had appended a certificate of amendment to the effect that instead of

being founded on 2 Will. 4. c. 45. s. 27, the appeal was pursuant to 2 Will. 4. c. 45. s. 33 (1).

1. The qualification of the said James Beal was duly proved and admitted in all other respects.

2. On the 31st of July, 1876, the appellant resided in a house (which he occupied as a tenant) situate in Queen's Road, in the parish of Saint Thomas, within the said borough, where he continued to reside until the 29th day of March, in the present year, 1877.

3. On the said 29th day of March, the appellant's term having expired, he gave up possession of his residence in Queen's Road, and he, his wife and child of necessity went to his wife's mother's house (at her invitation) with the intention of remaining there (if he was so permitted) until such time as he could obtain a suitable dwelling-house within the said borough.

4. The mother-in-law of the appellant resides at No. 5, Mount Dinham, within the said borough. The house so occupied by her is one of a number of houses called "The Free Cottages," which was given by the trustees of the same to inhabitants of Exeter, to be occupied free of rent during the pleasure of the trustees. The following are the printed rules of the Free Cottages:—

Rules contained in the trust deed.

"Except in the case of a married couple no person shall reside with any inmate except by permission of the trustees.

"Every inmate by whomsoever nominated shall be subject to the rules and orders of the trustees and shall be subject to dismissal by the trustees as hereinafter mentioned.

"The trustees shall, from time to time, have full power and authority to remove and displace any person from the cottages who shall wilfully transgress

(1) By 2 Will. 4. c. 45. s. 33 it is enacted that "no such person (i.e., one qualified as a freeholder to vote for a city or borough) shall be so registered in any year unless such person, . . . where his qualification shall be in any city or borough, shall have resided six calendar months next previous to the last day of July in such year within such city or borough or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken."

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such rules or orders or be guilty of other misconduct."

[Then followed certain bye-laws and regulations for the conduct of the inmates, which are not material to the present case.]

5. From the said 29th day of March to the 29th day of May in the present year, the appellant (with the exception of one night, the night of the 2nd day of April, 1877, when absent in London on business) continuously lived and slept in the house so occupied by his mother-in-law. The appellant's wife and child lived and slept in the said house of the appellant's mother-in-law every day and night throughout the whole period from the said 29th day of March to the said 29th day of May, during the whole of which time, the appellant his wife and child exclusively occupied one sleeping apartment in the said house, but lived during the day in certain other rooms in the said house and occupied them in common with the appellant's mother-in-law, and during this period had no other residence or dwelling within the said borough or in any other place.

(The appellant's mother-in-law had not obtained any permission from the trustees as required by rule 1, to have her son-in-law reside with her.)

6. The appellant did not pay his mother-in-law for such use and occupation, but lived there as her guest (without interruption or interference on the part of the trustees) until the said 29th day of May, when he went to reside in the house in which he is now residing, which house is also within the said borough.

7. The appellant is a clerk to a solicitor carrying on business in the city of Exeter.

The Revising Barrister decided that the residence required by the Act was that of a *bona fide* inhabitant having a *domus* of his own within the distance set out. That the said James Beal between the 29th day of March and the 29th day of May, 1877, was a trespasser *ab initio* or at most a visitor in the house of his mother-in-law. That the six months' residence was thereby interrupted, and he therefore expunged the appellant's name from the list of voters.

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The question for the opinion of the Court is whether, consistently with the above facts, the said James Beal could be found to have legally resided for the six calendar months next previous to the last day of July, in the present year, within the said borough.

Arthur Charles (Bucknill and Darling with him), for the appellant.—The Revising Barrister was wrong in deciding the residence of the appellant to be insufficient. Before 2 Will. 4. c. 45. s. 33, there was no enactment compelling a residence within the borough, and therefore that statute restricted the right of voting to a six months' residence within the borough before the 31st of July, but the statute has not decided what residence. Under section 33 no quality of occupation is defined, as under section 27, and it is submitted the requisite residence is complied with if the voter is for the six months within the limits defined. The quality of the residence is immaterial, the voter would be entitled to be registered, even if he slept under a hedge and lived in public-houses within the required limits of the borough. In *The Queen v. Sowton* cited in *Burn's Justice*, Title, poor, p. 627, 30th ed., it is stated that when a man came to a place, on the first day he was regarded as a stranger, on the second as a guest, and on the third as an inhabitant.

[He was here stopped by the Court.]

Bompas, for the respondent.—It is necessary that the voter "reside" within the borough, otherwise it is impossible to tell if he is within the required limits. The case must therefore turn on the construction of the word residence. In *Whitehorn v. Thomas* (2), Erle, J., in treating of section 27, says, "sleeping at a place by no means constitutes a residence." The definition of residence is laid down in *Elliot on Registration*, 2nd ed. 204, adopted by Erle, J., in *Powell v. Guest* (3), and referred to in *Ford v. Pye* (4); residence must amount to home.

(2) 7 Man. & G. 1; s. c. 14 Law J. Rep. C.P. 38.

(3) 18 Com. B. Rep. N.S. 72; s. c. 34 Law J. Rep. C.P. 69.

(4) 43 Law J. Rep. C.P. 21; s. c. Law Rep. 9 C.P. 269.

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The trust deed expressly provides that no one is to be allowed to reside with any inmate of the Free Cottages, therefore the respondent cannot be considered other than a trespasser without any right of residence. Neither could the respondent be said to have had constructive residence, for that has always been put on the right to return, according to the definition in Elliot, "absence, no matter how long, if there be the liberty of returning at any time, will not prevent a constructive legal residence," but if the home is let for one day, liberty to return for that day is gone and the constructive residence is lost. The moment the appellant left the house of his mother-in-law he lost his residence, for he had no legal right to return. Even if a residence in the sense of a home is not required, but only a physical existence within the required limits, then any break must be fatal, for in such case the residence must be continual. If the appellant went away during the time he had a home with the right to return to it then he would not lose his residence, as he would have a constructive residence, but during the time he had no home his residence must be continual.

DENMAN, J.—I am of opinion that on the only point left to us by the Revising Barrister our judgment must be for the appellant. The ground on which the decision of the Revising Barrister principally depends is that the residence required by the Act is that of a *bona fide* inhabitant having a *domus* of his own within the distance set out; what he afterwards states as to the residence of the appellant in this exceptional place rendering him a trespasser *ab initio* is not, in my opinion, important.

Section 33 requires a residence only during the six months previous to the 31st of July, and we cannot construe such a residence to be the same as the residence required by other statutes, which refer to a different franchise; we must construe it in reference to this particular section.

Before the Reform Act (2 & 3 Will. 4. c. 45) many difficulties were occasioned by reason of holders of real property coming from a great distance with pro-

bably no knowledge of the people or interest in the place, to take part in the elections, and with the view of preventing these the Act altered the limit of residence, but I do not think to the extent contended for by the counsel for the respondent.

The appellant in my judgment was resident according to section 33, he had ceased to reside in his old house, but he and his family had dwelt in another place within the limits of the borough; it was urged he dwelt there under a precarious tenure, but for all that I do not see how he can be said to be non-resident. It was next contended by the respondent's counsel that even if away for a single day he lost the residence because he had no legal right to return; but this contention I apprehend to be a fallacy: we are at liberty to look at the meaning and substance of the circumstances attending this case, and I do not think that because it is found by the Revising Barrister that the appellant was away for one whole day in London, that such a fact is sufficient to deprive him of the franchise, it amounts to no more than that the appellant slept away from home for that night. Looking also to the certificate of amendment supplemented to the case by the Revising Barrister it seems highly probable that the case was not stated nor argued on this section, and that the Revising Barrister was not called upon to decide whether this break of one night was fatal to the qualification of residence under section 33.

The decisions on questions of residence are not applicable to the present case. We must put a construction on the section apart from authority, and in my opinion the appellant was resident within the true meaning of section 33, and the decision of the Revising Barrister must be reversed.

LINDLEY, J.—I am of the same opinion. We have to decide the meaning of the word "reside" in section 33. The appellant, in fact, resided within the borough during the requisite period, for he had a temporary home in the house occupied by his mother-in-law. I am not prepared to go the length suggested by the counsel for the appellant, that sleeping

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under a hedge within the borough would be a sufficient compliance with the section, or that any residence within those limits will do, but taking the word "residence" in its strictest sense, I am of opinion that the appellant did in fact "reside" during all the requisite time.

The only objection which can be urged is that he might be turned out, but I do not see that makes any difference, for, notwithstanding, he remained residing within the borough. In my judgment, therefore, the appeal must be allowed.

Decision reversed, but without costs.

Solicitors—S. D. Hamilton, agent for J. W. Friend, Exeter, for the appellant; J. E. Fox & Co., agents for H. & B. J. Ford, Exeter, for the respondent.

[IN THE COMMON PLEAS DIVISION.]

(Appeal from Revising Barrister's Court.)

1877. { GRANT (appellant) v. THE
Nov. 20. { OVERSEERS OF PAGHAM (respondents).

Parliament—County Vote—Disqualification of Voter—Bribery—Report of Election Judge (31 & 32 Vict. c. 125. s. 43).

By the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), section 11, subsection 14, the Judge who has tried an election petition in which a charge is made of any corrupt practice at the election is to report to the Speaker *inter alia* "whether any corrupt practice has been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice;" and by section 43 of such Act it is enacted that "where it is found by the report of the Judge upon an election petition under the Act that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election," and shall, amongst other things, be incapable of being registered as a voter during seven years next after being so found guilty.

An election Judge appointed to try a petition against the election and return of A. G. as a member to serve in Parliament for the borough of K. reported, in compliance with the directions of the Parliamentary Elections Act, 1868, that it "was proved before him that the said A. G. was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854, and he further reported that the nature of such corrupt practice was the promising before and at the time of the said election to certain voters for the said borough of K. and other inhabitants thereof that the said A. G. would, in the event of his being returned at the said election, and after such return, give to such voters and other voters and inhabitants of K. an entertainment consisting, among other things, of meat and drink, with the view and intent to induce such voters to vote for him the said A. G. at such election:—"—

Held, that, even if the promising to give an entertainment to voters under the circumstances stated in such report amounted to bribery, it was not found by such report, either in express words or by necessary inference, that bribery had been committed by or with the knowledge and consent of the said A. G. at the said election, and that therefore the said A. G. was not disqualified by the said 43rd section of the Parliamentary Elections Act, 1868, from being registered as a county voter.

This was an appeal from the decision of the Revising Barrister for the Western Division of the county of Sussex.

The appellant, Albert Grant, claimed to have his name inserted in the list of voters for the Western Division of the county of Sussex, as being duly qualified in respect of his ownership of certain freehold property situate in the parish of Pagham, in the polling district of Bognor, in the said division of the said county.

One Eugene Edward Street, a voter for West Sussex, duly objected to the said appellant being so inserted on such list of voters. The appellant, the said Albert Grant, was proved to be duly qualified in respect of his said claim, unless the objection put forward by the

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said Eugene Edward Street, and mentioned in the next paragraph, should be decided to be a valid one.

The said objection was that the said Albert Grant, having been returned by the returning officer for the borough of Kidderminster as having been duly elected on the 31st day of January, 1874, to serve in Parliament for the said borough, a petition had been presented against such election and return, and at the trial of the matters alleged in such petition before Mr. Justice Mellor (the election Judge appointed to try the same), such election and return were determined to be null and void, and that the certificate and report made by Mr. Justice Mellor as such Election Judge, on the trial of the said petition, and dated the 17th day of July, 1874, rendered the said Albert Grant incapable of being registered as a voter and voting at any election in the United Kingdom during seven years next after the said 17th day of July, 1874.

The certificate and reports, so far as the same are material, are in the words and figures following:—"Now I, Sir John Mellor, Knight, one of the Judges on the *rota* for the election petitions in England, have, according to the Parliamentary Elections Act, 1868, tried the matter alleged in the said petition, and determined the same, and do hereby certify and report that at the trial of the matters alleged in the said petition I determined that the said Albert Grant was not duly elected and returned at the same election, and that his election and return were, and are, wholly null and void. And in compliance with the directions of the Parliamentary Elections Act, 1868, I further certify and report that it was proved before me that the said Albert Grant was guilty of a corrupt practice at the said election within the true intent and meaning of the *Corrupt Practices Prevention Act, 1854*. And I further report that the nature of such corrupt practice was the promising before and at the time of the said election to certain voters for the said borough of Kidderminster and other inhabitants thereof, that the said Albert Grant would, in the event of his being returned at the said election,

and after such return, give to such voters and other voters and inhabitants of Kidderminster an entertainment consisting, among other things, of meat and drink, with the view and intent to induce such voters to vote for him, the said Albert Grant, at such election.

"And I further report that in the course of the trial it appeared, more or less clearly, that a number of voters had been induced to vote for the said Albert Grant, by virtue of a promise made to them by persons canvassing them for their votes, that their names should be put down upon a committee, and that it would be worth to them 10s. each when all was over, and in other cases that they would be paid for their services when it could be done with safety, but insomuch as in some cases the persons implicated were not clearly identified, and in other cases the counsel for the respondent did not call them to contradict or explain the circumstances on the ground that their evidence did not affect Mr. Grant, I think that I cannot safely report the names of any persons as having been proved to have been guilty of bribery.

"I am not able, from the evidence before me, to report that there is reason to believe that corrupt practices extensively prevailed at the said election. There was evidence of a good deal of illegal treating during the election. But it was not proved to my satisfaction to have been corrupt."

The evidence produced before the Revising Barrister, and admitted by the appellant and objector as common to both, consisted of a return to an order of the honourable the House of Commons, dated the 12th of June, 1874, for copy of the shorthand writer's notes of the judgments delivered by the Judges selected in pursuance of the Parliamentary Elections Act, 1868, for the trial of election petitions, and ordered by the House of Commons to be printed on the 5th of August, 1874. With the consent of the parties the Revising Barrister stated that he annexed to the case, as part thereof, a copy of the said return, and that for the purpose of this appeal he incorporated in the case as facts proved before him, the facts stated

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in Mr. Justice Mellor's judgment (1) and certificate.

After hearing all the arguments, for and against the said objection and claim, the Revising Barrister decided and determined, (having regard to the distinction existing between bribery and treating, as affecting a voter's mind, and that treating as defined in the Corrupt Practices Act, 1854, does not include to treat, but that bribery, as defined in the said Act, does include a promise to give, and having regard to Mr. Justice Mellor's judgment and certificate, and to the nature of the promised entertainment and the value of the proposed accompanying gifts, as set forth in Mr. Justice Mellor's judgment, and for other reasons,) that the corrupt practice reported by Mr. Justice Mellor to the House of Commons, to have been committed by the said Albert Grant at the Kidderminster election, was, and amounted to bribery, within the true intent and meaning of the Corrupt Practices Prevention Act, 1854, and the Parliamentary Elections Act, 1868, and that consequently it was found by the said report that bribery had been committed by the said Albert Grant at the said election, and accordingly the Revising Barrister disallowed the appellant's claim to have his name inserted in the list of voters.

Pollard, for the appellant.—The Revising Barrister has travelled out of the report of the election Judge, and referred to what was stated by such Judge in the course of his judgment, but the question whether the appellant is disqualified from being a voter or not, must turn entirely on the report of the election Judge, and this Court cannot look to what is stated in the judgment. The disqualification is only given by the 43rd section of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), and that attaches it only when personal bribery has been found by the report of the election Judge, and he and he only is competent to determine whether the facts

proved amount to bribery or not. The words of the 43rd section are "where it is found by the report of the Judge upon an election petition under this Act, that bribery has been committed by, or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election," and he shall be incapable of being elected during seven years next after the date of his being found guilty; "and he shall further be incapable, during the said period of seven years, of being registered as a voter, and voting at any election in the United Kingdom." This is a highly penal enactment, and should therefore be construed strictly, and it should be shewn that the offence comes within the very words of it as stated by Bayley, J., and Best, J., in *Lord Huntingtower v. Gardiner* (2), by Willes, J., in *Brett v. Robinson* (3); and Lord Coleridge, C.J., in giving the judgment of the Court in the *Launceston Election Petition Case*, *Drinkwater v. Deakin* (4), commented on the 36th section of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), and drew the distinction between the words "shall be guilty," and "shall be declared guilty by an election committee." To bring the case within the 43rd section of 31 & 32 Vict. c. 125, the report should have found that the appellant had committed bribery *eo nomine*, and not merely to have found facts which may or may not be considered equivalent to bribery. Next it is necessary that the report should have found the appellant guilty of personal bribery. The 43rd section expressly requires for the disqualification of the candidate that it should be found "That bribery has been committed by or with the knowledge and consent" of the candidate, and in this respect there is a marked distinction between this 43rd section and the 36th section of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), which makes a candidate incapable of

(2) 1 B. & C. 297.

(3) 39 Law J. Rep. C.P. 265; s. c. Law Rep. 5 C.P. 503.

(4) 43 Law J. Rep. C.P. 355; s. c. Law Rep. 9 C.P. 626.

(1) As the Court declined to look at this judgment it is unnecessary to set it out in this report.

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being elected during the then existing Parliament, if he be "declared by any election committee guilty, by himself or his agents, of bribery, treating or undue influence at such election." And this distinction is preserved by the 46th section of the Parliamentary Elections Act, 1868, which enacts as follows, viz., "For the purpose of disqualifying in pursuance of the 36th section of the Corrupt Practices Prevention Act, 1854, a member guilty of corrupt practices other than personal bribery within the 43rd section of this Act, the report of the Judge, on the trial of an election petition, shall be deemed to be substituted for the declaration of an election committee, and the said section shall be construed as if the words 'reported by a Judge on the trial of an election petition,' were inserted therein in the place of the words 'declared by an election committee.'" In the present case Mellor, J., uses in his report the words "guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854." That shews that that learned Judge did not mean an offence within the 43rd section of the Parliamentary Elections Act, 1868, and there is nothing in the report which shews that the learned Judge meant personal bribery.

Next, the facts stated to be found in the report do not amount to bribery, and certainly not to personal bribery. In the second part of the report, where the learned Judge is reporting the nature of the corrupt practice, he is not reporting under the 43rd section, but under section 11, sub-section 14, which states that "where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petitioner refers, the Judge shall, in addition to such certificate, and at the same time report to the Speaker as follows: (a) whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice." A promise not to give money but an entertainment, consisting of meat and drink, viz., a dinner,

to be consumed on the spot, and not meat and drink to be taken home by the voter is not bribery. [He referred to the judgment of Willes, J., in the *Bodmin Case* (5), of Lush, J., in the *Brecon Case* (6), and of Grove, J., in the *Poole Case* (7).]

No counsel appeared for the respondent.

GROVE, J.—I am of opinion that the decision of the Revising Barrister must be reversed. I regret that we have only had the advantage of hearing an argument on one side, because it is desirable to hear what may be said on both sides, lest we should miss seeing some sections of the statutes affecting the question. But having made these observations I must state that in my opinion the finding of the Election Judge does not bring the case within the 43rd section of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), on which section alone depends the personal disqualification of the voter. Now the Election Judge is required by sect. 11, sub-sect. 14 of that Act, in addition to his judgment and certificate whether the member petitioned against has been duly elected, to report to the Speaker of the House of Commons on the three heads there mentioned under (a), (b) and (c), the first of these, namely (a), being, "whether any corrupt practice has or has not been proved to have been committed by, or with the knowledge and consent of, any candidate at such election, and the nature of such corrupt practice." That is in clear and similar words to those in the 43rd section, which enacts the disqualification of the candidate "where it is found by the report of the Judge upon an election petition under this Act that bribery has been committed by, or with the knowledge and consent of, any candidate at an election." Now there can be no doubt that in the present case the Election Judge has not reported in the terms of this enactment, because he has not reported that a corrupt practice was committed by or with the knowledge and

(5) 1 O'Malley & Hard. 124-125.

(6) 2 O'Malley & Hard. 43.

(7) 2 O'Malley & Hard. 123.

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consent of the candidate. It may be that he had in his mind that Albert Grant was personally guilty of such practice, but he does not find that such was the case; and this is the more apparent because in the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), it is enacted in section 36 that "if any candidate at an election for," &c., "shall be declared by any election committee guilty by himself or his agents of bribery, treating or undue influence at such election, such candidate shall be incapable of being elected during the Parliament then sitting," shewing that being declared guilty of bribery was in that Act applicable to bribery whether committed by the candidate himself or his agent, and the 46th section of the Parliamentary Elections Act, 1868, makes this still more apparent, for in that section it is said that "for the purpose of disqualifying in pursuance of the 36th section of the Corrupt Practices Prevention Act, 1854, a member guilty of corrupt practices other than personal bribery within the 43rd section" of that Act of 1868, "the report of the Judge on the trial of an election petition shall be deemed to be substituted for the declaration of an election committee." There the Act expressly distinguishes between being guilty of corrupt practices and being guilty of personal bribery; therefore the words in the report of the Election Judge in the present case *prima facie* import that the member was guilty of a corrupt practice other than personal bribery, for the words are only that "Albert Grant was guilty of a corrupt practice at the said election," using the very words which are used in this 46th section in contradistinction to personal bribery. I, therefore, am of opinion that on the face of this report the finding of the Election Judge is consistent with the said Albert Grant being guilty of corrupt practices, not necessarily committed by himself or with his knowledge and consent, but by his agent without such knowledge and consent. Then the learned Judge further reports the nature of such corrupt practice, and it has the same infirmity as in the preceding part in not adopting the words under sub-

division (a) of sub-section 14 of section 11. It does not state that the promising there mentioned was made by the candidate himself or with his knowledge and consent. It states that the promising was, not that he, Albert Grant, would, but that "the said Albert Grant would," in the event there mentioned, give an entertainment. It does not fix the corrupt practice on the candidate himself by necessary inference any more than the first part of the report does. In construing a penal Act such as this one, we ought to see that the case comes clearly within what the Act contemplates, and I do not find in this report the statement of what would bring the case within the 43rd section of the Parliamentary Elections Act, 1868, that is to say, bribery committed by or with the knowledge and consent of the candidate. I think that we cannot look at the terms of the judgment of the Election Judge, for in the first place the reasons of a judgment are not evidence for the Court, because they may be merely the opinions of the Judge upon various matters, and not evidence at all; and secondly, the whole disqualification of the candidate under the 43rd section is made to depend, not upon the judgment, but on the report of the Judge. Here the report does not find that the candidate was guilty of a corrupt practice with his knowledge and consent, and therefore it is unnecessary to consider the last point argued, that is to say, whether a promise to treat may or not be bribery, and I decline giving any opinion upon it.

DENMAN, J.—I entirely concur with my brother Grove in his regret that this case, which is undoubtedly one of great importance, has been argued only by counsel on one side. It was partly for this reason that my brother Lindley and myself were anxious that the questions involved in it should be discussed before my brother Grove, as neither of us had had, like him, experience in election cases. It appears to me that this case wholly turns on the question whether it has been found by the Election Judge that bribery was committed by and with the knowledge and consent of the present appellant, the candidate at the election

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referred to in this case. The Revising Barrister was of opinion that the report of the Election Judge amounted to that finding, although it was not so in strict form. For the reasons I am about to give I do not agree with him in this. In the first place, it has been argued before us that it will not suffice for the purpose of imposing the penalty given by the 43rd section that the report of the Election Judge amounts to a finding that bribery had been so committed; for that that section only imposes the disqualification where there is an express finding by such report that bribery has been committed by or with the knowledge and consent of the candidate, and that, therefore, the omission of even the word "bribery" would be fatal. That may be so, because in the Lannceston election case (4) Lord Coleridge, C.J., drew a marked distinction between the case of a candidate guilty of bribery and declared guilty by an Election Committee, for which now the report of the Election Judge is substituted. It may be that unless the Judge in his report finds bribery in so many words, the case does not come under the 43rd section; but still it would be startling if the Judge should report that he found the candidate guilty of what all the world would say was glaring bribery, and yet because he had not used the word "bribery" the candidate should not be disqualified by this section. However, I do not think it necessary to determine that point now, and as there has been no argument on one side, I expressly reserve my opinion upon it.

I agree with my brother Grove that, looking at the report of the Election Judge, and making every fair intendment, it does not appear that the Election Judge went the length of finding that personal bribery had been committed by Mr. Grant. He has found Mr. Grant guilty of a corrupt practice, and that such corrupt practice was the promising of an entertainment in the event of his being elected. But there are many cases in which that might be done without personal bribery by the candidate; and I so entirely agree with my brother Grove in what he has stated

on that subject, that it is only necessary for me to add that I am prepared to decide this case on the ground that there is nothing in the finding which is equivalent to such a statement as that personal bribery had been committed. It is, therefore, unnecessary to determine whether the promise to treat would be bribery. It may be that the promise held out something valuable, though in the form of an entertainment, which would make it bribery, although the entertainment, if there had been no such promise, would not be bribery. I desire, however, to leave this question for some future case, and to confine my decision to this—namely, that the words in the report of the Election Judge do not imply that what was done was done by the candidate, or with his knowledge and consent, even assuming that what was so done was bribery.

LINDLEY, J.—I am of the same opinion. The case must be brought within the 43rd section of the Parliamentary Elections Act, 1868, in order to be bribery, and in order to render the appellant disqualified from being registered as a voter. That section requires for such disqualification that it should be found by the report of the Election Judge that bribery has been committed by or with the knowledge and consent of the candidate. No actual form of such report is given in the Act, but in the absence of any finding in express terms that bribery has been committed by the candidate personally, or with his knowledge and consent, there must be words equivalent so clearly expressed as to leave no reasonable doubt as to their meaning. Here the report does not find that bribery has been so committed as would bring the case within the 43rd section, either in so many words, or in words which are equivalent, and, therefore, on these grounds I think the appeal must be allowed.

Decision reversed.

Solicitors—Robinson & Preston, agents for Boestock & Rawlinson, Brighton, for appellant.

[IN THE EXCHEQUER DIVISION AND IN
THE COURT OF APPEAL.]

1877. }
Dec. 6. }

SMITH v. DOBBIN.*

Practice—District Registry Writ—Appearance out of District—Notice to Plaintiff—Judgment in Default of Appearance—Order XII. rule 6a—Indorsement on Writ—Order IV. rule 3a.

A writ was issued out of a district registry against a defendant resident out of the district. The defendant entered an appearance in London, but failed to give notice to the plaintiff under Order XII. rule 6a. :—Held, that the appearance was not complete, and that the plaintiff was entitled to sign judgment.

The writ was indorsed "This writ was issued by T. W. G., of Hereford, whose address for service is T. W. G., care of T. W. & Son, 11, Bedford Row, W.C. :"—Held, a sufficient indorsement under Order IV. rule 3a.

The writ in this action was issued out of the Hereford District Registry on the 20th of August, and was indorsed, "This writ was issued by T. W. Garrald, of Hereford, whose address for service is T. W. Garrald, care of T. White & Son, 11, Bedford Row, W.C." The writ was served on the 22nd of August. The defendant entered an appearance in London on the 29th of August, and the same day sent notice of appearance to the office of Thos. White & Son, but sent no notice to the plaintiff or his solicitor, at his address within the Hereford district, as required by Order XII. rule 6a.

The plaintiff, after the expiration of the time for entering an appearance, waited long enough for the arrival of such notice in due course of post, as required by the same rule in case of appearance elsewhere than where the writ is issued, and then signed judgment.

The defendant took out a summons to set aside the judgment for irregularity, and the Master made an order as prayed. The Judge at chambers affirmed the Mas-

ter's order, and the plaintiff appealed to the Exchequer Division on the 15th of November.

A. T. Lawrence, for the plaintiff.

Petheram, for the defendant.

KELLY, C.B.—I have come to the conclusion, with some reluctance, that the order ought to be set aside. The action was brought in a district registry and the writ served. The defendant was bound by a certain day to enter an appearance, either in London or the country. He did enter it in London, and yet judgment has been signed. But the rules clearly require, in such a case, that notice should be given to the solicitor in the country. No such notice was given, and many days elapsed and the plaintiff was entitled to sign judgment. The defendant may come with an affidavit of merits and state that his failure took place through the complication of the rules, but the judgment is regular. If it were otherwise, the requirement of notice could not be enforced. I have great difficulty in finding any ground for upholding the order. The plaintiff lives in the country where he is entitled to notice. He waits not merely a single day but several days, and receives no notice whatever. If not entitled to sign judgment he would either have to go to London himself or require his agent to search; he might then find that an appearance had been entered. What should he do? Is he to set aside the appearance? This is a circuitous course to which, I think, he ought not to be put. Moreover, if the appearance is good, he cannot set it aside. If bad, he can sign judgment. It is, however, competent to the defendant, on due notice, to make a further application.

HUDDLESTON, B.—I am of the same opinion. It has been argued that the fact of not sending the notice was a mere irregularity, and that appearance having been entered judgment could not have been signed. But what constitutes an "appearance?" If it had been completely entered judgment could not be signed. I think appearance does not mean merely giving a paper to an officer of the Court. There must be two things

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* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J., in the Court of Appeal.

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under rule 6a of Order XII., entering the memorandum and serving the notice. Until the defendant does the latter he does not enter an appearance. I am supported in this view by the provision of rule 5a, Order XIII., that the plaintiff shall wait till next day before he enters judgment. The plaintiff was justified in entering judgment, but the defendant ought to be allowed an opportunity of making an affidavit of merits, and shewing that he has been misled by the rules.

Order rescinded.

Against this decision the defendant appealed to the Court of Appeal, and the case was heard on the 6th of December.

Petheram, for the defendant.—The indorsement to the writ is misleading. "Of Hereford" may or may not be a sufficient description of the plaintiff's solicitors' place of business; but the terms of the indorsement as a whole are such that the natural inference is that the London address is the only address for service. Even if the writ is correct, the notice of appearance is not a necessary part of the appearance itself. Judgment cannot be entered for "want of appearance" when an appearance has in fact been entered.

A. T. Lawrence, for the plaintiff, was not called upon to argue.

BRAMWELL, L.J.—I am of opinion that this appeal ought to be dismissed. Of course the defendant has no merits, or we should have heard of them. It is a mere technical point of procedure. I need not go into the matter at any length. I think that the plaintiff has indorsed his writ correctly, and in a way which ought not to mislead anyone. Mr. Petheram admitted that if the plaintiff had been residing within the district it would have been enough to say, "This writ was issued by T. W. Garrald of Hereford." Then all that the statute requires is that the plaintiff should add something, and the question is whether what he has added is enough. I am of opinion that it is. It means to say, "if you do not reside in the Hereford district, send your notices to

11, Bedford Row," and that is what is required.

Mr. Petheram suggests that the appearance is in itself regular, though there has been an irregularity in not giving a proper notice. But if that is so, what remedy has the plaintiff for the irregularity? It is said that he might take out a summons to set aside the appearance for irregularity. But how can that be when the contention of the defendant is that the appearance is not irregular? I therefore think that the appearance is not effectual unless notice is given in the manner prescribed by the Act, and this view is borne out by Order XIII. rule 5a, which prevents the plaintiff in a case like this from entering judgment for want of appearance until after a letter has had time to arrive from London in due course of post. The solicitor in the country is entitled to say, "You have not entered an appearance here, and you have not given me notice of having entered it in London within the eight days, or within a course of the post after them; so I am entitled to sign judgment."

BRETT, L.J.—I am of the same opinion. The objections to the indorsement on this writ are not critical but hypercritical. According to all ordinary modes of transacting business, it gives the plaintiff's place of business in a way which, considering the size of the place, seems quite sufficient. Then it adds an address in London where service can be effected. This makes the indorsement a good one, and then we have an appearance which does not comply with Order XII. rule 6a, and therefore not a proper appearance. The plaintiff is not in the wrong, and the defendant is; and therefore, according to all rules, the plaintiff is entitled to sign judgment. Order XIII. rule 5a, clearly shews that the notice is a necessary part of the appearance, for it is necessarily implied from that rule that the defendant's solicitor, after post time on the day following the expiration of the eight days, may sign judgment if he does not get such notice. The plaintiff therefore in this case was entitled to sign judgment for want of an appearance; and such

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judgment cannot be set aside without an affidavit of merits and payment of costs.

COTTON, L.J.—I cannot doubt that the words “of Hereford” are a sufficient designation of the plaintiff’s solicitor’s place of business, and that the writ is sufficiently indorsed. That being so, the defendant when he enters an appearance in London has to send written notice to the defendant’s solicitor on the same day, and unless he does so the appearance is not complete, and the plaintiff is entitled to sign judgment.

Judgment for the plaintiff.

Solicitors—Thos. White & Sons, agents for T. W. Garrald, Hereford, for the plaintiff; Courtenay & Croome, agents for William Hebb, Ross, for the defendant.

[IN THE COMMON PLEAS DIVISION AND
IN THE COURT OF APPEAL.]

1877.
June 21, 23. } SHEPHERD AND OTHERS v.
July 23. } KOTTGEN AND OTHERS.*
Nov. 23. }

Shipping—General Average—Part of Vessel cut away to save whole Adventure—Sacrifice of mere Wreck.

A ship being caught in a storm portions of the rigging gave way to such an extent that the main mast began to lurch violently, whereupon, fearing that the mast would rip up the decks and thereby endanger the safety of the ship the captain ordered it to be cut away, which was done. In an action by the owner of the ship to recover from the owners of the cargo their proportion of general average loss incurred by the sacrifice of the mast, the Judge left to the jury the following questions; first, Are you of opinion that the mast was virtually a wreck and gone at the time it went over? secondly, Do you find it was hopelessly lost? The jury answered both questions in the affirmative:—

Held, by the Court of Appeal, reversing the decision of the Common Pleas Division,

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J., in the Court of Appeal.

that there had been no misdirection, and that substantially the right questions had been left to the jury.

If anything on board a ship, which is cut or cast away because it is endangering the whole adventure is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average.

This was an action, by the owners of a ship, to recover from the owners of the cargo their proportion of a general average loss, tried before Manisty, J., and a special jury, when a verdict was found for the defendants on the questions put to them by the learned Judge.

The evidence given at the trial and the questions put to the jury are stated in the judgment.

A rule for a new trial was afterwards moved and obtained on the ground of misdirection, and on the ground that the verdict was against the weight of evidence.

Butt, J. O. Mathew and Hollams (on June 21 and 23), for the defendants.

Cohen and Macleod, for the plaintiffs.

The following authorities were referred to—*Corrie v. Coulthard* (1), *Johnson v. Chapman* (2), *Phillips on Insurance*, section 1271.

Cur. adv. vult.

The judgment of the Court (3) was delivered on July 12 by

GROVE J.—This was an action by ship-owners against the owners of cargo, really by the underwriters on the ship against the underwriters on the cargo.

The only question for our consideration was, whether the cutting away of a mast under the circumstances detailed in the evidence was a subject for general average contribution or not.

The evidence for the plaintiff was

(1) Not reported; it was a case tried before Cleasby, B., which afterwards came before the Court of Appeal.

(2) 9 Com. B. Rep. N.S. 563; s. c. 35 Law J. Rep. O.P. 23.

(3) Grove, J., and Lopes, J.

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mainly that of the captain of the ship *Rollo* and the first and second mates, taken on commission.

For the defendants four experts were called, who gave their evidence upon hearing that for the plaintiff read. Some letters of the captain and the log were also put in, but these do not vary the evidence so far as it is material for our decision.

The vessel was bound for Hong Kong, and somewhere between Scilly and Lisbon she encountered a storm; portions of the rigging gave way, and from this cause the mainmast was, in the captain's language, lurching violently. He says, "We wore the ship to try to save the mast. The mainmast was lurching violently. The mainmast would not break. We wanted it to break, for the simple reason that it was lurching so heavily that I was afraid it would open the ship out. I ordered the chief mate to cut away the port rigging, so that it might fall to starboard, clear of the ship. The mate obeyed my order." On cross-examination he says, "As soon as the starboard main rigging was gone, I knew the mast was gone, unless we could secure the starboard main rigging. The whole difficulty was that the mast would not break. I was afraid the mast would break the ship out." Re-examined, "The mast was lurching so much as to put the ship in danger of opening up." Question, "If the mast had not been lurching so much, could you have secured the mast?" Answer, "Yes."

The mate being asked, "Why did you want to cut the mast away?" says, "To save the ship and cargo, and our lives, I should think. The mast was lurching about so violently, I expected it would rip up the decks. If the decks were ripped up she (the ship) would fill with water." Cross-examined, "Some of the rigging had gone and the ship was lurching violently. We thought, of course, then, that the mast would go, or, if it did not go, that it would rip up the decks."

The second mate says, "The mast kept lurching. The rigging was ultimately cut away, and then the mast went over the side, to starboard." Question, "Why

was the port rigging cut away?" Answer, "To let the mast go." Question, "Why did you want the mast to go?" "Because it would have torn the ship's deck; it would have opened her up." Cross-examined, he says, "If it had broken off it would have been a different thing altogether. We were afraid of its ripping up the decks. I can't say if the mast would have gone, whether we had cut the port rigging or not. She might have got steadier afterwards. I decline to speculate on what might have occurred. I know that if the mast had not gone the ship would have opened out."

The expert called first for the defendant said that under the circumstances described in the evidence for the plaintiff, he would have described the mast as a wreck—a gone mast. On cross-examination he said, "That if the mast had been lurching out of the ship, that would have been an extremely dangerous thing for the vessel." The other experts give evidence much to the same effect, one saying that "it (the mast) was an impediment to the adventure, and one that it was desirable in the interests of all to get rid of." Another on cross-examination said that if the weather had moderated it might have been possible to have saved the mast, but difficult.

The substance of the evidence appears to us to be, first, that, if the storm had continued, of which there was great probability, the mast would not have broken, but would have gone wholly overboard, tearing up the ship, and that in all probability the whole would have been lost; secondly, that the mast might possibly have been saved if the weather had moderated quickly, but that this was very improbable; thirdly, that the mast was cut away, not as a mere incumbrance, like a mast overboard and attached to the ship by rigging, but for the purpose of preventing its tearing up the ship and sacrificing the adventure.

The learned Judge concluded his summing-up as follows:—You must judge for yourselves, having regard to all the circumstances, the state of the weather, the state of the sea, the rigging gone (and all these circumstances are proved by the witnesses, and there is no evidence to

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contradict them) are you of opinion that that mast was virtually a wreck and valueless and gone at the time it went over?

The jury found that the mast was a wreck; and in answer to a further question by the learned Judge, "Do you find it was hopelessly lost?" The foreman said, "Yes."

The rule before us was obtained on the ground of misdirection, and that the verdict was against the weight of evidence.

The misdirection complained of was, that the Judge did not ask the jury, as was done by Cleasby, B., in the case of *Corrie v. Coulthard* (1), "Whether, if the weather had moderated, the mast could possibly have been saved?"

During the argument another question occurred to us as having an important bearing upon the case, which was this: whether, at the time the mast was cut away, the purpose for which it was cut away was, to save the adventure by preventing the mast tearing up the ship, to which the evidence very strongly pointed; or whether it was cut away as wreck, as a mere incumbrance or lumber.

The question was very much discussed by the Court of Appeal in *Corry v. Coulthard* (1), to which we shall presently refer.

We are of opinion that both the questions just alluded to should have been asked of the jury, that although the learned Judge does say to them that, if the mast had not been cut away, it would have been very dangerous for the vessel, and that there was common danger to the ship and to the cargo, he does not put these as questions to the jury but leaves to them only the question of whether the mast was virtually a wreck and gone. He says, "As to putting to you whether, if the weather had moderated it might have been saved in a storm amounting to a hurricane, or at all events a heavy gale, and the ship in the trough of the sea, and the weather not shewing any signs of improvement, to ask you whether, if the weather had moderated the mast might have been saved, seems somewhat out of place in this case." And he then puts the question which he repeats at the close of the summing-up.

We are further of opinion that, assum-

ing the question which we have stated to have been put to the jury, and the jury had found for the defendant, that finding would have been wrong and against the weight of evidence.

In our judgment, the beneficial objects of the doctrine and law of general average would be frittered away if, where a sacrifice is made, as seems obviously the case here, to save the whole adventure, the sharing the burden of such sacrifice could be made to depend upon nice questions of probability, afterwards discussed, as to whether the thing might or might not have been saved.

In ordinary questions of general average, it is presupposed that great danger exists to the ship and cargo, and in those cases the probability is that the thing sacrificed would have gone with the whole venture, and therefore it would be the sacrifice of a probably valueless thing. Here, if the mast had gone, the ship would probably have gone with it. The ship was probably saved by the sacrifice of the mast. The evidence appears all one way on this point. The case differs in our judgment from those of cutting away wreck, as hypothetically put by Willes, J., in the case of *Johnson v. Chapman* (2), where he supposes a case of part of a mast going overboard, with spars and sails attached to it, and hanging by a stay, battering and adding to the danger of a vessel. There the wreck is real not anticipatory; and as Willes, J., observes, "You cannot keep it; there is no intentional sacrifice in cutting it away." Here the mast was sound and entire and a mast; it was in its usual place, though lurching from the rigging being gone on one side.

It would defeat the main utility of general average, if, at a moment of emergency, the captain's mind were to hesitate as to saving the adventure, through fear of casting a burden on his owners. What was the pressing necessity here at the time of the act? The prevention of the ship being torn up and lost. "Wreck" is hardly an accurate term for contingent wreck. The making the potential the same as the actual, we cannot help thinking, will much embarrass the law on this subject; and the judgment of experts as

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to probabilities after the event is a very dangerous criterion for a jury to be guided by. The case of *Corry v. Coulthard* (1) is almost identical in facts with this case; indeed, in our judgment, it is identical in so far as the legal question is concerned. That case is not reported; but by consent of counsel on both sides in this case, we have been furnished with the shorthand writer's notes of it. The Court of Appeal, consisting of the Lord Chief Justice of England, Sir B. Brett and Sir R. Baggallay, gave no formal judgment, but their observations in the case on the motion by way of appeal from the Exchequer Division, are all one way, and wholly in point as to the present case. There, the mast (an iron one) becoming loose, the captain feared (though it turned out afterwards without cause) that it would go through the bottom of the ship, and he cut it away. The same contention was put forward there as here, but the jury found for the plaintiff, i.e., in favour of general average, Baron Cleasby asking them whether, if the weather had moderated, the mast could possibly have been saved? But the observations of the Court go much further than on the mere question whether the direction of the Judge was right; the Lord Chief Justice says: "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into; it is enough if he exercise his judgment under all the circumstances He must exercise his judgment. He cuts away the mast not because of its value as a mast, but because he thinks its condition is likely to be destructive of the vessel. . . . If the danger is that the mast will perish at the same time that it causes the perishing of the ship, and it is cut away for the purpose of preventing peril to the ship and its own destruction, is not that general average? Whatever be the condition of the mast it was a source of danger to the ship." The Lord Chief Justice says much more to the same effect.

Sir Balil Brett says, "You do not mean to say it was so valueless that a man in a calm would have thrown it overboard! it was worth money. . . . Wreck means rubbish, I suppose. . . .

If it is done for the benefit of the ship and cargo, then it is general average."

In the present case, it appears to us, the evidence is greatly preponderating, that the mast was cut away for the benefit of the ship, cargo and crew, that it was not actual wreck, and was not cut away as such.

Mr. Phillips, a high authority on this subject, says, 1271, "If the thing abandoned is so exposed to destruction that it cannot possibly be retrieved and saved, and its abandonment cannot possibly contribute to the safety of the crew and ship, cargo or freight, there may be grounds of objection to contribution; but, in case of such objection, the construction will be very liberal in favour of contribution."

Being of opinion that the question of the mast being saved was put to the jury as one of probability and not of possibility; that no question was left to them as to the purpose for which the mast was cut away; and that contingent wreck was treated by the Judge as though it were actual wreck, we think there should be a new trial. We also think that, although the learned Judge is not dissatisfied with the verdict, yet that the verdict was against the weight of evidence, regarding the evidence from the point of view we have regarded it in this judgment.

Rule absolute for a new trial.

From this decision the defendants appealed on the 23rd of November.

Butt and J. O. Matthew (Hollams with them), for the plaintiff.—If, at the time when it was cut away, there was any reasonable probability of the mast being saved eventually, the defendant's case is not maintainable. But the findings of the jury shew that the mast was absolutely valueless at the time when it was cut away, and, therefore, no sacrifice was made for which general average can be claimed. The thing sacrificed contained in itself the elements of destruction, and must be considered in the same light as a bale of cotton which has caught fire and is thrown overboard to save the ship. The law with regard to the nature of the sacrifice which entitles the owner to

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claim general average contribution will be found in *Benecke's Principles of Indemnity in Marine Assurance*, pp. 183, sqq., and also at p. 243, where the writer, after quoting 1 *Emerigon*, 436, says that where water is thrown down the hold to extinguish fire among the goods, and goods which are not on fire are spoilt by it, this is general average. The same principles, with some modification, will be found laid down in *Parsons on Marine Insurance*, vol. 1, p. 212 (note), where the American cases of *Orockit v. Dodge* (4), *Slater v. The Hayward Railway Company* (5), and *Lea v. Grinnell* (6), in which latter case there was a difference of opinion between Hoffman, J., and Duer, J., are cited. The view taken by Parsons is also taken by Willes, J., in *Johnson v. Chapman* (2). He says,—"A lawyer could not lay down as a matter of pure law that all lumber cut loose is wreck. But what I say is that if it was virtually lost, if not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost" (that is the case here), "you would properly call that wreck, and would not say it was general average." He then goes on to distinguish the case where something is cut away which would be safe but for the common danger. The rule to be collected from the authorities, therefore, amounts to this—that if the thing cut or cast away, although endangering the whole adventure, is in such a state that it must itself be lost, even though the rest of the adventure survive, then its destruction gives no claim to general average contribution. The case of *Corrie v. Coulthard* (1), relied on by the other side in the Court below, is distinguishable. There was no element of destruction in the condition of the mast when it was cut away. It was cut away under a misapprehension, and was sacrificed, though a sound mast, for the benefit of ship and cargo.

Cohen and Macleod, for the plaintiffs.—The right question for the jury is whether there is a possibility of saving that

which was sacrificed. The question whether there was a reasonable hope of doing so is immaterial. *Johnson v. Chapman* (3) has been misunderstood. No part of the ship was there sacrificed, but a loose deck cargo, impossible to stow, dangerous to approach and worse than valueless. There was no option as to the sacrifice. The present case is analogous to that of a vessel on her beam-ends, when spars are cut away to relieve her. Such cases are rightly general average, for the principle and purpose of general average is that the master may be disembarassed of all speculations as to what may happen. All loss voluntarily inflicted on the vessel by the master with the object of saving the adventure ought to be borne rateably by all parties. The word "loss" means loss at the particular moment of the jettison, and the application of the principle is not affected by the discovery afterwards that the thing lost must in any case have perished. The real question is whether the mast was so valueless that, if the weather had moderated at once, then it could have been saved. The opinions of the old writers are various; and Benecke's view that there is no general average if the thing sacrificed was morally certain to be lost is not accepted by other writers (see *Parsons*, vol. ii. p. 287), and is opposed to the true principle of general average. The English law is that if any part of the ship is destroyed to save the whole adventure, then there is a claim for general average. The analogy between the case of *Chapman v. Johnson* (2) and the present case is complete. There the cargo was in such a state that the men could not come near to stow it. Here the mast was in such a state that the men "could not live" at the main rigging, so it could not be repaired. The danger to the mast, therefore, was merely the peril of the sea, to which the whole adventure was subject. This is just like the case of a vessel on her beam-ends, and is distinguishable from the case of the bale on fire, where the thing contains in itself the elements of destruction. The rule may be given thus:—There is always a claim for general average when the sacrifice is

(4) 3 Fairf. 190.

(5) 26 Conn. 128.

(6) 6 Duer 400.

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made with the object of saving the adventure, and when what makes the sacrifice necessary is the peril of the sea. The mast in this case was not itself in any peculiar peril, and only was "gone" in the sense of gone with the whole adventure.

BRAMWELL, L.J.—I am of opinion that this appeal ought to be allowed. I think the right question was left to the jury, and that their verdict was found on sufficient evidence. But, in point of fact, when the judgment of the Court below comes to be examined, we find there was really no difference between them and Mr. Justice Manisty as to what the law is, only they seem to think that he did not lay it down; but I think he did. I think that, in effect, he asked the jury whether there was any possibility of saving the mast, and the jury answered that there was not. They said the mast was "hopelessly gone" before it was cut away. The only question was in what way its destruction should be consummated, for it was already in the course of destruction. My brother Brett has written down what will be a valuable rule on the subject, but I will put it in this way:—When the thing said to be sacrificed has some peculiar condition attaching to it, such that whether the whole adventure is saved or lost, the specific thing must necessarily be lost, then there is no sacrifice on the part of the shipowner to entitle him to contribution for general average. So here the mast was in such a state that, whether the ship came safe to port or not, it must be lost; and, therefore, there is no claim to general average contribution, as there is no sacrifice. And I cannot help thinking how reasonable the rule seems in the present case, for the mast, no doubt, went in consequence of some imperfection in the way in which the rigging was fitted. So, while agreeing with the view of the law taken by the Court below, I cannot agree with the view they take of the question which was left to the jury. I think the right question was asked, and I may add that I think it was put deliberately, after consulting the

authorities, for the question was put to the jury with great precision.

BRETT, L.J.—In my opinion, the learned Judge left the right question to the jury, and there was evidence on which they might reasonably find as they did find; and on that verdict the plaintiffs have no claim for general average contribution. It seems strange to say that the question raised in this case is a novel one; yet it is. A definition of general average, and of that which it is necessary to establish in order to found a claim for contribution to it, has been often enunciated. The right to general average contribution is founded on an intentional sacrifice for the benefit of the ship and cargo; but it has not before been necessary to consider carefully the meaning of the word "sacrifice," nor what conditions are necessary to constitute a sacrifice. The question was before the Court in *Corrie v. Coulthard* (2), but there it was not necessary, as it is here, to define accurately what will constitute a sacrifice. Now, I agree that the question which ought to have been left to the jury was substantially left to them by my brother Manisty, unless, indeed, we come to the conclusion that by "possibility" we mean that which is mathematically or scientifically possible. But, in the ordinary concerns of life, the word is not so used, nor should it be so used in an issue of law.

Here the act of sacrifice relied on is the cutting of the port rigging in order to insure the immediate fall of the mast. The question is whether that act can be said to be an act of sacrifice. Assuming for the purpose of this opinion that the master in cutting the port rigging intended to sacrifice the mast for the benefit of the ship and cargo; it cannot be that he was of opinion that the mast was an absolute wreck and so cut it away simply to get rid of it. If he had so thought, no question of general average could arise, for the master would not have done what he did with the intention of saving the ship and cargo; and the first essential element, namely, intent to save, would have been wanting. He intended to sacrifice, but then comes the question, did he in truth sacrifice any-

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thing? Consistently with the decision of this Court in *Corrie v. Coulthard* (1), and in accordance, as it seems to me, with what was intimated by the Court in that case, the following proposition may be stated:—If anything on board a ship, which is cut or cast away because it is endangering the whole adventure is in such a state within itself, or in such condition from external circumstances, that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim to general average contribution. Or the proposition may be stated in the following terms:—Where, whether the act relied on as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state, or by reason of the condition in which it is placed, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice.

Another form of stating the result of these propositions is to say, that there is nothing in respect of which general average contribution could be claimed, because the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to its owner.

We may say, therefore, with regard to this case, that there was no sacrifice, or alternatively, that there was nothing in respect of which the plaintiffs can claim contribution. They cannot claim it in respect of loss to themselves, for by the hypothesis they have lost nothing; there has been no sacrifice, for nothing has been sacrificed; there is nothing for which general average contribution can be claimed, for nothing was lost.

It seems to me that the question left to the jury must mean—was the mast at the time of the act relied on as the act of sacrifice (that is, the cutting away of the port rigging in order to let the mast fall clear of the starboard side), was the mast, when that was done, not by reason of

any inherent fault, but of the condition into which it was brought, considering the impossibility of the storm subsiding in time (using the word impossible as it is used in ordinary human affairs), necessarily a lost mast, that is to say, must it have been lost whether the ship was saved or not? In other words, though the ship had not been lost, and the mast had not been cut away, it would have fallen overboard, and would have been lost to the owner in two minutes—before there was any possibility of the storm abating. I rather adhere to the phrase “possibility,” meaning any possibility of which human beings can take account; and therefore I consider that the finding of the jury meant that the mast was in such a state that it was absolutely lost whether the ship was saved or not, or whether the act of sacrifice had been done or not. Therefore, I am of opinion that, although there was the intention to sacrifice, there was no sacrifice and therefore no loss, and therefore no claim to general average contribution. This decision is, in my opinion, quite consistent with *Corrie v. Coulthard* (1), because the jury there declined to find what here they have found upon sufficient evidence.

COTTON, L.J.—I think there should be no new trial here. As I understand the findings of the jury, the mast was gone at the time when the act was done. “Hopelessly gone” is the expression; and that which is hopeless is impossible in the common sense acceptance of the word. When one says that a thing is impossible in the ordinary course of human events, that means that there is no hope that the event considered impossible, will happen. Here the mast, as distinguished from the mast and ship, was hopelessly gone. I admit that if one only reads the depositions there seems to be some doubt, but the evidence of the experts makes it quite clear that the mast must have gone, and the master only anticipated its going overboard by about two minutes. Does that state of things justify a contribution for general average? I am of opinion that it does not. When part of a common adventure, i.e. the ship and cargo,

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Shepherd v. Kottgen (App.), C.P.

is abandoned for the good of the whole, and the whole is saved, equity says that all shall contribute to indemnify him whose goods have been sacrificed to the common advantage. The man whose goods were abandoned must be treated, in assessing the value of the goods lost, as if they had been saved with the rest of the cargo. There is no reason why one individual should bear all the loss, and it must be considered what the value of the abandoned goods would be if they were part of what was saved. Therefore it is necessary that there should be a voluntary act of abandonment, and this case may be decided by an application of that principle. When the thing itself is in peril by a state of things peculiar to itself, and must unavoidably go, even without the ship going with it, then the law does not consider the hastening of the crisis a voluntary abandonment. It is not an abandonment when in all human probability the thing would have been taken away by a superior force independently of the peril to which it was exposed in common with the ship.

Judgment for the defendants.

Solicitors — Lewis & Watson, for plaintiffs;
Hollams, Son & Coward, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1877. { THE LONDON TRAMWAYS COM-
Nov. 28. { PANY, LIMITED (appellants)
v. BAILEY (respondent).

*Contract of Service—Tramway Company
—Money deposited by Conductor on entering
Service—Deposit Money to be forfeited for
Breach of Rules—Company's Certificate
to be final as to Cause of Forfeiture—
Jurisdiction of Courts.*

[For the report of the above case, see
Law J. Rep. M.C. 3.]

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1877. } EADE (Administrator) v. JACOB.*
Dec. 6. }

Interrogatories—Discovery of Facts relied on by other Side—Evidence—Conversations—Order XXXI. rules 1, 5.

Under the new procedure either party to an action may obtain discovery, by interrogatories, of all the facts relied on by the opposite party as establishing his case, but not of the evidence of such facts.

Where facts so relied on consist of conversations, the general effect of such conversations may be asked for, but not the details.

This was an interlocutory Appeal from the Exchequer Division.

The action was for the recovery of land for forfeiture for breach of covenants in a lease, and for mesne profits and damages, brought by the plaintiff as administrator of the defendant's lessor, Isaac Eade.

One of the breaches of covenant relied on was, that during the term the defendant made certain alterations in, and additions to, the demised premises without the consent in writing of the lessor or of the plaintiff as administrator.

In respect of that breach the defendant pleaded that such alterations and additions, if any, as were made without the consent in writing of Isaac Eade, were made with his consent and authority, and that he was aware that they were being made and did not object thereto, but acquiesced in and approved of the same and waived all right to forfeiture of the said lease for any breach of contract in respect of the same.

The plaintiff thereupon administered the following interrogatories:—

1. "At what date or dates were the alterations and additions referred to in the 4th paragraph of the defence made? Give the name and address of the builder or builders or other person or persons by whom they were wholly or partially executed.

2. "When did the said Isaac Eade

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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consent to, or authorise the alterations and additions mentioned in the said 4th paragraph other than the alterations, to which he consented in writing? Was the consent or authority given on more occasions than one? If so, state the times of each. Also state when and in whose presence such consent or authority or consents and authorities were given. State fully the conversation or conversations when such license or consent, licenses or consents, were given by the said Isaac Eade."

The defendants took out a summons before Hawkins, J., in chambers, to strike out the above interrogatories on the ground that the information sought was matter which ought to be obtained, if at all, by summons for particulars.

The learned Judge struck out the latter part of the second interrogatory, which asked where and in whose presence the alleged consent was given, and demanded a full statement of the conversations which took place at the time of the alleged consent.

The plaintiff appealed from this order to the Divisional Court on the 29th of November, when the learned Judges who composed that Court differed in opinion; Cleasby, B., being of opinion that the order of Hawkins, J., should be affirmed, and the Lord Chief Baron holding that the interrogatory ought to be allowed as originally drawn, on the ground that since the adoption of the rule in Chancery with respect to interrogatories, the plaintiff was entitled to the discovery of all the facts in the knowledge of the defendant, including the fullest information as to the circumstances attending those facts, and not merely their time and place. In coming to this conclusion he relied on the case of *Hills v. Wates* (1), and he expressed his opinion that the conversations and even the details of those conversations were material circumstances of which the plaintiff was entitled to have discovery.

The Court being equally divided, no order was made.

Thereupon, this appeal was brought.

Anderson, for the defendant (*Lawrence* with him).—The interrogatory as to the conversation is admissible on the principle laid down in *Hawkins v. Carr* (2). There, in an action by an executor, the defendant alleged payment by a bill of exchange, and the Court allowed interrogatories as to the circumstances under which the bill was given. So here the plaintiff is entitled to discovery of the circumstances of the alleged waiver, and they can only consist of the conversations. *Hills v. Wates* (1) follows *Hawkins v. Carr* (2), and proceeds on the same principle.

Lumley Smith, for the plaintiff.—There is no question of principle in this case. The learned Judge would have allowed interrogatories to establish a forfeiture. But these questions go beyond the proper bounds, and far beyond *Hawkins v. Carr* (2), which is not an authority for interrogating with respect to conversations. Too much detail is required. The proper way for the defendant to proceed would be to ask for particulars, not to administer interrogatories.

Lawrence replied.

COTTON, L.J. — My learned brothers have asked me, as I have had long experience in the matter of interrogatories in Chancery, to deliver the judgment of the Court:—

There seems to be considerable misapprehension as to the nature of the right of litigants to administer interrogatories. The old common law rule is at an end, and it is not the practice for a party to obtain liberty to administer such interrogatories as a Judge shall think fit. But everyone has a right to ask of the opposite party any questions he chooses, subject to this, that after they have been delivered, if the party interrogated can shew that they are scandalous or irrelevant, or not put *bona fide* for the purposes of the action, or that the matter enquired after is not sufficiently material at that stage of the action, or on any other

(1) 43 Law J. Rep. C.P. 380; s. c. Law Rep. 9 C.P. 688.

(2) 35 Law J. Rep. Q.B. 81; s. c. Law Rep. 1 Q.B. 89.

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ground (i.e. any other ground of a similar nature) then such party, or the public officer in the case of a corporation, may apply to have them struck out.

But the *onus* in all cases lies on the party objecting to the interrogatories. *Prima facie* any question may be put, as in the old form of Chancery practice. The question here is whether Mr. Justice Hawkins has properly exercised his discretion in striking out a part of the interrogatories in the present case. The parties have been before the Exchequer Division. Now if the Exchequer Division, having heard the objections, had been unanimous in the opinion that part of these interrogatories ought to be struck out, I should have been very unwilling to entertain this appeal, unless it appeared that the Divisional Court were clearly wrong on a matter of principle. But in the present case, the Court below were divided; and therefore we are bound to give our opinion whether the interrogatories should be allowed or not.

Now I do not base my judgment upon the fact that the plaintiff in this case is an executor, except to this extent, that an executor is entitled to some indulgence in respect of interrogatories when for the *bona fide* purpose of obtaining information he comes to ask his opponent about matters which would have been strictly within his testator's own knowledge. In the present case I think that the interrogatories have, to some extent, been pushed too far. And I think that the objection to them has gone too far also. Looking to the Chancery practice, I hold that the person interrogating has a right to get at a statement of the facts relied on by the other party as establishing his case, but he is not entitled to obtain the evidence of those facts. On this principle I think the words "and in whose presence" should be struck out of the interrogatory, for it is not incumbent on the plaintiff to tell the defendant what witnesses can prove the facts.

Then comes the question about the conversations. Now the feeling of the Court of Chancery has always been this, that if a conversation is relied on, the party who relies on it must state on his pleadings in effect the substance of that

conversation, and I must say I consider this a very wholesome rule, as we all know how small an alteration in the terms of a conversation makes a material difference. I therefore think that the defendant should be allowed to interrogate as to the conversation. But I think we must strike out the word "fully," for though the substance of the conversation must be given, the defendant cannot be expected to give the particulars, and the plaintiff must not be vexatiously discontented with the information given him. I have had some doubt whether evidence of the conversation is open to the defendant upon his statement of defence, but I am inclined to think it would be confining him too strictly to say that he cannot rely upon it. If so, the plaintiff is entitled to know what are the conversations on which the defendant relies. And partly, I may say on my own part, to discourage appeals to this Court with regard to interrogatories, and partly because the plaintiff has not been completely successful, there should be no costs of this appeal.

Solicitors—Charles Gregory, for plaintiff; Angell & Imbert Terry, for defendant.

[IN THE COURT OF APPEAL.]

1877. }
April 10. } KYNASTON v. MACKINDER.*
Nov. 21. }

Practice—Trial by Jury—Order depriving Successful Party of Costs—Order LV.
—"Application made at the Trial."

In a cause tried at the assizes by a Judge and jury an application to deprive the successful party of costs was made an hour after verdict, and while another cause was proceeding:—Held, that the application was not too late under Order LV., which requires the application to be made at the trial.

Action for assault. The defendant denied the assault, and by way of alternative defence paid into Court the sum

* *Coram* Lord Coleridge, C.J.; Bramwell, L.J.; and Brett, L.J.

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of 1s., and said it was enough to cover the damage.

At the trial before Amphlett, L.J., at Nottingham Spring Assizes, 1877, the jury found that there had been an assault, but that the shilling paid into Court was too much, and assessed the damages at one farthing. Judgment for the defendant.

About an hour after verdict, and while another cause was being tried, the plaintiffs counsel applied to the learned Judge to make an order depriving the plaintiff of costs.

His Lordship took time to consider, and on the following morning made the order as prayed.

The defendant (on April 10) appealed.

Lawrance (W. Graham with him), for the defendant.—The application was too late. The trial was over and the solicitors gone, and no counsel was heard for the plaintiff. The order should be made at the trial, and “for good cause shewn,” which implies that there must be argument, and also that the Judge’s discretion is not absolute, but subject to be reviewed by this Court. If the rule left an absolute discretion to the Judge, the whole of the latter half of the rule, which deals with trial by jury, would be useless.

[BRETT, L.J.—You say that “good cause” is cause which a Judge shall rightly decide to be good.]

Lumley, for the plaintiff.—The application was in time. It was practically made at the trial, being made the same day in the same Court. The order is in the Judge’s discretion, and the rule that it is to be made for good cause shewn is merely directory. If not, the Court will not interfere unless it is clearly shewn that the Judge is wrong, for the Judge sees the witnesses and the manner in which the case is fought, which the Court of Appeal cannot.

Cur. adv. vult.

The following judgment was delivered on November 21 :—

BRETT, L.J.—We think that the application was made within the proper time. If we held otherwise business could not be carried on, considering the very short time for the trial of causes at the assizes.

And we think that the mere fact that the Judge took time to consider the point makes no difference.

As to the question whether the Judge made this order “for good cause shewn,” we need not determine whether we have jurisdiction to review the Judge’s exercise of his discretion, for this is a case in which we think we ought not to interfere, even if we had power to do so.

Order affirmed.

Solicitors—Oldman, agent for Oldman & Ivesson, Gainsborough, for plaintiff; Whyte, Collisson & Co., agents for Atter, Stamford, for defendant.

[IN THE EXCHEQUER DIVISION.]

1877. { THE GENERAL STEAM NAVIGATION
June 13. { COMPANY v. THE LONDON AND
EDINBURGH SHIPPING COM-
PANY.

Practice—Costs—Collision of Ships—Compulsory Pilotage.

The rule of the former Court of Admiralty, that in an action of collision of ships, no costs are allowed to the party who, after raising other defences, succeeds on the defence of compulsory pilotage alone, does not apply to cases in the Exchequer Division.

The “Daioz” (47 Law J. Rep. P., D. & A. 1) distinguished.

This was an action for damages arising from the collision of the defendants’ steamship *Marmion* and the plaintiffs’ steamship *Florence*, while the latter was riding at anchor in the river Thames.

The defendants pleaded that the *Florence* had not the proper regulation riding light; that there was no negligence on the part of those in charge of the *Marmion*, but that the collision was the result of inevitable accident; and that if the collision was caused by the negligent management of the *Marmion*, it was caused solely by the fault of the pilot in charge, under circumstances and within a

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district such as to render his employment compulsory by law.

At the trial the defendants relied only on the last defence, and the jury found that the collision was due solely to the negligence of the pilot on board the *Marmion*. Leave was reserved to enter the verdict for the defendants if the employment of the pilot was compulsory. After argument, the verdict was accordingly entered for the defendants.

Notice was thereupon given of a motion for an order declaring that the defendants were not entitled to recover any costs of defence, on the ground that they raised other defences than that of compulsory pilotage, and succeeded on the defence of compulsory pilotage alone.

Butt and *R. E. Webster* moved under the clause of Order LV. relating to trials by jury, which provides that "where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried, or the Court shall otherwise order."—Power is here given to the Judge at the trial, and also to the Court. It was an invariable rule of the former Court of Admiralty that where a defendant succeeded on the plea of compulsory pilotage alone, he was not allowed his costs. This rule has been upheld in the Court of Appeal in the case of *The Daiois* (1), on appeal from the Probate, Divorce and Admiralty Division. It is, since the Judicature Act, a rule of the High Court, and not merely of the Division which takes the place of the Admiralty Court.

Murphy and *Bray*, for the defendants, were not called upon.

KELLY, C.B.—It is clear that the power given by Order LV. to the Judge can only be exercised at the trial. But it has been contended that the words "the Court shall otherwise order" give a substantial and independent power to this Division. Can that power be exercised on appeal at all, and can it be exercised on appeal only? These questions

have not been determined, and I forbear to determine them. I leave it to any Court which may be disposed to make such an order. I assume, for the purposes of this case only, that the Court has the power contended for. Then on what grounds are we asked to exercise it? It has been the law for centuries in this Court that when a defendant succeeds he is entitled to his costs. We are called upon to make an order in a case where the defendant has succeeded that he shall not have his costs. The application, by the Rules, can only be made "for good cause shewn," and the cause shewn is that the practice of the Admiralty Court, and now of the Probate, Divorce and Admiralty Division, established some centuries ago, is that in cases of collision where the owners say there is compulsory pilotage, and that defence alone is successful, the defendant is entitled to no costs. A case has been referred to in which this practice has been affirmed by the Court of Appeal, in a case in the Admiralty Division, and the question is whether we are called upon to treat that decision as binding upon us. It may be a good practice in Admiralty, but, in my opinion, it is very unjust. The decision of the Court of Appeal has nothing to do with the practice or law of any of the other Courts of Westminster Hall. As to collision, where there is negligence on both sides, a rule has been laid down. The Legislature wisely interposed, and they said that the practice of the Admiralty in that case shall be the practice of the High Court and all the Divisions. But no rule has been laid down on the present point, and by the law and practice of this Court the defendants are entitled to their costs.

HUDDESTON, B.—I am of the same opinion. The application is made under Order LV., and it has been suggested that, as there has been no order made by the Judge at the trial, there can be no order made by us. I should have no doubt on that subject. A divisional Court is empowered to make orders so as to take the case out of the ordinary rule. The Rule does not say the Court "on appeal," but the "Court" who would

(1) 47 Law J. Rep. P., D. & A. 1.

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decide on the merits. In *Baker v. Oakes* (2), two learned Judges adopt, and the third does not dissent from, this view. Then comes the question whether there is sufficient cause shewn to influence the Court to alter the general rule. The application is not made on the merits, but the rule adopted by the Admiralty Court is relied on. The argument is that, the Court of Appeal having adopted the rule, have laid down that in all cases of compulsory pilotage this rule must prevail. I do not think this is the effect of the decision. The Master of the Rolls says that "the rule which has been adopted in the Admiralty Court in similar cases ought also to obtain in the Court of Appeal." It was never suggested that the rule would be the same in other Divisions. If this case and not the case from the Admiralty Division had gone to the Court of Appeal, a totally different question would have arisen.

Order refused.

Solicitors—William Batham, for plaintiffs;
Thomas Cooper, for defendants.

[IN THE APPELLATE DIVISIONAL COURT.]

1877. } WATKINS (*appellant*) v. PRICE
Nov. 21. } (*respondent*).

Game—Taking—1 & 2 Will. 4. c. 32.
s. 3.

[For the report of the above case, see
47 Law J. Rep. M.C. 1.]

[IN THE COMMON PLEAS DIVISION.]

1877. } ELMORE AND ANOTHER (*appel-*
Dec. 7. } *lants*) v. HUNTER (*respondent*).

Thames Watermen Act, 1859—"Worked
or navigated"—*Barges towed by Steamer.*

[For the report of the above case, see
47 Law J. Rep. M.C. 8.]

(2) 46 Law J. Rep. Q.B. 246.

[IN THE COMMON PLEAS DIVISION.]

1877.
Nov. 27, 28, }
29.

PARROTT v. WATTS.

Evidence—Hearsay—Declaration accompanying Act—Statement of Deceased Vendor—Identification of Property.

Statements of a deceased vendor, made at the time of sale to indicate the property sold, are, for the purpose of its identification, admissible in evidence.

Plaintiff claimed, under a surrender of copyhold lands in 1845, to be in possession of a certain piece of waste land within the manor of M., purchased by him from B., the then tenant in possession, who was also plaintiff's predecessor in title, and the surrenderor under the deed of surrender. In order to identify the land claimed with a parcel of land described in the deed of surrender as "the common piece on the Mind," the plaintiff stated that at the time of the purchase, B., since deceased, went over the land with him, and pointed out to him "the common piece on the Mind." On objection to this evidence,—

Held, that it was admissible, as a declaration accompanying and explaining an act.

This was an action of trespass, tried before Huddleston, B., and a special jury, at the Manchester Spring Assizes, 1877, when a verdict was found for the plaintiff, with 1s. damages.

The plaintiff, by his statement of claim, sued the defendant for trespassing over his land in search and pursuit of game. The defendant, in answer, alleged that the land in question was not the land of the plaintiff, but was the freehold of the defendant; and further alleged that the said land was part of the waste of the Royal Manor of Macclesfield, whereon the customary freeholders of the manor had a right to shoot, and that the defendant, as a customary freeholder of the manor, committed the alleged trespasses in exercise of his right of shooting.

At the trial, the plaintiff produced evidence to shew he was copyhold tenant of a farm of the Royal Manor of Macclesfield, called the Fox Bank Farm, which

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he had purchased from one Boothby, and had conveyed to him, by surrender and admittance, in 1845, and that in that surrender, as well as in all previous surrenders of the same farm which had taken place during the last 100 years, a parcel of land therein described as "the common piece on the Mind" had been included as part of the Fox Bank Farm, and passed with the conveyance of the same. The plaintiff asserted the piece of land in dispute to be "the common piece on the Mind," and, in order to identify it, stated that at the time of the surrender in 1845, Boothby, since deceased, the then surrenderor and the plaintiff's predecessor in title, went over the farm with him and pointed out to him "the common piece on the Mind." The plaintiff also proved various acts of ownership. In the result a verdict was found for the plaintiff, with 1*s.* damages.

A rule *nisi* for a new trial was afterwards obtained, on the ground, amongst others (1), that the learned Judge was wrong in admitting the plaintiff's evidence of what Boothby had told him.

McIntyre and *F. P. Tomlinson* shewed cause (on Nov. 27, 28) against the above rule, and citing *Sugden on Vendors*, p. 175, 11th ed., contended that the evidence was admissible, first, to shew what was parcel; secondly, as part of the transaction; thirdly, as a declaration against interest.

Ambrose and *E. Sutton* supported the above rule, and contended that the evidence was inadmissible as being hearsay.

The following judgments were (on Nov. 29) delivered as follows:—

GROVE, J.—The evidence of identification which was objected to, was to the effect that the person last seised, one Boothby since deceased, had, at the time of the purchase, named this piece to the

purchaser, who was the plaintiff in the present action. The evidence of the plaintiff was as follows:—"He (Boothby) pointed out to me the common piece on the Mind." The question for us to decide is whether that evidence was admissible, and we are of opinion it was.

The outgoing purchaser, or vendor, takes the purchaser over the land in order to shew him the parcels (certainly the usual mode of indicating the property) and in saying, this is the parcel named in the conveyance, he makes a statement which, to my mind, amounts to a declaration accompanying an act, such act being the delivery of the deed, and on that ground I hold the evidence to be admissible.

It also would be admissible as a derogation of the grant of the seller, and as Boothby was dead it would be a declaration of a deceased person, and moreover it would be the only evidence on which the purchaser could find out what property was meant to pass by the conveyance. True, as the defendant's counsel argued, it was hearsay evidence, but the only way in which notorious places are known is by hearsay evidence. No case was cited bearing on the question, but I know of no case by which in principle this evidence could not be admitted.

LINDLEY, J.—With regard to the evidence of identification adduced at the trial, I hold such evidence to be admissible. The plaintiff had bought this piece of the Mind in 1845 from Boothby, who was then in possession, and I apprehend that the fact of what he then bought is a fact material to the question at issue, and in that case what the vendor said, if accompanying and explaining the fact, is admissible; and moreover, as Boothby was dead, it might amount to a statement of a deceased person against his interest.

(1) The rule *nisi* was obtained on other grounds, but these, as well as so much of the arguments and the judgment of the Court as proceeded upon them, are omitted, as the only point on which it is considered necessary to report the case is the question of admissibility of evidence. }

Solicitors—Stephens & Stephens, agents for Parrott, May & Sons, Macclesfield, for plaintiff; Lewis & Sons, agents for Barclay & Henstock, Macclesfield, for defendant.

1877.
Nov. 9. }
Dec. 21. } HOLME v. BRUNSKILL AND
ANOTHER.*

Principal and Surety—Discharge of Surety by Alteration of Contract between Landlord and Tenant—New Tenancy.

The defendants, as sureties for A. B., in March, 1873, entered into a bond with the plaintiff, which, after reciting that the plaintiff had agreed to let from year to year a farm called R. to the said A. B., and a stock of 700 sheep which had been delivered to him, contained the condition for making the bond void if the said A. B. should at the determination of the said tenancy deliver up to the plaintiff the like number of sheep as were so delivered to him. The farm R. consisted of 234 acres, and was, with the sheep, let to A. B. at the yearly rental of 210*l.* On the 9th of November, 1875, the plaintiff gave A. B. a notice to quit, which was not a good notice, being a notice to quit "on the 10th of April, 1876, or at the expiration of his tenancy;" but afterwards, on the 8th of April, 1876, the plaintiff and A. B. agreed that a certain field consisting of seven acres should be given up to the plaintiff, and that the rent should be reduced by 10*l.* as from the 10th of April, 1876. In the following year the plaintiff gave a good notice to quit for the 10th of April, 1877, and at the expiration of this time the sheep, being deficient in number, the defendants were sued on their bond. At the trial the jury found that the new agreement between the plaintiff and the tenant on the 8th of April, 1876, did not make any material difference as regards the tenant's capacity to perform the condition in the bond:—

Held, by DENMAN, J., after reserving judgment for further consideration, that the alteration in the agreement between the plaintiff and A. B., by which the farm was thus diminished in the number of acres and the rent reduced, was such as necessarily to make it a new and different agreement, which, not having been assented to by the defendants, discharged them from their bond, notwithstanding such alteration did

not make any material difference in their risk.

Held, also, that the tenancy after the 10th of April, 1876, was a new tenancy, and that therefore on this ground also the defendants were not liable in this action.

The plaintiff was the owner of a farm and lands called Riggindale, in the county of Westmoreland, which consisted of 234 acres (partly arable and partly pasture land) and was let to one George Brunskill, as a yearly tenant, at the rent of 210*l.* a year.

The defendants and the said George Brunskill, on the 18th of March, 1873, entered into a bond with the plaintiff for the payment of 1,000*l.*, subject to a condition whereby after reciting that the plaintiff had agreed to let to the said George Brunskill from year to year the said farm and lands called Riggindale, and a stock of 700 heath-going sheep, as regards the arable lands from the 2nd of February, 1873, as regards the lands for pasturage and sheep from the 10th of April, 1873, and as regards the dwelling-house and buildings from Whitsuntide, 1873; and that the said sheep were delivered to the said George Brunskill on the 11th of April, 1868, and consisted of the numbers, species and quality mentioned in a schedule to the said bond, the condition was that "if the said George Brunskill, his heirs, executors or administrators did and should at the determination of the said tenancy deliver up unto the plaintiff, his heirs, executors, administrators or assigns, along with the said farm and premises, the like number, species and quality of good and sound sheep as were delivered to the said George Brunskill as aforesaid, and of the same stock or of the offspring, breed or produce thereof," &c., "and in case the said stock should at the determination of the said tenancy be reduced or deteriorated in numbers, quality or value, did and should pay to the plaintiff, his heirs," &c., "compensation for such reduction or deterioration to be ascertained" by certain persons and in manner therein mentioned, and "did and should, yearly and every year during the

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* Before Denman, J., on further consideration.

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said tenancy, pay or cause to be paid to the plaintiff, his executors," &c., "by way of rent or interest for the said sheep the sum of 35*l.*," then the said bond was to be void.

The action was brought against the defendants, as such sureties, for 148*l.* 18*s.* 1*d.*, damages claimed for breaches of the condition of the said bond in this, namely, that on the 28th of March, 1877, when it was alleged the said tenancy had been determined, the said George Brunskill did not deliver up to the plaintiff, along with the said farm and lands the like number, species and quality of sheep as were delivered to him as aforesaid, and further the said George Brunskill did not pay to the plaintiff compensation for the reduction and deterioration of the said stock of sheep which had been ascertained in the manner provided by the said condition to amount to 132*l.* 14*s.*, and further also he did not pay 16*l.* 4*s.* 1*d.*, rent due for the said sheep from the 10th of April, 1876.

The cause was tried before Denman, J., at Liverpool at the last Summer Assizes, when it appeared that on the 9th of November, 1875, the plaintiff gave George Brunskill a notice to quit "on the 10th of April, 1876, or at the expiration of his tenancy," and that afterwards, but before the 10th of April,—namely, on the 8th of April, 1876, the plaintiff and the said George Brunskill came to an agreement, by which a field called Bogfield, part of the farm lands, was given up to the plaintiff, who was to pay 10*l.* a year less rent from the 10th of April, 1876. The tenancy was in other respects on the same terms as before, and it continued until the 10th of April, 1877, when it ended by a good notice to quit given by the plaintiff in 1876.

For the defendants it was contended that by this last agreement the defendants were discharged from liability under their bond in respect of the breaches for which the action was brought.

The learned Judge took evidence, and left a question to the jury as to the materiality of the alteration in the original agreement, the nature and effect of which are fully stated in the judgment; and the jury, having found against the defendants

on the question of materiality which was so left to them, the learned Judge reserved judgment, and the matter was argued before him upon further consideration in the early part of the Michaelmas Sittings by

Aspinall and *C. Crompton*, for the defendants, and

Charles Russell and *Dickinson*, for the plaintiff.

In addition to the authorities mentioned in the judgment, the following were referred to during the argument—*The Croydon Commercial Gas Company v. Dickinson* (1) and *Skillett v. Fletcher* (2).

Cur. adv. vult.

DENMAN, J. (on Dec. 21) delivered the following judgment:—

This was an action brought by the plaintiff against the defendants to recover damages for non-performance of certain conditions of a bond by one George Brunskill, for whom the defendants were sureties. The bond, which was dated the 18th of March, 1873, after reciting that the plaintiff had agreed to let from year to year a farm and lands called *Riggindale* to the said George Brunskill, and a stock of 700 heath-going sheep which had been delivered to him, and that it had been agreed that George Brunskill and the defendants should enter into the said bond for the redelivery of the said sheep or their offspring in manner thereafter expressed, contained the condition that the bond should be void "if the said George Brunskill, his heirs, executors or administrators, did and should at the determination of the said tenancy deliver up to the plaintiff, his heirs, executors, administrators or assigns, along with the said farm and premises, the like number of species and quality of good and sound sheep as were delivered to the said George Brunskill as

(1) 45 Law J. Rep. C.P. 869; and on appeal, 46 Law J. Rep. C.P. 167; s. c. Law Rep. 1 C.P. Div. 707.

(2) 35 Law J. Rep. C.P. 164; s. c. Law Rep. 1 C.P. 217; and on appeal, 36 Law J. Rep. C.P. 206; s. c. Law Rep. 2 C.P. 169.

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aforsaid," &c., or pay a sum to be assessed by arbitration.

The statement of claim alleged that the tenancy was determined on the 28th of March, 1877; that George Brunskill did not deliver up to the plaintiff the like number, &c., of sheep as were delivered to him, nor pay the sum assessed in the manner provided by the bond.

The facts proved at the trial were as follows:—The plaintiff was owner of a farm called *Riggindale*, consisting of 234 acres partly of arable and partly of pasture land, which had been let in 1868 by the plaintiff's father to George Brunskill as tenant from year to year. George Brunskill continued to be tenant from year to year to the plaintiff after his father's death. Besides the 234 acres the letting included a right of pasturing sheep upon the commons and fells adjoining. On the 9th of November, 1875, the plaintiff had given George Brunskill a notice to quit "*on the 10th of April, 1876, or at the expiration of his tenancy.*" Before the 10th of April, 1876—viz., on the 8th, the parties met and agreed that a certain field of seven acres, called the Bogfield, should be given up to the plaintiff, and that George Brunskill should pay 10*l.* less rent for the future as from the 10th of April, 1876.

No other alteration was made in the terms of the original tenancy. On the 5th of October, 1876, the plaintiff gave George Brunskill a notice to quit for the 10th of April, 1877, which was admitted to be a good notice for that date. At the expiration of *this* tenancy the sheep were found to be deficient in number by 156, and the persons named in the bond assessed the amount payable in respect thereof and of some sheep rent unpaid at 148*l.* 18*s.* 1*d.*

Under these circumstances, it was contended for the defendants, at the trial, and afterwards upon the argument upon further consideration, that the arrangement made on the 8th of April, 1876, amounted to a fresh tenancy as from the 10th of April, 1876, and to a surrender by operation of law of the original tenancy; and that the plaintiff could not sue in respect of a deficiency of sheep arising at the expiration of the

new tenancy as not being the tenancy contemplated in the condition of the bond. It was also contended that even if the tenancy could be considered as the same, there had been such an alteration in the terms of the bargain between George Brunskill and the plaintiff, and such an alteration in the risk of the sureties, as to discharge the sureties from their obligation.

The plaintiff contended that the tenancy continued until the 10th of April, 1877, varied only in its terms in one particular, but still remaining the same tenancy; and that the alteration in the agreement between George Brunskill and the plaintiff was not one material to the liability of the defendants in respect of the breach sued for, or one increasing the risk of the sureties.

I thought it best to take evidence at the trial, and to leave the following question to the jury—"Whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties as regards the tenant's capacity to do the things mentioned in the condition of the bond, and for the breach of which the action was brought." The jury, having found this question in the negative, I reserved judgment, and heard the case fully argued on the 8th of November, and have now to pronounce judgment.

Before proceeding further it will be convenient to state shortly the nature and effect of the evidence upon the question which went to the jury.

It appeared that the Bogfield which was given up by the tenant in consideration of the abatement of 10*l.* of the total rent, was a field on which sheep did not usually pasture, and which produced hay of a coarse description, fit for cattle but not for sheep; and that the same farm in the hands of the preceding tenant had supported 1,100 sheep, but that tenant also held a field of eighteen or twenty acres, which George Brunskill did not hold at the time of the bond. On the other hand, it appeared that the Bogfield was occasionally used for pasturing sheep, to the extent of twenty-five sheep at a time being placed on it and an adjoining field of five acres, and that it was used

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(though there were other places which could be equally well used) during the lambing season.

Several witnesses for the plaintiff said that the giving up of the Bogfield would make no appreciable difference in the power of the land to support 700 sheep, the sheep being kept principally on the adjoining heaths and fells, and only brought on the farm in severe weather; but on cross-examination one or more of them admitted that it might make a little difference; that it would make an appreciable difference in the spring; that it might make a difference of perhaps fifteen; that it might compel the farmer to have to find hay elsewhere either for the cattle or the sheep; and so that he would make less profit out of the farm; and that though it might not have any effect as to the number of sheep, it might have rendered it necessary to give up a couple of cattle.

Upon the argument it was contended for the defendants that, taking the whole of the evidence together, it was clear that there was such an alteration as to be material to the ability of the tenant to perform the condition of the bond, and no evidence amounting to evidence for the jury to the contrary. It was also contended that the question of materiality is not for the jury, but that I was bound to hold that the alteration discharged the sureties without reference to its materiality, and that the tenancy, not being the same tenancy as that mentioned in the bond, the condition did not apply to it, nor were the defendants liable in respect of any omission to perform its terms.

In order to decide whether there is an alteration in the risk such as to discharge the surety, I think it is impossible to lay down an absolute rule that in all cases it is for the Judge to decide as matter of law whether the alteration is such as to have that effect or not. There must, I think, be many cases in which the Judge would have first to take the opinion of the jury upon the question whether the alteration was of such a character as to affect the surety in any way by *substantially or materially* altering the risk. By way of example, I think it impossible to

say that if in the present case the evidence were that the landlord and tenant had merely agreed that the landlord should have the exclusive use of a small shed on the premises during the continuance of the tenancy, such an agreement would necessarily discharge the surety. I think it would in such case be a question for the jury at the most whether the shed in question was of such importance—whether it played so material and substantial a part, if any part at all, in assisting the tenant in *keeping up the stock of sheep*, as that the depriving himself of it by allowing the use of it to the landlord, would render him less capable of performing the condition of the bond.

In the present case I think that if there had been no alteration in the contract between the plaintiff and the principal, and the tenancy had continued the same, it would have been a question for the jury upon the evidence whether the alteration in the terms of the tenancy, so far as the giving up of the Bogfield was concerned, did make any material difference in the risk in the sense above explained; and the jury having in effect found that it did not, I should not feel myself justified in holding the contrary as matter of law, and on that ground giving judgment for the defendants. The matter was one in its nature far more fit for the consideration of a special jury of the county of Cumberland than for a lawyer; and I cannot even say that I am dissatisfied with the view they took, though I might possibly, perhaps through ignorance of sheep farming, have come to a different conclusion upon the evidence if it had been for me to decide the question.

But as to the other contentions of the defendants, viz., that the contract between the plaintiff and the principal was a different contract, and that the tenancy was a new tenancy after the agreement of April, 1876, I am of opinion that on these grounds the sureties are not liable. I think it impossible to contend that the words "farm and lands called Riggindale," in the recital of the bond, meant anything except Riggindale farm as it then existed, viz., a farm of 234 acres, in-

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cluding the Bogfield; and though in one sense it would still be called Riggindale farm after the new agreement, I do not think that that fact would justify me in holding that I could reject that part of the recital of the bond as immaterial. On the contrary, I think that it was a material part of the bond, and that any such alteration of the holding as the diminution of the farm by seven acres, and a reduction of the rent by 10*l.*, however unprejudicial it may in fact have been to the surety, is on the face of it such an alteration in the agreement between the plaintiff and the principal as necessarily to make it a new and different agreement, which, unless assented to by the sureties, must discharge them from their obligation. *Whitcher v. Hall* (3) and *The North Western Railway Company v. Whinray* (4) are strong authorities to this effect; and I do not think that the case of *Sanderson v. Aston* (5) is at all in conflict with these decisions, for it only decides that where the sureties undertook generally to be responsible for the conduct of a person "as clerk and traveller," without any reference in the bond to the terms of the agreement as to the kind of notice which was to be given by either party, the mere substitution of an agreement for a one month's notice for an agreement for a three months' notice was not sufficient to discharge the sureties.

In the present case I think it impossible to say that the alteration was not such as to make a new agreement in a particular expressly referred to in and part of the condition of the bond, and therefore, within the authorities, to constitute an altered contract for the performance of which the sureties had given no undertaking.

I also think that the sureties are entitled to succeed, upon the ground that the tenancy which was contemplated by the bond ceased by the operation of the notice to quit given in November, 1875, followed by the fresh agreement in April,

1876. The only distinction which was pointed at between the present case and that of *Tayleur v. Wildin* (6), which was cited for the defendants (but for which distinction it would be precisely in point), is that in that case the notice which had been given was a good notice to quit on the proper day, given in proper time, whereas in the present case the notice was given too late to be a good notice for the day for which it gave notice to quit. But it would have been available as a notice to quit in the following year, and was not therefore wholly void or necessarily inoperative, and therefore it appears to me when the landlord and tenant agreed together that, as from the day mentioned in that notice as the day for quitting, the rent should be reduced and a field given up by the tenant, the tenancy became a new tenancy as much or even more clearly than was the case in *Tayleur v. Wildin* (6). I am therefore of opinion that the defendants were not responsible for the deficiency of sheep which existed at the expiration of this new tenancy or for the non-payment of the amount assessed by the arbitrators in respect of that deficiency. I therefore give judgment for the defendants.

Judgment for the defendants.

Solicitors—Johnston & Harrison, agents for Harrison & Little, Penrith, for plaintiff; J. L. Morris, agent for Arnison & Co., Penrith, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1877. } CAMPBELL (*appellant*) v.
Nov. 23. } STRANGEWAYS (*respondent*).

License—Keeping Dog without—License subsequently Obtained on same Day—Fraction of a Day—30 Vict. c. 5. ss. 5, 8.

[For the report of the above case, see 47 Law J. Rep. M.C. 6.]

(3) 5 B. & C. 269.

(4) 10 Exch. Rep. 77; s. c. 23 Law J. Rep. Exch. 261.

(5) 42 Law J. Rep. Exch. 64; s. c. Law Rep. 8 Exch. 73.

(6) 37 Law J. Rep. Exch. 173; s. c. Law Rep. 3 Exch. 303.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1877. }
 Nov. 28. } ANGELL v. BADDELEY.*

Sheriff—Interpleader—Return to Writ of fi. fa.—Side-bar Rule—Right to Immediate Return pending Interpleader Issue.

Pending an interpleader issue as to the property in goods seized by a sheriff under a writ of fi. fa., the execution creditor has not an absolute right to an immediate return of the writ.

A sheriff having seized certain goods under a writ of fi. fa., three different persons put in claims to separate portions of the goods. The sheriff interpleaded, and three separate interpleader orders were made. One of the claimants in pursuance of the order paid into Court the value of the goods claimed by him, to an amount sufficient to answer the debt. The other two claimants disobeyed the order; but the sheriff, instead of selling the goods claimed by them, abandoned possession of the whole. The plaintiff, thereupon, obtained a side-bar rule calling on the sheriff to return the writ:—Held, affirming the judgment of the Queen's Bench Division, that the plaintiff had no right to such return, and that the side-bar rule ought to be set aside.

This was an appeal from an interlocutory order of the Queen's Bench Division.

The plaintiff obtained judgment against the defendant for 38*l.*, and instructed the Sheriff of Middlesex to levy an execution upon the goods, issuing a writ of fi. fa. to him for the purpose.

The sheriff entered, and thereupon three persons laid claim to their goods. A Mr. Ramus claimed the goods on the first floor, under a bill of sale, and two other persons, Hunt and Baddeley, lodgers, and relations of the defendant, claimed those on the ground floor and second floor respectively as their own property.

The sheriff interpleaded, and an interpleader summons was heard before Lush, J., on the 28th of September, 1877. The goods were valued by the sheriff at 105*l.*, those claimed by Mr.

Ramus at 45*l.*, and those claimed by Hunt and Baddeley at 40*l.* and 20*l.* respectively.

Lush, J., made three separate interpleader orders in the usual form, ordering the claimants to pay into Court respectively the sums of 45*l.*, 40*l.*, and 20*l.*, or to find security for the same amounts to the satisfaction of the master within seven days, and that on such payment the sheriff should withdraw from the possession of the goods seized under the writ, and further ordering that unless the said payments should be made or securities given, the sheriff should proceed to sell the goods and pay the amount realised into Court, and that the parties should proceed to the trial of an interpleader issue, such issue to be prepared and delivered by the plaintiff within ten days, and returned by the defendant within seven days; the issue to be tried at the next sittings in Middlesex.

Ramus paid the sum of 45*l.* into Court within the seven days.

Hunt and Baddeley took out summonses for further time for their payment, and the plaintiff and the sheriff consented to allow them another week on payment by them of eleven days' possession money and 6*s.* 8*d.* costs to the sheriff.

The claimants drew up no orders on this consent, but on the 12th of October applied for a further extension of time.

The summons was unavoidably adjourned till the 15th, when the claimants gave notice of withdrawal of their respective summonses.

The sheriff was still in possession of the goods claimed by Hunt and Baddeley, and the plaintiff now requested him to sell them. The sheriff, however, did not comply with this request, and shortly afterwards the plaintiff found that he had withdrawn from possession.

Thereupon the plaintiff, on the 19th of October, obtained a side-bar rule calling upon the sheriff to make a return to the writ of fi. fa. within four days.

The sheriff then applied for and obtained from Lopes, J., in chambers an order setting aside the side-bar rule with costs.

The order of Lopes, J., was affirmed on appeal by the Queen's Bench Division,

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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the Court consisting of the Lord Chief Justice and Mr. Justice Mellor.

Against this decision the defendant now appealed.

G. E. Lyon, for the defendant.—The claimants Hunt and Baddeley have not complied with the order of Lush, J., and the sheriff consequently had no right to withdraw. If Ramus succeeds in his interpleader, the plaintiff will have no remedy, except by bringing an action against the sheriff, and we do not wish to have that trouble and expense.

[BRAWWELL, L.J.—But how could a return to the writ help you?]

We wish to know authoritatively what has been done. We do not want the delay of an action.

[BRETT, L.J.—In an action you could not have costs as between solicitor and client.]

The sheriff as a general rule is bound to return the writ on request, see *Watson on Sheriffs*, Ch. V., sect. iii., and the interpleader issue does not afford a reason why he should not do so. We cannot proceed against the sheriff till he has been ruled to return the writ.—See *Morland v. Leigh* (1), *Chitty's Practice*, p. 670. The sheriff has not complied with the order as he was bound to do—*Cleaver v. Fisher* (2). He is therefore now in the wrong, and the execution creditor ought not to be forced to wait for his remedy. The sheriff may die or go out of office before the interpleader is decided, and then we should lose our remedy.

[BRAWWELL, L.J.—Is not your proper remedy to attach the sheriff for contempt?]

That will do us no good. We want our rights, and not to punish the sheriff.

Cock, for the sheriff.—The sheriff has only done what has been the usual practice for many years. If the sheriff is satisfied that Ramus's claim is not a substantial one, and that the money paid into Court by him will be available to satisfy the debt, he may in his discretion withdraw from possession of the other goods,

and the plaintiff has no right to harass him with an application like the present till it is shewn that he is wrong. If it turns out that the sheriff has made a mistake, the defendant will be in precisely the same position after the interpleader has been tried as if the sheriff now made a return.

[BRETT, L.J.—Why should not the sheriff make a return?]

Because he cannot say *fieri feci* till he knows whether the goods claimed by Ramus are available or not. Neither *fieri feci* nor *nulla bona* would be a true return at present, and a return of the facts would be a bad return.

[BRAWWELL, L.J.—That would appear to be so from the cases of *De Moranda v. Dunkin* (3) and *Hamilton v. Dalziel* (4), where the sheriff was held not bound to return a writ of *capias* where a special bailiff is appointed. But why should not the return be postponed?]

It would be of no use. It is the invariable practice to set it aside, and we contend that the discretion of the Court below was properly exercised in doing so.

Lyon replied.

BRAWWELL, L.J.—I think there is no doubt that this appeal ought to be dismissed.

I am quite certain that if the side-bar rule were a matter of right, and the plaintiff insisted on obtaining it, the sensible thing would have been for the Court to have enlarged the time for making the return till after the issue had been tried. The return before that time would be quite unprofitable and useless if the sheriff were to return the true state of facts. But I am of opinion that the side-bar rule was not a matter of right, and the learned Judge had a discretion to set it aside if he thought it had been improperly taken out.

Let us see how the case stood. Certain goods were seized as the goods of the debtor. Then three different claimants come forward, and three interpleader orders are made in the usual form, to the effect that on payment into Court of

(1) 1 Stark. 389.

(2) 2 Dowl. P.C. (n.s.) 292.

(3) 4 Term Rep. 119.

(4) 2 W. Black. 952.

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certain sums by the respective owners the sheriff is to withdraw, but if they fail to pay the money in, he is to sell the goods. Now, here, I am almost inclined to think that the sheriff has misinterpreted the order. It almost looks as if he had fallen into a wonderful mistake, namely, that the order permits him, if enough money to satisfy the debt is paid into Court under one interpleader order, to withdraw as to all. But I do not think a gentleman with the experience of the sheriff of Middlesex can really have thought so. However, one of the debtors has paid in a sufficient sum to satisfy the claim, and the sheriff has withdrawn in the other cases without selling. The consequence is that if the claimant who has paid the money into Court succeeds in the issue, the execution creditor is entitled to say to the sheriff, "Where are the goods you were ordered to sell, or the proceeds of them?" And if the sheriff cannot give a satisfactory answer he is liable. He may then be called upon to make a return to the writ, and if he says "*nulla bona*" he is liable for not having kept the goods or sold them; or if he says "*feri feci*," the answer is, "then hand over the money." Therefore in the event of Ramus succeeding, the plaintiff will have a sufficient remedy against the sheriff. If Ramus fails, the money he has paid in is sufficient to satisfy the claims and the sheriff will have proved to be in the right. Therefore whether Ramus succeeds or not the plaintiff is adequately protected. But the plaintiff says, and says justly, "If Ramus succeeds against me, instead of having the money in Court and a certain present remedy, I shall only have a right of action against the sheriff, which is not so good a thing." To that objection there are two answers. In the first place, I think that if the plaintiff were likely to be prejudiced by the action of the sheriff he should at once go to the Court or a Judge and claim the benefit of the interpleader order, and call upon the sheriff either to sell the goods or to pay the money into Court. That seems to me to be the plaintiff's true remedy. But I am not by any means sure whether, if I were asked to grant the order, I would do so, and for a very cogent reason. Suppose a

debt for about 40*l.* The sheriff enters, and finds 500*l.* worth of goods, and seizes one chattel in the name of the whole. Then it turns out there are twenty claimants to the goods, each claiming 25*l.* worth. What then is the sheriff to do? If he sells the goods of A. under the interpleader he may be wrong. So of B., and so of all the twenty claimants. Then are all the goods to be sold in order that the plaintiff may be sure to have money in Court to answer the debt? I am by no means sure that if the sheriff sold the whole 500*l.* worth to satisfy the debt of 40*l.* he would not have got out of one difficulty only to get into another, since he might be liable to an action for an excessive levy. I think in such a case the sheriff ought to be encouraged in the exercise of his discretion. In these cases sheriffs, and those whom they employ, are not, as a rule, unduly reluctant to sell, and I think that it is not a bad thing that the Courts should encourage the sheriff in this direction, and say to him, "Do not sell more than you are obliged to sell. If you can trust to the unfounded nature of a claim, or to your ability to make a second seizure, and choose to run the risk, you can do so without being called to account before you are proved to have been wrong." And if we look at the present case we shall see that at present the plaintiff has suffered no wrong, and the sheriff has done only what he ought to be encouraged to do.

It is said that the sheriff could make a return to the writ by telling the truth. And no doubt he could, but many such returns have been quashed for insufficiency. Suppose he returns thus: "I have seized certain goods, but whether of the defendant's I do not know." That would be the kind of return he would have to make here. "I have seized certain goods; one Ramus has claimed them. There has been an interpleader order, and Ramus has paid money into Court to abide the event." That would be a good return so far; but then he would have to go on: "I have also seized certain other goods, but whether of the defendant's or not I cannot say; but there has been an interpleader order directing the goods to be sold unless certain sums were paid

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into Court by the claimants. The claimants have not paid the money into Court, and I have not sold the goods." What would happen then? Would the return be quashed as insufficient, or could an action be maintained against the sheriff for not selling? I think it would be a bad return, being neither *nulla bona* nor *feri feci*. If it is said that the return gives the plaintiff a right to direct the sheriff to sell—as by a writ of "*venditioni exponas*" (which I don't think is the case), the answer is that he has that right already. It seems to me, therefore, that the side-bar rule ought not to have been granted. It is of no use whatever; it occasions great trouble and expense, and does not further the plaintiff's case in the slightest degree. I therefore think that this appeal ought to be dismissed, and that Mr. Justice Lopes and the Court below were perfectly right.

BRETT, L.J.—I am not prepared to say that the sheriff acted rightly in this case, nor that he had any discretion to act as he did after the interpleader order, though before the interpleader order he undoubtedly had. But after the sheriff has applied for an interpleader order with regard to each claimant, and has obtained protection for himself on certain terms, he is bound to obey the interpleader order; and I am inclined to think that when the money ordered to be paid by any claimant is not paid, the sheriff is bound to sell and to pay the money into Court, and that he might be attached for disobedience to the order. But it is not necessary to decide that point. The only ground on which I can agree with the decision in question on this appeal is that Mr. Lyon has not made out an absolute right to an immediate return to the writ. I do not think Mr. Lyon has made that out, and if not it seems to me that it follows that the Court have a discretion whether they will set aside the side-bar rule or not.

Now the true test whether the plaintiff has an absolute right to the side-bar rule or not is this—Could an immediate return be of any use to the person insisting on it? No present answer that the sheriff could make would be of any use what-

ever. It would be a most futile return to make, and therefore I am of opinion that this judgment is right, and ought to be affirmed.

COTTON, L.J.—I agree that this appeal ought to be dismissed, for the reasons given by my brother Brett. I think there must be a discretion in the Court as to whether or no the sheriff shall be ordered to make a return, and in the absence of any absolute immediate right to call for a return, the Court have discretion to order whether the side-bar rule shall stand or not. The point which weighs with me as to the right to a return is that I cannot see how the plaintiff could be benefited by it. He cannot bring his action till after the interpleader issue is determined. His only present relief would be by an application to enforce the directions of the interpleader order. I am not inclined to say that the sheriff had any right to give up the goods in the present case, but it is not necessary to decide that point, as the only relief to which the plaintiff is entitled is to apply to the Court to enforce the original order. In that case the sheriff would have to answer the application, and the Court would have a discretion which they might exercise either way; but that is the only form of relief to which the plaintiff is entitled.

Appeal dismissed.

Solicitors—F. J. Angell, for appellant; Maynard, for the sheriff.

[IN THE QUEEN'S BENCH DIVISION.]

1877. { LESLIE AND OTHERS (appellants) v. FITZPATRICK (respondent).
Nov. 28. {
Dec. 1. {

Infant—Master and Servant—Contract of Service—Employer's and Workman's Act, 1875 (38 & 39 Vict. c. 90), s. 4.

[For the report of the above case, see 47 Law J. Rep. M.C. 22.]

[IN THE COURT OF APPEAL.]
(Appeal from the Queen's Bench Division.)

1877. }
Nov. 30. }
Dec. 6. }

WARD v. HOBBS.*

False Representation—Sale of Animals in Public Market—Implied Representation of Freedom from Infectious Disease—32 & 33 Vict. c. 70 (Contagious Diseases (Animals) Act), s. 57.

The defendant sent pigs, infected with a contagious disease, for sale to a public market (which is an offence under section 57 of the Contagious Diseases (Animals) Act, 1869). The plaintiff bought the pigs, which infected other pigs in his possession, causing him great loss and expense. In an action for breach of warranty and false representation,—Held (reversing the decision of the Queen's Bench Division), that the mere act of exposing the pigs for sale in a public market was no evidence of an implied representation by the defendant that they were free from infection, or that he did not know them to be infected.

This was an appeal from a decision of the Queen's Bench Division, reported 46 Law J. Rep. Q.B. 473, where the facts are fully stated.

The action was for breach of warranty and false representation, on the sale by the defendant to the plaintiff, at a public market, of certain pigs, which were suffering at the time of sale from typhoid fever.

The plaintiff claimed damages for the loss of the pigs sold, and of others which were infected by them; and also for the expense of endeavouring to cure them, and for the loss of the use of 300 acres of stubble which were rendered temporarily useless by them.

The conditions of sale contained the following provisions:—

"The lots, with all faults and errors of description (if any), to be paid for and removed at the buyer's expense immediately after the sale."

"No warranty will be given by the auctioneer with any lot; and as the lots

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue."

Brett, L.J., before whom the case was tried, ruled that there was no warranty.

The jury found that the defendant knew at the time of the sale that the pigs were suffering from a disease which rendered them worthless, and a verdict was entered for the plaintiff for 66*l.* 19*s.*

Judgment was stayed; and on motion, pursuant to leave reserved, to enter judgment for the defendant, on the ground that there was no evidence of false representation, the Divisional Court gave judgment for the plaintiff, holding that the act of the defendant in sending the pigs for sale to a public market, from which animals infected with a contagious disease are excluded by law (1), was an implied representation that the pigs were not so infected to his knowledge.

Against this decision the defendant now appealed.

J. J. Powell and *H. D. Greene*, for the appellant.—The mere fact that the defendant sold the pigs in the market cannot be regarded as evidence of a representation that they were not diseased to his knowledge, especially considering that he guarded himself by the condition that the pigs were sold with all faults. The plaintiff will rely on the case of *Bodger v. Nicholls* (2). But in that case there was evidence that the defendant had actually represented the beast sold as a "healthy cow;" and what is there said by *Blackburn, J.*, in accordance with the plain-

(1) By 32 & 33 Vict. c. 70. s. 57, "If any person exposes in a market, or fair, or other public place where horses or animals are commonly exposed for sale, or exposes for sale in any sale-yard, whether public or private, or places in a lair, or other place adjacent to, or connected with any market or fair, or where horses or animals are commonly placed before exposure for sale he shall be deemed guilty of an offence against this Act, unless he shows to the satisfaction of the justices, before whom he is charged, that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge."

(2) 28 Law Times, N.S. 441.

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tiff's contention here, is merely an *obiter dictum*. The contract expressed between the parties is this: "These pigs may have faults; I do not say they have not. I sell them as they are." Into this the plaintiffs seek to import a further implied contract.

[BRETT, L.J.—No; they say there is an implied representation. BRAMWELL, L.J.—The contention is that to expose these pigs in the market is the same as saying, "These pigs have no infectious disease that I know of."]

But then there is an express condition which negatives such an implication. The only form in which the plaintiff can bring his action is "deceit," for there is no warranty, and the breach of statutory duty would not give a cause of action. Lush, J., it is true, says that it is like exposing a glandered horse for sale, which is an indictable offence—see *The Queen v. Henson* (3). But that is because human beings may be affected with glanders, and the exposing of a glandered horse for sale is indictable as a nuisance. If the action is for deceit, it fails because there is no representation. The fallacy which runs through the contrary assumption is a confusion between a representation by a man that he is innocent and the presumption of law that he is innocent. The presumption of law is based upon an inference, which no doubt the people in the market may probably draw. But that is not a representation. In all cases of false representation something has been either said or done for the purpose of inducing a belief, as in the case of a false pretence by a cheque, by wearing a cap and gown at Oxford, &c. If there was a representation, it must be shewn to be false to the defendant's knowledge, and it must also be shewn that the plaintiff was influenced by the representation. There is no evidence to support either of these conclusions in the present case.

H. Matthews and Bros., for the plaintiffs.—There was evidence in this case that the defendant knew that the pigs were suffering from a contagious disease. If he sent pigs to market in such a con-

dition *scienter*, that is in itself a complete cause of action, without any representation as to the condition of the pigs—*Cooke v. Waring* (4), *Smith v. Greene* (5).

[COTTON, L.J.—In *Smith v. Greene* (5) the question was one of damages in an action on a warranty. BRETT, L.J.—*Cook v. Waring* (4) was a different case. There the plaintiff did not take the cattle voluntarily.]

In the present case the doctrine of *Fletcher v. Rylands* (6) applies. The diseased cattle are like a wild beast to be kept in by the owner, on pain of damages.

[BRETT, L.J.—But these are not the points that were raised at the trial.]

As to the point really discussed, if a man sends cattle to a place to which it is illegal to send them when in a state of disease, that is some evidence that he intended to represent the cattle as not being diseased to his knowledge. It must be taken that the people attending the market must have inferred that the defendant would not have sent the pigs to market if he knew that they were diseased, and that the defendant knew they would naturally draw that inference. There are no cases in point except *Bodger v. Nichols* (2).

[BRETT, L.J.—There is the case of *Schneider v. Heath* (7), in which a rotten ship was sold "with all faults," and the purchaser was not permitted to set aside the sale for fraud.]

But in that case there was no statutory duty imposed on the vendor. Here the implication arises out of the statute.

[BRETT, L.J.—You say the fact of the act of the vendor being a crime makes the difference?]

It is not conclusive that there has been a representation, but it is evidence to go to the jury. The question is whether a certain inference of fact can be drawn by the jury. It is clear that conduct may amount to a representation. The mere

(4) 2 Hurl. & C. 322; s. c. 32 Law J. Rep. Exch. 262.

(5) 45 Law J. Rep. C.P. 28; s. c. Law Rep. 1 C.P.D. 92.

(6) 37 Law J. Rep. Exch. 161; s. c. Law Rep. 3 H.L. 330.

(7) 3 Campb. 506.

(3) Dears. C.C. 24.

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act of sale has been held a representation of title, in *Eichholtz v. Bannister* (8)—which qualified the decision in *Morley v. Attenborough* (9),—because the natural inference from the sale is that the vendor has title. Here the natural inference from the defendant sending the pigs to market is that he does not know that they have a contagious disease. If not, he would be committing a crime, and there is always a presumption of law that a man is innocent rather than guilty.

[COTTON, L.J.—Assuming that the inference is reasonable, does that justify us in holding that the defendant is making a representation?]

Yes, when coupled with the further proposition that the defendant knew what inference people would draw.

[BRETT, L.J.—And also that unless they drew that inference, no one would buy the pigs.]

H. D. Greene in reply.—The criminal law has nothing to do with this case. The inference that a man is innocent is purely a rule of the criminal law, and has nothing to do with the question of representation. On the opposite hypothesis every man who does anything must be held to make a representation that he is not acting illegally. But the inference drawn by one man is a different thing from a representation made by another. If there is no representation, there is no cause of action. In *Hill v. Balls* (10) a glandered horse was brought by the defendant to a repository for sale. The plaintiff bought it, and put it among other horses which it infected; but it was held that there was no cause of action. Here if anywhere, the rule of *caveat emptor* applies. There was no warranty. The conditions invited inspection, and there was no duty on the part of the defendant to disclose the true state of the pigs.

Cur. adv. vult.

The following judgments were delivered on the 6th of December:—

(8) 17 Q.B. Rep. N.S. 708; s. c. 34 Law J. Rep. C.P. 105.

(9) 3 Exch. Rep. 500; s. c. 18 Law J. Rep. Exch. 148.

(10) 2 Hurl. & N. 299; s. c. 27 Law J. Rep. Exch. 45.

BRAMWELL, L.J.—As to one of the questions raised in this case I cannot say that I have not had a great deal of doubt, or that I am entirely free from it now.

The facts that gave rise to the matter which we have to determine are stated with admirable clearness by my brother Lush in his judgment in the Court below. They amount to this:—The plaintiff says, "I bought a number of pigs at a public market, which had been exposed by you, the defendant, there. I admit I bought them under conditions of sale which said there was no warranty, and that inasmuch as I might inspect them no allowance would be made. (I forget the exact words) for any faults in them." "But," says the plaintiff, "I was induced to enter into that contract, which no doubt does not give me any such right as a warranty would give, by fraudulent representation and fraudulent conduct on your part, which led me to understand that the pigs were not infected by an infectious disease to your knowledge, whereas in truth they were to your knowledge infected with a contagious disease, the consequence of which was that they were of much less value than they would have been, and infected other pigs of mine."

Now let me assume (though I have considerable misgivings about it) that the defendant knew that the pigs were infected with a contagious disease, in other words, that they were to his knowledge infected with a contagious disease. Then, if so, the only remaining question would be whether he fraudulently, knowing that to be the case, represented the contrary, (in the word fraudulently are included these words, "with a view to defraud the plaintiff or others,") and whether the plaintiff was defrauded and deceived thereby.

No doubt there is evidence that the defendant knew, as I said before, that they were infected with a contagious disease. The only evidence by which it was sought to make out that he fraudulently represented that they were not so to his knowledge was this—that he exposed them for sale in a public market. Then this reasoning is used. It is unlawful to expose pigs affected with a contagious disease in a public market; and you, the

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defendant, must be taken to have known that. Very likely he did, and there is probably evidence from which the jury might find that he did know it. I think it may be taken that he did know it. Then it is said, "You must be taken, therefore, by the very fact of exposing pigs for sale in a public market, to affirm that to your knowledge they were not affected with contagious disease." Then when fault is found with the expression that the man "must be taken to affirm" something, when the man is affirming nothing, the expression is altered (though perhaps not substantially changed) into this: "Your conduct was such as would reasonably cause anybody to believe that you were saying or representing that you did not know these pigs were infected with a contagious disease." Then when it is objected to that mode of putting it, that an action of this sort could only be maintained on the ground of fraud, it is said it matters little what your intention was, if you knew that your conduct would deceive other people, and that they would think that you were asserting in effect that those pigs were not infected with a contagious disease. That is fraud on your part, because you must expect people will draw a natural and proper conclusion, and therefore you must have known, or there was evidence (as Mr. Matthews very adroitly put it, without laying down as a proposition of law that the man was liable)—there was evidence that you knew that the pigs were infected with disease, and in that case you ought not to have brought them into a public market. Then it is said there is evidence, therefore, that the defendant must have known that people would infer that he was not knowingly committing an illegality, and consequently there is evidence to shew that his conduct was likely to deceive people into the belief that to his knowledge these pigs were not infected with disease. Mr. Matthews limited his argument to the case of pigs in a public market, but if his argument is well founded the law must be that in all cases a man furnishes evidence as between himself and any individual who is affected by what he is doing, that he is doing nothing unlaw-

ful. That is the general proposition which Mr. Matthews calls on us to affirm. For my own part I have the greatest difficulty in doing so. And I have come to the conclusion that I ought not to do so. We must look at the abstract proposition that he endeavoured to set up. If the fact was that the defendant did know that his pigs were infected with a contagious disease, his conduct is so desperately bad—wicked I suppose one may call it—(not irreligious but immoral, and an injury to his neighbours and all mankind), that one would draw almost any conclusion against him; but looking at the abstract proposition for which Mr. Matthews contended, and for which he must contend, I think it cannot be maintained; namely, that when a man does anything he furnishes evidence that he is not, to his knowledge, doing anything illegal. I think that is not the law. I think that the observation made by Mr. Greene is a well-founded one, that a man may conduct himself in such a way that he must know that a certain conclusion is very likely to be drawn from it, but if he is not conducting himself in that way with a view to that conclusion, it is the fault of the person who draws the conclusion and acts upon it instead of taking the trouble of getting a direct representation from the man who sells; and not the fault of the man who so conducts himself. Or to put it in more precise language, before a man can complain of a fraud, he must shew that there is something done intentionally to deceive him as an individual or as one of a class or as one of the public, and it is not enough that he shews certain conduct which, without that view, or intent, may have that consequence.

Now, the case of a man taking infected pigs to the market is not a deceit on the public. He is risking a breach of the law and its consequences, but he is not making a representation of any sort or kind. Although it would be very desirable to punish a person misconducting himself like this defendant, I think one must look at the general principle to see how a man who thought himself innocent in the matter would feel himself affected by such a rule as Mr. Matthews contended

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for. A man sends pigs or cattle or anything else to market, he thinks there is nothing the matter with them, but to his astonishment is charged with making a representation, fraudulent and false to his knowledge. Of course it would be said that if it was not fraudulent and false to his knowledge, the tribunal ought to decide in his favour, but I think the man has a right to complain that he should be drawn into such a controversy at all. I can understand that it may happen to anyone who has a few sheep to sell, and sends them to market as innocently as possible, that it may be said, "Your sheep have got the scab." "I did not know that," says the owner of the sheep. "Yes," says the other man, "you did; and I shall bring witnesses to prove you did, and to prove that you are a rogue." The man would say, "I very much object to that. If you want to make out that I made a false representation to you, why did you not come to me and ask me about the matter on which you have speculated? I object to being drawn into this controversy." Upon these grounds, with all respect to the opinions that have been entertained, I think there is no evidence of such a representation as is necessary to involve the defendant in this case.

I cannot help thinking there is something analogous to the case of an extravagant person, who, for the sake of display, wears a splendid ring and drives a brilliant britzka at Brighton for a week. He goes into a tailor's, who draws the conclusion that he must be a rich man. He might say no man in his senses would dress in this manner and drive about in this way unless he had a great deal of property. The tailor readily supplies him upon the strength of the appearance he presented. Then when he does not pay he says, "You are a fraudulent man. You conducted yourself in such a way that I was legitimately led to the conclusion that I could trust you, and I trusted you accordingly. Now I find that the representations as to what I thought you were making are wholly false, and you are a man without money and cannot pay." I do not think people have a right to draw a conclusion from

conduct that is neither directed to them as individuals, nor as members of a class, nor as part of the public, for the purpose of their acting upon it. I think if this was the only question in the case we ought to come to the conclusion that the defendant was entitled to our judgment. I repeat, and I cannot help repeating, and it would be uncandid to deny, that one would be desirous of punishing this man; but I do not think we can do so. Possibly the other opinion is the right one, and I have had considerable doubt about it, and I am not free from doubt now; but there is this to be said in favour or in extenuation of the opinion I am now pronouncing, that the public are protected in cases of this sort, because the man for committing an act like this is subject to a fine. I cannot help thinking that anyone who has pigs or cattle sent into market, or who has pigs or cattle travelling along the road in such a state as to injure others which may be in the market or travelling along the road, would be liable to have an action brought against him. I should think so. It would be a violation of duty on his part, which would be the unlawful act which would have caused the damage. But I do not think that would help the plaintiff in the way suggested by Mr. Matthews, namely, that if he could not recover for the defective state of the pigs themselves, he could recover for the mischief they had done to the plaintiff's other pigs, because the sending the pigs to market is not the immediate cause of the mischief. The immediate cause is the plaintiff buying them and taking them home; and if he cannot complain of the sale neither can he complain of the consequences of it.

But there is another point in this case. It was argued before us, as I said before, on the ground that the defendant was a fraudulent person, that he had dishonestly affirmed a thing which was false to his knowledge, that is to say he dishonestly affirmed that these pigs were not infected with a contagious disease to his knowledge. Now it is a remarkable thing that in the statement of claim, there is no such averment. The third paragraph of the statement of claim says this—"The de-

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defendant either knowingly or having good reason to believe" (that will not do, for a man is not a fraudulent man because he believes one thing when he ought to believe another. Most people are very prone to believe that their own pigs are all they ought to be), "having good reason to believe that the pigs were suffering from an infectious disease, exposed the same for sale." There is no charge of fraud there. There is no charge that either the defendant knew that he was representing an untruth, if he was representing it, nor any charge that it was done with the intent to deceive anybody, nor any charge that it did deceive the plaintiff. According to the statement of claim, the plaintiff says he has a right to recover, however honest the defendant may have been. I do not find that any question was left to the jury or any fact found by them as to there being any fraud in the defendant or in what he did, unless the knowledge itself is fraud. My brother Lush says in his judgment, "There is nothing here which suggests to the buyer that the pigs were the remnant of a diseased herd, many of which had died; nothing inconsistent with the representation implied by the act of bringing them to the market." If this implied representation were put into words, together with the condition, it would be no more in effect than this, "I believe them to be free from infection, but I will not warrant that they are, and the buyer must take all risks." I do not find, therefore, that my brother Lush puts his decision on the ground that the fraud had been intended, and that the purchase was its natural effect. In the result, therefore, on both these grounds the defendant is entitled to our judgment.

BRETT, L.J.—I have come to the same conclusion, but with the utmost reluctance. If I thought that, according to law, such conduct as that of the defendant in this case could make him liable, I should be most happy so to hold; but I have come to the conclusion that there was no evidence of any fraudulent misrepresentation for which an action can be maintained, on the ground that

there was no evidence that any representation was ever made by the defendant at all.

The case was originally tried before me; and, as my Lord has observed, in the statement of claim there is no allegation of fraud. Moreover, there is no allegation of any representation made at all, and there is no allegation, therefore, of any false representation. At the trial I felt myself considerably hampered by this form of the statement of claim.

I did not think it right, for reasons that I have often given, to amend this statement of claim by inserting a charge of fraud which the parties themselves had not made. I therefore had a considerable misgiving whether there was any cause of action disclosed, but I left such questions as I thought I was entitled to leave, under the circumstances, to the jury, in order that the Court might afterwards consider whether there was any cause of action. Having left those questions, as one often does, in that way to the jury, I gave leave to the defendant to move if there was no evidence to go to the jury. The defendant took advantage of that leave, and it seems to me (and I found my judgment upon that assumption) that the defendant in so acting upon that leave, gave the go-by to the form of the pleadings altogether. The question, therefore, raised in the Court below, and the question before us, is whether, without regard to the pleadings at all, there is evidence of any cause of action which the plaintiff might maintain against the defendant.

The injury of which the plaintiff really complains is this: that he bought from the defendant pigs which were, by reason of disease in themselves, entirely valueless; and, moreover, by reason of the disease in themselves were dangerous to other pigs, with which they must almost necessarily be placed in contact. That is the ground of complaint. The plaintiff has to make out that the law gives him a remedy for that injury.

Now the relation between the plaintiff and the defendant was that of vendor and purchaser, and there was no other relation. The pigs were sent by the defen

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dant to a market, and they were put up for sale, not only without a warranty, but with an express notice that they were to be sold "with all faults." The pigs were afflicted with a disease which did, in fact, render them valueless, and which did make them dangerous to other pigs with which they must almost necessarily come into contact. I think there was evidence which would have entirely justified the jury in finding that the defendant knew of that disease in the pigs, that he knew that the pigs, by reason of that disease, were themselves valueless, and that he knew that those pigs would almost necessarily be put in contiguity with other pigs, and that they would then infect other pigs. But the defendant made no express representation with regard to the pigs other than this—that he would not warrant them, and that they must be sold with all faults. Under those circumstances it is obvious to every one that there was no warranty, and that the plaintiff cannot maintain an action for breach of contract.

Under what form of legal remedy then is it possible for him to maintain his action, if there was no breach of contract? I apprehend where the transaction is simply between a vendor and purchaser, not between a manufacturer and purchaser, the only formula under which the plaintiff can maintain his action for such an injury is that the defendant made representations to him which were misrepresentations and fraudulent by reason of the defendant knowing at the time he made them that they are untrue, and making them in order to deceive the plaintiff. The plaintiff must bring this case, if he can, within that formula. That the defendant made any express representation as to the condition or quality of the pigs must be denied. It is manifest that he did not. Then the question is reduced to this—did he, by his conduct, make any representation with regard to the quality or condition of these pigs? If these pigs had not been sent to a market, and if there had been no crime in what the defendant did, and if the only defect relied on by the plaintiff had been a defect in the quality

of the pigs themselves, such as to lessen their value, I apprehend that the cases shew there was no implication of any representation by the defendant as to the quality or condition of the pigs. He did nothing to conceal the defect in the pigs. There would have been nothing but his offering to sell them.

Now that an offer to sell does imply some representation I think is true. I think that a person who offers things for sale, does, by the mere offer, make a representation that he does not know that he has no title to sell them at all; and by the mere offer of sale, and by the sale, if after the sale it were proved not only that he had no title, but that he knew he had no title, it seems to me that there would be a representation, and a false and fraudulent misrepresentation on which a plaintiff might recover. I will not say by the mere offer of chattels or goods or merchandise for sale there may not be some other representation. I do not desire to shut myself out in future from considering whether there may not be a representation that he has not, knowingly, himself done something to the article which he offers for sale, which makes it entirely valueless. I do not say whether that is so or not,—but that he makes no representation as to the quality of the thing he sells by a mere offer of sale, and that he makes no representation that he himself does not know of a defect in quality is, I think, proved by the cases.

The case which is usually cited for that purpose is the case of *Baglehole v. Walters* (11), where a vessel was sold with all faults, but the seller knew of a latent defect which I believe amounted to making the ship unseaworthy. The seller knew that, but made no representation in fact, and did nothing to conceal or to endeavour to conceal the defect; he left it as it was. It was held that his knowledge of the latent defect under such circumstances gave no right to the plaintiff, the purchaser, to complain of the purchaser. That must be on the ground that by offering the ship for sale

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he did not represent that he did not know of a latent defect. But he did know of it, and yet it was held that that could be no valid claim.

In the case of *Schneider v. Heath* (7) there was the same offer of sale, and the same defect, and the same knowledge by the vendor of the defect, yet, inasmuch as he had done something more than the other vendor had done, namely, he had done something to conceal the defect, it was held that the doing something to conceal the defect did amount to conduct that was in effect a misrepresentation; that is, it was putting a false appearance upon the defect which he knew of and endeavoured to conceal. Then it was held that he did, by such conduct, represent that he did not know of the defect, whereas in point of fact he did, and took means to conceal it. In that case it was held that there was a representation and a misrepresentation.

It seems to me that where there is the mere fact of offering a chattel for sale, where nothing is said about quality or condition, and nothing is done to conceal a defect, though the seller knows of the defect, and he knows that if the purchaser even suspected him of the knowledge, the purchaser would not buy, and although such conduct seems to me to be immoral and dishonest, and dishonest in a high degree, yet the cases decide that there is no remedy because there is no representation.

If that be so with regard to goods offered for sale otherwise than in a market, would there be any difference by reason of their being offered for sale in a market? I cannot see any valid distinction between an offer to sell in or out of a market. Then is there a representation because the sale under the circumstances covers a criminal offence? I know not whether there is such a case in a sale not in a market, but I cannot see that there would be any implied representation, or that one is authorised to imply a representation, merely because the man would be guilty of a crime, when you cannot imply a representation because it would be a dishonest thing. The distinction seems to me to be too refined.

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It is said that you have a right to suppose that a man would not run the risk of committing a crime, and he must know that you would assume that he would not run the risk of committing a crime. I cannot see that myself. It eludes me. It seems to me to be an illusory distinction to say that you may imply that, whereas you must not impute that he must know that you would rely upon his not having done a wilfully dishonest thing. That escapes me. I cannot see it. Moreover, if the defect is only as to the quality of the thing itself, and as to its value, it being assumed that there is no guarantee, it is strong to say that you must imply a representation; and although, as my Lord has pointed out, Mr. Matthews spoke of there being only evidence of a representation, and did not say that it was to be a legal implication, I confess I cannot see how it can be evidence, unless it is a presumption of law. For, when may you make a presumption? You have only a right to make a presumption, if almost every reasonable person upon hearing the undisputed facts would make the same presumption. If, therefore, the facts are evidence of a presumption at all, and are admitted, it seems to me to follow that the presumption must be made, and that a Judge would have to direct the jury that if they believed the evidence, they must find the presumption. Now, if merely the fact of the offering for sale, and the knowledge of the defendant of a defect in quality, which would not make him criminally liable, would not permit you to make the presumption that he intended you to suppose that he was not guilty of dishonesty, does it make any difference that the defect is not only in the quality of the thing itself affecting its own value, but that the defect will cause that animal to do injury to other animals? I cannot see that you can carry the presumption a bit further.

Now as to the presumption that a man will not run the risk of being convicted of a crime, it is not true. It cannot be true. In this case it would not be true because the defendant did actually run the risk, and he sent these pigs to mar-

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ket knowing that they were infected with the disease.

That was a crime; and if what he did was known, I apprehend he was probably fined. I forget how that was; but that he was liable to be fined is beyond all question. Therefore in this case the defendant did run the risk which it is said everyone had a right to assume he did not intend to run. I can see nothing in the fact of its being in the market—nothing of importance more than this, that the fact of the pigs being sent to market made the sending them, with knowledge, a crime; whereas, if they had been sold with the same knowledge and under the same circumstances elsewhere, he would not have been guilty of a crime, but, to my mind, of a grossly dishonest act. Therefore, if we are to make this presumption it comes to this: that if he had sold the pigs at a farm under the same circumstances, there would have been no remedy; but because he sent them to a market, and thereby laid himself open to a fine, there is to be the presumption, and the plaintiff is to have his remedy.

I therefore think, with great respect, after an anxious consideration, that you have no right to make a presumption, that the man represents to you that he will not run the risk of committing a crime; neither do I think that you can make the presumption where the defect is not only in the quality of the thing itself as to value, but is a defect which will have an effect upon other things.

I cannot see how that additional injury comes in. Is there any more a representation than if that additional injury did not exist? I can see that there is a difference between a thing being infectious, and when the defect affects only its own value; but to my mind there is no legal distinction with regard to the point we have to consider. Therefore, although I should have been most anxious, if I could, to have upheld the decision of the Queen's Bench Division, which I take to be a decision that by the offering for sale in the market, and by reason of that being a crime, and by reason of the defect being not only as

to the value of the thing itself, but also its being infectious, there arises a presumption which, to my mind, we ought not to make. I think it would be introducing a new presumption, and one which is too little removed from the case in which there is no presumption at all in the contract of purchase and sale. I therefore with the greatest reluctance say that on the ground that there was no evidence of representation at all,—certainly none expressed, and none to my mind that can be presumed from the conduct of the defendant, I think the judgment of the Queen's Bench Division cannot be maintained, and that we, sitting here, ought to say that there was no evidence to go to the jury of any cause of action that the plaintiff could maintain against the defendant.

COTTON, L.J.—I have arrived at the same conclusion. The only question is whether or not this claim could be maintained in an action of deceit. The foundation of that action must be false representation. If the representation suggested was made here, there was sufficient evidence to shew that the defendant knew the representation to be a false one. There was no representation by words. Of course there may be a representation otherwise than by words. There may be conduct which may be legally treated as having been pursued for the purpose of representing a certain state of things to exist. If conduct is pursued for that purpose, it is a representation just as much as if the representation was made in words.

What is relied upon here as a representation is this; that the defendant, knowing the pigs had an infectious disease, sent them to market. Is that evidence on which a jury could find properly that the defendant represented that the pigs had not, to his knowledge, any infectious disease? Now it is remarkable, and it is of importance when you come to consider whether, as a matter of fact there was such a representation, that the pleadings in no way state that the plaintiff had any representation made to him, that the pigs were not to the knowledge

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of the defendant suffering from any contagious or infectious disease, or that from the pigs being in the market the plaintiff presumed or inferred that the defendant did not know that the pigs had any infectious or contagious disease. In the absence of any such statement in these pleadings or any strong evidence to shew that, as a matter of fact, there was any representation by the conduct of the defendant, ought we to presume that such a representation was made by the mere act of sending these pigs to market? I think it would be wrong to presume that such a representation was made, unless we can come to the conclusion that by sending them to market the defendant intended so to represent.

Ought we to infer that the intention of the defendant in sending these pigs to market was to represent or to induce persons to believe, which would be equivalent to a representation, that he did not know that they were infected with a contagious disease? Now I should say that that was not the reasonable conclusion to draw from his sending them to market. That was the ordinary way of getting rid of pigs, and although the defendant was doing a wrong act, not only to his neighbour but an act punishable under the Act of Parliament, in sending these pigs to market, I think we cannot come to the conclusion from the mere circumstance of his sending the pigs to market that he did so with an intent to represent that to his knowledge there was nothing wrong with those pigs, and nothing that made it criminal for him to send them to market.

Ought we then, as a matter of law, to presume that the defendant made such a representation as suggested by the argument of the plaintiff? To do so would be to impute to the defendant a fraudulent representation when he never intended to make any representation. The plaintiff's argument was based on this, that anybody has a right to be presumed innocent until he is found guilty. That is true. But is anybody to be presumed to make a statement that in every act he does he is innocent? or to make a representation negating the existence of every fact

which would make his acts criminal or fraudulent? In my opinion there is no such rule, and I think it would be too great a refinement to imply from the presumption of honesty a representation by everyone that there is nothing that makes his acts dishonest.

Judgment reversed.

Solicitors—Abbott & Co., agents for Chas. Lucas, Newbury, for plaintiff; Rickards, Walker & Maude, agents for W. H. Cave, Newbury, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1877. } MUIR (*appellant*) v. HORE
June 8. } (*respondent*).

Contagious Diseases (Animals) Act (32 & 33 Vict. c. 70)—Order of Council of 1875—Transit of Animals—Regulations as to Pens—Vessel conveying Sheep from Ireland—Jurisdiction of Justices—Appeal—Special Case under 20 & 21 Vict. c. 43.

[For the report of the above case, see 47 Law J. Rep. M.C. 17.]

[IN THE EXCHEQUER DIVISION.]

1877. } YOUNG (*appellant*) v. COOK
Nov. 23. } (*respondent*).

Excise—License to deal in Plate—Lower or Higher Rate of Duty—Article "Where the Gold shall be of Two Ounces or upwards"—Article containing less than Two Ounces of Pure Gold—30 & 31 Vict. c. 90. ss. 1, 3, 5.

[For the report of the above case, see 47 Law J. Rep. M.C. 28.]

[IN THE COURT OF APPEAL]

(Appeal from the Common Pleas Division.)

1877. } THE UNION BANK OF CANADA v.
Nov. 12. } COLE AND OTHERS.*

*Letters of Credit—Bills of Exchange—
Contract between Giver of Letter and Pur-
chaser of Bills—Conditional Contract to
accept.*

Letters of credit, containing a promise to accept bills, create a contract between the giver of the letters and the person who advances money on the faith of them only when such letters are intended to be shewn to third persons for the purpose of obtaining advances, or where the giver of the letter has so conducted himself that such an intention may fairly be presumed.

Documents in the form of letters of credit were addressed by the defendants to S. & Co., corn merchants, authorising them to draw bills on the defendants against shipments of grain. To the documents certain conditions were appended. S. & Co. drew bills upon the defendants under the credit so opened without performing the conditions. The plaintiffs, having notice of the conditions, and knowing that they were unfulfilled, advanced money on the bills so drawn, which the defendants refused to accept. In an action against the defendants for not accepting the bills,—

Held, that if the documents created a contract between the plaintiffs and defendants, that contract was subject to such of the conditions as were not necessarily subsequent to the advance.

This was an action to recover the sum of 2,500*l.*, being the amount of a bill drawn by J. B. Stevenson & Co. upon the defendants, under the circumstances hereinafter set forth.

A special case without pleadings was stated for the opinion of the Common Pleas Division, the material parts of which are as follows:—

1. The plaintiffs are bankers carrying on business in Lower Canada, and having a branch at Montreal, and the defendants are merchants in London, trading as W. H. Cole & Co.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

2. Messrs. J. B. Stevenson & Co. was a firm carrying on business at Montreal before and at the time of giving the letters of credit hereinafter mentioned.

3. The sole member of the firm was John Black Stevenson, who at the time of the giving of the said letters of credit was in London.

4. Messrs. J. B. Stevenson & Co. employed as their agents in London for the sale of grain and flour the firm of C. F. Claudius & Chattaway.

5. On the 24th of January, 1874, the defendants addressed to Messrs. J. B. Stevenson & Co., and handed to Mr. J. B. Stevenson a letter of credit, of which the following is a copy:—

"85, Gracechurch Street,
"London, 24th January, 1874.

"W. H. Cole & Co.

"Credit No. 604.

"Messrs. J. B. Stevenson & Co.,
"Montreal.

"Gentlemen,—By request and for account of your good selves, we hereby confirm a credit in your favour to the extent of 25,000*l.*, say twenty-five thousand pounds sterling, to be available by your draft or drafts upon us at (60) sixty days' sight.

"The object of this credit is to provide for your reimbursements against shipments of grain to the U.K. or Continent, as per instructions hereinafter named.

"This credit becomes void if not used on or before the 31st of December, 1874.

"You will please state in the body of your drafts and advise us that they are drawn under credit No. 604, and of this date.

"We are, gentlemen,

"Your obedient servants,

"(Signed) W. H. Cole & Co.

"25,000*l.*"

"Conditions under which this credit for 25,000*l.* is available:—All drafts to be represented by equal value in complete and clean bills of lading (consigning the property to order) and invoices. Said documents to be attached to the drafts and surrendered to us upon acceptance; but discretion is left, in case of necessity, to attach the same for due payment of our acceptances at maturity or under discount. The drafts negotiated must re-

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present grain ^{and} flour (at sale prices, less freight and insurance), and actually sold for shipment by your agents Messrs. Claudius & Chattaway, and your advices must be accompanied by copies of invoices at contract prices and conditions and drafts upon the buyers at sixty days' sight for corresponding amounts. In the event of any buyers refusing acceptance of the drafts so drawn, or declining to accept any shipment in fulfilment of a contract, or failing to meet his acceptances, or to retire same under discount on arrival of the shipment, power is hereby reserved to the undersigned to dispose of the shipment in reimbursement of their acceptances, or to make the buyers such allowances as may appear equitable and just; and any deficiency which may arise upon any of the above contingencies shall be refunded to us promptly by Messrs. J. B. Stevenson & Co.

"In case this credit is required to be used against shipments which from any cause are not sold at time of shipment, a satisfactory margin upon the London market value is to be allowed and agreed upon before the drafts are issued by cable communication with Messrs. C. F. C. & Co., who shall refund to the undersigned any deficiency which may arise between the acceptances and proceeds of all shipments or consignments under this clause.

"Marine insurance is to be amply provided for by Messrs. C. F. Claudius & Chattaway, and the policies to be surrendered to the undersigned or placed at their disposal, but without any responsibility whatever from irregularity of the insurance or defaulting underwriters or companies, unless in the case of insurances being effected in America, then the same is to be on Lloyd's conditions, and acceptable to the London corn trade. Usual certificates for payment of claim in England, payable to order, to accompany the other documents or advice of drafts, failing which power is reserved to the undersigned to effect insurance at Messrs. Stevenson's costs.

"Upon due payment of the buyers' acceptances or collection of proceeds of any shipment under this credit, the undersigned agree to repay C. F. C. &

C. the amount disbursed by them for marine insurance upon the interest so represented.

"Duplicate and all copies of bills of lading to be sent to W. H. Cole & Co. direct, or through the bankers negotiating the drafts.

"The credit to be considered a revolving one, and reopened to the extent of any drafts issued, provided that in the case of sold cargoes or shipments Messrs. Stevenson & Co. have not any advance from the undersigned or Messrs. C. F. C. & Co. within twenty-one days from the date of issue of drafts of any irregularity or non-acceptance by the buyers, or subsequent advice that any buyer has failed to meet his acceptance or retire the documents upon arrival of the shipment; and in the case of unsold or rejected shipments so soon as advice of sale and collection of proceeds has been received.

"Power is reserved to the undersigned to determine the credit or modify the terms thereof, as they may think desirable. Commission $\frac{1}{2}$ % with interest in account current as customary, and any balance due to be settled on the account being rendered."

6. The defendants on the 30th of January, 1874, signed and addressed to the said J. B. Stevenson & Co., and handed to the said J. B. Stevenson in London another letter of credit, of which the following is a copy:—

"85, Gracechurch Street,

"London, 30th January, 1874.

"Credit No. 606.

"Messrs. J. B. Stevenson & Co.,

"Montreal.

"Gentlemen,—By request and for account of your good selves we hereby confirm a credit in your favour to the extent of 3,000l.—say three thousand pounds sterling—to be available by your draft or drafts upon us at sixty days' sight.

"The object of this credit is to provide for your disbursements in grain and for flour in anticipation of shipment to U.K. or Continent, as per instructions hereinafter named. This credit becomes void if not used or withdrawn before the 31st of December, 1874.

"You will please state in the body of your drafts, and advise us that they are

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drawn under credit No. 606, and of this date.

"We are, gentlemen,

"Your obedient servants,

"W. H. Cole & Co.

"3,000L."

"Conditions under which this credit for 3,000L. is available:—

"This credit is to be used for grain and for flour, either on the way from the Western States of North America, or in harbour or warehouse of Montreal, intended for shipment to the United Kingdom or Continent, always being duly covered against fire or marine loss by Messrs. J. B. S. & Co.

"Drafts to be issued as short a time as practicable before actual shipment on board of the export vessel, but in no case to be drawn at a longer period than twenty days before the signing of the bills of lading. All drafts are to have inserted in the body thereof, the description, quantity and position of the grain and for flour, against which they are drawn, and when practicable the name of the export vessel by which it is to be shipped. The sum thus drawn for is to be deducted from the invoice amount upon drawing against the bills of lading under credit, No. 604. In the meantime the property thus represented is to be held in trust for the undersigned as collateral security.

"In the event of any contingency by which any drafts under this credit shall have been issued more than twenty days before shipment of the goods so represented is complete, Messrs. J. B. S. & Co. are to remit to the undersigned, within a further period of twenty days, sufficient funds in coverture thereof drawing against the complete shipping documents under credit, No. 604.

"This credit to be revolving and reopened to the extent of any drafts that are duly covered, in accordance with the conditions thereof. Commission $\frac{1}{2}$ per cent. with interest in account current as usual.

"W. H. Cole & Co.

"London, 30th January, 1874."

7. Before the transactions which gave rise to this action, that is to say, in

March, 1874, J. B. Stevenson & Co. applied to the plaintiffs at Montreal to discount a bill for 750L., drawn under the above letter of credit, No. 606, and then exhibited to Frederick Nash, the branch manager of the bank where the said J. B. Stevenson & Co. for some time had an account, the last-mentioned letter of credit. The plaintiffs acceded to that request, and on the 21st of April, 1874, purchased of Messrs. J. B. Stevenson & Co. a bill of that amount. The said bill was drawn against, and in the draft was inserted the description, the position and quantity of such wheat, and the vessel, *Jane Batters*, by which it was to be shipped.

8. On purchasing the said bill, the letter of credit, No. 606, was delivered to the plaintiffs, and by them retained until they received advices that it had been duly accepted when the said letter of credit, No. 606, was re-delivered to the said Messrs. J. B. Stevenson & Co.

9. The wheat mentioned in the last-mentioned bill had been previously to the purchase of the bill actually sold for shipment by Messrs. Claudius & Chattaway, and was subsequently duly shipped by the *Jane Batters*; and a bill was afterwards duly drawn with shipping documents, under and pursuant to the said letter of credit, No. 604, for the balance of the invoice, after deducting the 750L. And the said bills were duly accepted and paid by the defendants.

10. In this way the plaintiffs' branch manager at Montreal had obtained a knowledge of the terms of the said letters of credit.

11. On the 9th of July, 1874, the said Messrs. J. B. Stevenson & Co. informed the said Frederick Nash that they were in want of some money, and offered to sell the plaintiffs a bill of exchange for 2,500L., to be drawn on the defendants, under the letter of credit, No. 606, against a cargo of wheat to be shipped by a steamer called the *Hettie*. They explained to Frederick Nash that the *Hettie* was not in port, but the bill was to be drawn in the same manner as the former bill was drawn against the cargo of the *Jane Batters*. Frederick Nash suggested

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that Messrs. J. B. Stevenson's account was overdrawn, but, on referring to it, ascertained that there was a small balance to their credit.

He told Messrs. J. B. Stevenson & Co. that they must strictly conform to the terms of the said letter of credit, which they promised to do. They told him that the bill was drawn for disbursements in connection with the shipment to be made by the *Hettie*, as specified in the bill. They told him that when they drew against the shipment by the *Hettie*, they would, as in the case of the *Jane Batters*, deduct the amount of the bill, in accordance with the terms of the letter of credit. He enquired of Messrs. J. B. Stevenson & Co. if the wheat was in port. He was informed that it was not, but was told by Messrs. J. B. Stevenson & Co. that they were always receiving wheat from the west (which was the fact), but they also stated that they had no special quantity of wheat at that time, either appropriated in fact or designed in their intention for the *Hettie*. The said Frederick Nash accordingly agreed to purchase a bill for 2,500*l.*, drawn under credit, No. 606, of Messrs. J. B. Stevenson & Co., and Mr. J. B. Stevenson having returned to his office, drew, indorsed and sent to the plaintiffs a bill of exchange which was in the words and figures following:—

"J. B. Stevenson & Co.

"Montreal, 9th July, 1874.

"No. 78,

"Exchange for

"2,500*l.* sterling.

"Sixty days after sight of this first of exchange, second and third of same tenor and date unpaid, pay to the order of ourselves in London, twenty-five hundred pounds sterling value received, and charge the same with or without further advice to account of.

"Against shipment 4,000 quarters, No. 2 Milwaukee spring wheat now afloat to be shipped, per ss. *Hettie*, under credit No. 606, of date 30th January, 1874.

"Stevenson & Co.

"To Messrs. W. H. Cole & Co.,

"London, England."

12. The plaintiffs on receipt of the

bill, paid 2,500*l.* to the credit of J. B. Stevenson & Co.

13. Before the said Frederick Nash agreed to make any advance, the letter of credit, No. 606, was produced to him, and when the advance was made the letter of credit was delivered to him.

14. On the 9th of July, 1874, and after the said sum of 2,500*l.* was passed to the credit of Messrs. J. B. Stevenson & Co., they drew out by cheque the said sum of 2,500*l.*, and were also allowed by the plaintiffs on that day to overdraw to the extent of 37,794 dollars and 23 cents, for which over-draft the plaintiffs received security.

15. On the same 9th of July, 1874, Messrs. J. B. Stevenson & Co. had at least 4,000 quarters of No. 2-Milwaukee spring wheat afloat and on their way to Montreal; of this, 2,500 quarters were on that day in the hands of the Montreal Transportation Company, as common carriers, deliverable to J. B. Stevenson & Co., and of which they held an indorsed bill of lading.

16. On the 10th of July, 1874, Messrs. J. B. Stevenson & Co. wrote and sent to the defendants a letter which was in the words and figures following:—

12, St. Sacrament Street, Montreal,

10th July, 1874.

"Messrs. W. H. Cole & Co.,

"London.

"Dear Sirs,—Bills—We beg to advise our draft on you, @ 60 d/s, our order against 4,000 qrs. No. 2 Mil. spring wheat now here afloat, shipment, per ss. *Hettie*, under credit, No. 606, this amount to be deducted from invoice of this vessel, and in same manner as advanced, per *Jane Batters*.

"We are faithfully yours,

"J. B. Stevenson & Co."

17. The said 2,500 quarters of wheat arrived in Montreal on the 18th of July, 1874, and were afterwards delivered to the said J. B. Stevenson & Co., and by them shipped on the 17th of July, 1874, into two vessels called the *Lufra* and the *Astarte*.

18. After the said 2,500 quarters had been so shipped on board the said vessels, the said Messrs. J. B. Stevenson & Co.,

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on the said 17th of July, drew bills against the cargoes of these vessels. One of the said bills was drawn against the cargo of *Lufra* for 7,650*l.*, and was sold to the plaintiffs. The bill against the cargo of the *Astarte* was not sold to the plaintiffs.

19. The ss. *Hettie* mentioned in the bill was, on the said 9th of July, 1874, on its way to Montreal, and expected to arrive daily, but did not, in point of fact, arrive till the 18th of July.

20. Before the *Hettie* could be loaded in the ordinary course of business, J. B. Stevenson & Co. stopped payment, and the *Hettie* was not loaded, neither did the said Messrs. J. B. Stevenson & Co. ever remit to the defendants any funds in coverture of the said bill for 2,500*l.* The wheat, which the bill sued upon purported to represent, had not been sold for shipment by Messrs. Claudius & Chattaway, nor had any margin upon the London market been allowed or agreed upon by cable communication.

21. J. B. Stevenson & Co. dealt largely in wheat and were constantly in the receipt of it, and in the ordinary course of business expected to receive sufficient to enable them to make up the 4,000 quarters mentioned in the bill.

22. At the time of the drawing of the said bill for 2,500*l.* by the said Messrs. J. B. Stevenson & Co. there were bills current drawn by Messrs. J. B. Stevenson & Co. on the defendants, under the credit, No. 604, in excess of the full amount of all bills authorised to be drawn under credit, No. 604; but of this the plaintiffs had no notice at the time of the purchasing of the said bill.

23. The plaintiffs, *bona fide*, purchased the said bill for 2,500*l.*, on the faith of the said letter of credit of No. 606, and relying on the representations so made to them by Messrs. J. B. Stevenson & Co. in conversation, as detailed in paragraph 11, and as they appear on the face of the said bill for 2,500*l.*, and relying also on the promises made to them by the said Messrs. J. B. Stevenson & Co. that the said bill should strictly conform to the letter of credit, but without taking any steps except as herein appearing to satisfy themselves that the instructions or con-

ditions of the credit had been complied with.

24. Messrs. J. B. Stevenson & Co. never intended specifically to appropriate the proceeds of the bill for the purpose of paying for the said 4,000 quarters of wheat, but to use them, as they did in fact use them, for the general purposes of their business. It was, however, their intention at the time they drew the said bill to ship by the *Hettie* 4,000 quarters of No. 2 Milwaukee spring wheat as parcel of her cargo, which intention was frustrated by the failure of Messrs. J. B. Stevenson & Co.

25. Messrs. J. B. Stevenson & Co. never held any special quantity of No. 2 Milwaukee spring wheat in trust against the bill of exchange for 2,500*l.*

26. The plaintiffs remitted the bill to the London and County Bank in England for presentation for acceptance, who, on the 22nd day of July, 1874, duly presented it to the defendants for acceptance.

27. The defendants wrote an acceptance across the bill, and returned it to the said London and County Bank, with the following memorandum attached—

"22nd July, 1874.

"Memorandum.

"W. H. Cole & Co.,

"85, Gracechurch St.,

"London, E.C.

"To the manager of the

"L. & C. Bank.

"We hand you herewith J. B. Stevenson & Co.'s draft, No. 78, of 9th July, 2,500*l.*, duly accepted, upon the understanding that the shipping documents per *Hettie* are surrendered to us on the payment of the said draft.

(Signed) "W. H. Cole & Co."

28. On the 23rd of July, 1874, Mr. Thomson, manager of the London and County Bank, wrote to the defendants as follows:—

"We are unable to surrender the s/d relating to shipment of wheat per *Hettie*, applied for in your memorandum of yesterday, against which you state you have accepted Stevenson's draft for 2,500*l.*, as they have not yet been handed to us, nor are we likely to receive them."

29. On the 25th of July, 1874, Messrs.

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Clarke, Son & Rawlins, the solicitors of the defendants, wrote to the said Mr. Thomson as follows:—

"66, Gresham House,
"Old Broad Street,
"London, 25th July, 1874.

"Dear Sir,—Our clients, Messrs. W. H. Cole & Co., of 85, Gracechurch Street, have consulted us on your letter to them of the 23rd instant, received yesterday. You would seem therefrom to have misapprehended the meaning and effect of their memorandum attached to the bill for 2,500*l.*, as returned to you. Their acceptance to such bill was simply, as stated therein, given upon the understanding, and conditional on the shipping documents of *Hettie* being surrendered to them on payment of the draft, such being the only terms upon which they were to accept and pay the bill. If you are not prepared to take the acceptance on these terms, of course you must consider it as cancelled. We give you this notice at once, so as to prevent any difficulty hereafter, and must request to hear that you so recognise the position, as if needful it will be our duty to take proceedings on our clients' behalf to restrain any negotiation or dealing with the bill to their prejudice.

"We are, dear Sir,

"Yours truly,

"Clarke, Son & Rawlins.

"William Thomson, Esq.,

"General Manager,

"London and County Bank,

"21, Lombard Street."

The case then set out various letters which passed between the parties, in which the plaintiffs insisted on their right to an unconditional acceptance of the bill by the defendants, and the defendants refused so to accept the bill.

The case came on for argument in the Common Pleas Division, on April 26th, before Denman, J., and Lopes, J., when judgment was given for the defendants.

Against this decision the plaintiffs now appealed.

W. G. Harrison (*The Solicitor-General* with him), for the plaintiffs. — The three questions in this case are first, whether the document No. 606 is a

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letter of credit on which the plaintiff can sue. Secondly, whether if so, they are bound to see all the conditions fulfilled. And thirdly, whether all the conditions by which they are bound have been fulfilled. The whole question in effect is, what is the meaning of the document?

It is essentially different from No. 604. The bills drawn under No. 604 are to be covered, but this is to enable Stevenson to draw bills without cover; the first is to provide for "reimbursements," the second for "disbursements." Therefore, document 606 is an open letter of credit, given to Stevenson to be used by him in a particular way. Being a letter of credit, it is to be used. How can it be used except by being shewn to third parties, that they may advance money on the strength of it? The nature of the document is shewn in the case of *In re Agra and Masterman's Bank* (1). It is like the public offer of a reward or an advertisement. Any one who takes advantage of the offer, and acts on the faith of it is entitled to the benefit of it; and a contract is thus created between the giver of the letter of credit and the person who draws bills on the faith of it. Lord Cairns in that case lays down that such a contract is good even at law, and the claim in this case was framed in accordance with that judgment.

[COTTON, L.J.—But in that case there were words in the letter which shewed plainly the intention that the letter of credit should be shewn to third parties.]

If it is denied that this is a letter of credit, that is a question for the jury. But the primary object of all such letters is that they may be shewn to those who are to act on them, and so it is here unless it can be shewn that in the conditions there is anything to defeat that primary object. The conditions are subsequent to the advance, and may be considered merely directory to Stevenson. He could be sued for the breach of them; but they do not alter the character of the document.

Benjamin and *F. M. White*, for the de-

(1) 36 Law J. Rep. Chanc. 222; s. c. Law Rep. 2 Chanc. 391.

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fendants.—The documents Nos. 604 and 606 no doubt are letters of credit in a commercial sense. But there are two kinds of letters of credit—those addressed to the world at large, and those addressed to an individual. These are addressed to Stevenson & Co. individually, and would not induce anyone who advanced money on the faith of them to suppose that he had a contract with the giver of them. They would merely shew him that Stevenson & Co. were not drawing bills without having made arrangements for acceptance. A contract is not created with the person who takes the bills unless on the face of the letters they appear to be addressed to anyone who may take the bills, as in *In re The Agra and Masterman's Bank* (1), where Turner, L.J., says: "The letter was written in a double form. The first part of it contains the authority which is given to Dickson, Tatham & Co. to draw the bills; the second part is evidently, though not in terms, yet in substance, addressed to the persons who are to negotiate the bills." See *Story on Bills of Exchange*, 4th ed. § 459, where the distinction between general and special letters of credit is shewn. See also *Marius* "Advice concerning Bills of Exchange" (in *Molynes's Lex Mercatoria*), p. 35 and *Bell's Commentaries*, pp. 371-373. These documents, then, are letters of credit in the sense of "letters giving a credit," but not requesting any third person to give credit. Not only is there nothing on the face of the letters to shew that they are addressed to anybody who may take the bills, but the conditions as to shipment of grain bills of lading, &c., and the stipulation that the credit may at any time be withdrawn, negative such a conclusion. Even if they were addressed to those who should take the bills, the conditions are binding on the plaintiffs and they have not been fulfilled. In *Mason v. Hunt* (2) Lord Mansfield says: "An agreement to accept is but an agreement, and if it is conditional, and a third person takes the bills, knowing all the conditions annexed to the bills, he takes subject to the conditions." In *Denton v. The Great Northern Rail-*

way Company (3) certain times when certain trains were to start were announced to the public, and the action was brought against the company for not running the trains as advertised. Lord Campbell in that case says—"if the company promised to give tickets for a train running at a particular hour to a particular place to any one who would come to the station and tender the price of the ticket, it is a good contract with any one who comes. The promise is to the public at large. . . . It is in effect the same as if made to each individual conditionally, and on the individual fulfilling the condition it is an absolute contract with him and he may sue." But it is no contract till the conditions are fulfilled. In the same manner in *Wurlow v. Harrison* (4) an advertisement of a sale "without reserve" addressed to the public, was held to be the basis of a contract with any one who came and bid. Therefore even supposing the intention to have been in this case, that third persons should act on the letters of credit, yet they are bound by the conditions and there is in reality no contract till the conditions are fulfilled.

[BRETT, L.J.—Then arises the question whether conditions which cannot be fulfilled till after the advance, are conditions precedent to the contract. BRAMWELL, L.J.—The plaintiffs say that the conditions are such that those who make the advance could not possibly see to their performance. But I think that strengthens the position that these are not open letters of credit.]

Many of the conditions are precedent to and concurrent with the advance, and these at all events are binding on the plaintiffs. Again the draft which the defendants have refused to accept was not in proper form. "Now afloat" is not a sufficient description of the wheat, which ought to be specifically appropriated. In America the obligation of parties under letters of credit is put on another principle. In *Story on Bills*, § 462, note, it is laid down that the person in whose

(3) 5 E. & B. 860; s. c. 25 Law J. Rep. Q.B. 129.

(4) 1 E. & E. 295; s. c. 20 Law J. Rep. Q.B. 14.

(2) 1 Douglas, at p. 297.

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favour the letter is drawn is the agent of the person who writes the letter to pledge his credit. In that view of the matter the authority to pledge his credit must be governed by the terms of the document giving the authority.

The Solicitor-General in reply.—It has never been doubted that this is a "letter of credit" in the commercial sense of the word. It is called so throughout the case, and the propriety of the name was never questioned. The contract between the parties is an original obligation. No doubt the letter is addressed to the individual who is to have the credit, but so it was in *In re Agra and Masterman's Bank*. (1). There the Court inferred from certain words in another part of the document that it was meant to be shewn to third persons and acted on by them. Here the same inference may be drawn from surrounding circumstances. So in *Mailand v The Chartered Bank of India, London and China* (5) the letter was addressed to an individual, and the same inference drawn. See the judgment of Story, J., in *Russell v. Wiggan* (6), *Story on Bills*, 462, *Story on Promissory Notes*, 482. The true meaning of the contract which is to be gathered from the two documents is that the advances are to be without cover to the extent of 3,000*l.*, until the wheat is actually collected, and there is nothing to shew that any specific parcel of wheat was to be drawn against. On this construction it will be seen that all conditions precedent have been fulfilled.

BRAMWELL, L.J.—I am of opinion that this judgment ought to be affirmed. I hardly like discussing the question whether these documents are "letters of credit" or not, for I think in the present case it does not matter. It is certain that if they are letters of credit they are subject to certain conditions, and if there has been a contract with Stevenson & Co. which can be assigned wholly or in part, it can clearly be assigned only

as it is, and this shews that the plaintiffs cannot sue upon it. Stevenson, who assigned it, cannot sue upon the contract, and yet it is said that he and the defendants have entered into relations which enable him to bind them in some way or other;—that although he has no right of action himself, he has in some way been enabled to give a right of action against the defendants.

Now I must guard against too large an expression. There might possibly be conditions subsequent to which my remarks would not apply, the non-performance of which would disentitle Stevenson from suing, but not another person; for if the documents shewed that the person who acted upon them had to act at a time prior to the possibility of the conditions arising, his right could not be divested by any subsequent acts to which he could not possibly have been a party. But taking the case of a precedent or concurrent condition, it seems to me that if Stevenson had not performed it so that he could not complain, neither could the plaintiffs, especially when we bear in mind that the defendants had notice of the powers Stevenson had under the contract.

Let us see what the cause of complaint is. It is "that you did not accept a bill which you had undertaken with Stevenson you would accept on certain conditions. You authorised him to tell us you would do so, and to contract with us to that effect, and you undertook with us thereby to accept bills not drawn under those conditions." It seems to me this is an impossibility. The defendants had no contract with the plaintiffs, and no obligation other than to accept such bills as Stevenson was entitled to draw, except so far as Stevenson was bound by a condition subsequent.

Then arises this dilemma: either there was no letter of credit, and Stevenson had no authority to create a relation between the plaintiffs and the defendants which would make the defendants liable, or Stevenson had power to create a limited relation between them which must be interpreted by the terms subsisting between Stevenson and the defendants; and if those terms were not

(5) 2 Hurl. & N. 440; s. c. 38 Law J. Rep. Chanc. 363.

(6) 2 Story's, Rep. 213.

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complied with, there would be no liability.

I am satisfied that those terms were not complied with. Those terms are plain. When under credit 604, goods have been shipped, you may draw bills against the shipping documents and we will accept them. When the goods are not shipped, on giving us the security of the wheat in respect of which you wish to make disbursements, you may also draw bills, without attaching to them shipping documents. But in that case we shall still have the security of the grain to be shipped. "In the meantime the property thus represented is to be held in trust for the undersigned as collateral security."

If Stevenson had done what he ought, the property could have been held in trust. He could have appropriated a specific shipment absolutely in his draft on the defendants; and if he had not assigned it to anyone else it would have been a good equitable security. But nothing of the sort was done. It was not enough to say "Against 4,000 quarters Mulwaukie spring wheat now afloat." In the first place, Mr. White's objection is a good one. There was no particular quantity of 4,000 quarters to which the defendants could effectually have laid claim, as against persons with notice of the bill, or as against stoppage *in transitu* or seizure by the sheriff. But there ought to have been such a particular quantity. There was none, and it seems to me that Stevenson has not done what he was bound to do, and the plaintiffs took the bill, I will not say knowing that he had acted wrongly, but knowing that he had not complied with the terms. I think they must be held to trust to the honesty of Stevenson, and even if he had not told them of the terms, they would have taken it at their risk. This objection, whether the document is dealt with as a letter of credit or not, seems to me to be a good one. It seems to me therefore that the bill was drawn by Stevenson without authority, and as between Stevenson and the defendants might have been refused. Inasmuch as the defendants had not agreed to pay it if Ste-

venson drew it as he did, he had no authority to draw, and therefore no authority to pledge the defendants' credit as he did. Now I doubt whether the documents here are really letters of credit, but if they are, the defendants would lose the benefit of the conditions subsequent, and the equities attaching to the transaction between themselves and Stevenson, and all they would get would be for the benefit of conditions precedent or concurrent.

But even on this construction of the documents the case decided by Lord Cairns does not necessarily decide this case, for in that case there was a good cause of action, but here Stevenson had no good cause of action, and therefore no cause of action which could be assigned. For these reasons I am of opinion that the decision of the Court below ought to be affirmed. And there is one further observation I should like to make. If this wheat were hypothecated or bound with a trust to anyone who had advanced money upon it, that would be a good trust as against everyone who had notice of the transaction. Can you say then that it would not be a good trust as against the plaintiffs? When the *Lufra* was brought to Montreal and loaded, Stevenson drew a bill against the cargo, and the plaintiffs bought it and obtained a legal title. How could they have better notice of a trust? Perhaps it might be said that they did not know that wheat to be the "wheat afloat" referred to. However that may be, it does not matter in this case; I only mention it to shew how unreasonable it is to my mind to say that there were any goods held in trust to meet the bill in question.

BRETT, L.J.—I am also of opinion that the judgment should be affirmed. The plaintiffs brought their action against the defendants complaining that the defendants were under obligation to the plaintiffs to accept certain bills of exchange drawn on the defendants, which the defendants refused to accept. I think the plaintiffs must fail, for it has not been proved that the defendants were under

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any contract or obligation enforceable by any process of law. The plaintiffs could not succeed in proving any contract or obligation unless "credit 606" is an open letter of credit, *i.e.* a document which the defendants intended should be shewn to any one whatever, with the view of their purchasing the bills mentioned in it, or unless they have so acted that, while they had no such intention, third persons were reasonably led to believe that they had.

If it is urged that this is an open letter of credit, I should protest that we have not enough evidence before us to decide that point. If that is the real question in the case it ought to have been submitted to a jury. Now it is said on the part of the defendants that the document could not be an open letter of credit, because it is addressed only to Stevenson and not to people at large. But I cannot go so far as to say that no document could be an open letter of credit if addressed to an individual. If that which is asserted to be a letter of credit is addressed to *all the world*, then those who act upon it have in fact the advantage of an actual legal contract with the giver of the letter;—an actual contract either because it was intended by the giver of the letter that they should act upon it, or because he has so acted that persons dealing with him would have a right to infer that he so intended. Then whether he intended it or not, on ordinary principles of law he becomes bound. That establishes a privity between the persons giving the letter and the persons acting upon it, and on ordinary principles creates a contract at law. But it does not follow that where the letter is not addressed to the public there may not arise a contract between the person who acts upon and the person who signs the letter. If the person in whose favour the bill is to be drawn has some authority given to him, *e.g.* if an express authority in writing can be proved to have been given, and acted on, then there is a contract between the person who has signed the letter and the person who has acted upon it, to the same extent as if the letter had been addressed in terms to the party so acting.

If we could properly have inferred

from the case that the defendants really intended the plaintiffs to act on the letter, then there would be a contract between them. But I doubt whether when the case was drawn up that point was insisted on. It seems to me that the point before the arbitrator was whether, assuming that the document was a letter of credit, it was subject to certain conditions, and whether those conditions had been fulfilled. But it has not been urged upon us that the case should go back to the arbitrator, and I think that if any such intention could have been proved, such an application would have been made. I decline to say whether there was any such intention or not, but I do think that, as the case has been left to us to decide the question on the facts before us, the plaintiffs have not proved anything of the kind. And if not, they have not proved any contract on which they can found these proceedings. And I think that in the case of *The Agra and Masterman's Bank* (1) there would have been no equity if there had not been a contract at law, and that the question in law and in equity is the same. That being the case, the other questions become immaterial. But as they have been argued before us I think I had better give my opinion.

If credit 606 was an open credit it is not unconditional. There are clearly conditions which must be fulfilled before the plaintiff can recover. Some of these conditions are admitted, for instance that the form of the bill must be in accordance with the letter, but I also think there are others; I do not say that all the conditions in the document must be fulfilled, but only such of them as could possibly have been fulfilled when the plaintiffs were called on to make the advance, while the other conditions subsequent to that time might be conditions as between Stevenson and the plaintiffs, but not between the plaintiffs and the defendants.

It has been said that the plaintiff was bound, not only by the conditions of credit No. 606, but also by those of 604, which were incorporated with 606 either by course of dealing or in some other way.

In my opinion none of 604 is incorpo-

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rated with 606, but 606 stands by itself. But one of the conditions in 606 necessary to entitle the plaintiff to recover, is a condition that at the time of the draft there should be property which could be held in trust—not for Stevenson, but in favour of the defendants. Now there was no such property as could be held in favour of the defendants unless there was a specific quantity of wheat set aside for that purpose. If that was a condition affecting the defendants' liability, it was not fulfilled. I think it would be very wrong to draw the conclusion that Stevenson had no real ground for supposing that he had wheat coming forward. I suppose he had every reason to think he had wheat coming for the *Hetty*. But there was no specific wheat appropriated for the purpose. There was, therefore, a condition in favour of the defendants unfulfilled, and consequently the plaintiff cannot recover.

I cannot quite think the mere fact that on the bill there was only a mention of "wheat now afloat," would be enough to disentitle the plaintiffs, for, in my opinion, it would be a sufficient description, if the conditions were fulfilled. But I think the nonfulfilment of the condition to which I have adverted is fatal to the plaintiff's case, and further that if the stipulation as to security is not a condition, it is a limitation of Stevenson's authority to obtain an advance.

If then there was a license to obtain advances, so that the defendant would be bound, even if Stevenson had disobeyed the limit, supposing the plaintiff was not aware of such disobedience, yet as Stevenson was the agent of the defendants, if he disobeyed the limit and exceeded it, and the plaintiffs knew it at the time, they would be prevented from recovery. That is the ground of the judgment of the Court below, and on that ground I think, even if the other points were found in favour of the plaintiffs, the defendants are entitled to succeed.

COTTON, L.J.—The question in this case is whether there is a contract between the parties, on which the plaintiff is entitled to recover. In the case of *The Agra and Masterman's Bank* (1), the

Lord Chancellor decided in favour of the bill-holder on two grounds, either that there was a direct contract between the bill-holder and the givers of the letter, or that the bill-holder was assignee of the person to whom the letter was given.

Now in this case it cannot be contended that the plaintiffs can recover as assignees of a contract. If they claim as assignees, they must take the contract in its entirety, and stand in Stevenson's position; and all the clauses and terms of the agreement must be taken into consideration. But it is clear that some of the conditions have been broken, even though, it may be, it was impossible for the defendants to have fulfilled them. In this respect the present case is entirely different from that before Lord Cairns. In that case there were no conditions, but an attempt was made to defend the suit on the ground that the person to whom the letter was given was indebted to the defendants, and it was held that they had contracted themselves out of the right to set off such debts. The contract was made with all the world, so that any one could take advantage of it unconditionally.

The second question is whether in this case there is a contract at law between the plaintiffs and the defendants. If the document was, on the face of it, addressed to all persons whatsoever, it no doubt would make a contract at law between the giver of the document and any one who might act upon it.

Now, if it were necessary to decide the point, I should say that here there was no such contract. It is said on behalf of the plaintiff that unless such a document as this is intended to be shewn to any one to whom application is made for an advance, it is utterly useless; that no one would be able to obtain an advance without shewing a document of the kind. But the cases in the books, and ordinary mercantile usage, alike refute that proposition. People discount bills constantly without seeing any authority for the drawing, trusting that there is some authority; therefore there is no ground for saying that the necessity of the case demands that such documents as these should be shewn to everyone. Then it was

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said also that if the letter was to be shewn to third persons, it was a letter of credit free from all conditions, and that in fact these are not conditions but private directions to Stevenson, separate from the letter of credit. Now I cannot accede to that doctrine. The document must be taken as a whole. The conditions are strong evidence that it was not intended to be considered as a letter of credit in the sense of making a direct contract between the giver of the letter and the advancer of the money. Certainly in many respects the conditions touch matters only between Stevenson and Messrs. Cole, and could not be considered as part of a contract to be made with persons who must necessarily do their part before the performance of the conditions, but yet are to be liable on the whole of them.

If there is a direct contract, those conditions the performance of which cannot be insured, are not to be taken into consideration; but those which are not incapable of performance by the parties are part of the contract. In my opinion bills drawn under credit 606 were to be bills against wheat not only "to be shipped" but capable of being identified. It is said that it would be impossible to act on such a condition as this. But I do not think so. It would restrict the power of obtaining advances, but would not destroy it. This is evident from the fact that at the very time when the advance was made there were 2,500 quarters on board barges, for which Stevenson & Co. held indorsed bills of lading; and they might have drawn against that quantity, which was perfectly capable of identification. Stevenson & Co. could not draw against 4,000 quarters because there were no 4,000 quarters capable of identification. That is the defendants' argument, and the plaintiffs' answer is not satisfactory. The true interpretation of the contract is that the bills are to be drawn against specified wheat. I do not see otherwise how it could be determined what is the cargo from the invoice amount of which "the sum drawn for is to be deducted, upon drawing against the bills of lading under credit 604." It is not necessary to insert the name of the ship by which the

goods are to be sent; that is to be done only where practicable; but it would be impossible to say, when the ship was loaded, unless all the wheat afloat was shipped at one time, against what wheat there had already been a drawing. Again, how could the defendant interpose, if necessary, and say to Stevenson, "you are doing wrong, this wheat has been already drawn against." It would never be in his power to shew that Stevenson was appropriating his wheat by dealing with other people, if he may draw against an indefinite 4,000 quarters.

In my opinion, therefore, there must be a definite and specific quantity of wheat to be drawn against. It is admitted that there was no such quantity, and therefore, in my opinion, an essential condition had not been complied with.

As to the cases cited, I don't think I need go through them. In the case of *The Agra and Masterman's Bank* (1) the document itself shewed an intention that it should be shewn to other persons. In *Maitland v. The Chartered Bank of India, London and China* (5) again, the documents shewed that they were intended to be used for shewing to other persons. In that case, as in the other, there were no conditions, though it was attempted to be proved that there was a condition implied by the usage of trade.

Here the conditions appear on the face of the document, and it is found that something which the defendants have made a condition of the drawing of the bill, and which ought to have been performed, was not performed. I am, therefore, of opinion that the plaintiffs cannot recover.

Judgment affirmed.

Solicitors—Stevens, Wilkinson & Harris, for plaintiffs; Clarkes, Rawlins & Clarke for defendants.

[IN THE EXCHEQUER DIVISION.]

1877. }
Dec. 6. }

BENT v. ROBERTS.

Revenue—Inhabited House Duty—Income Tax—"Occupier"—Police Superintendent.

A superintendent of police who lives in a house adjoining the police station, which communicates with it by a door in the yard, the house being liable to be employed for such purposes of the police force as the chief constable may direct, and who is compelled to live there, but is subject to be removed from station to station at any time, is not liable to inhabited house duty or to income tax under schedule B., as occupier of such house.

CASE stated on the 2nd of December, 1875, by the Commissioners of income tax and inhabited house duty for the division of Manchester on appeal against an assessment under schedule B of the Income Tax Acts and for inhabited house duty on the house occupied by James Bent, of Old Trafford, in the township of Stretford, in the district of Manchester, second superintendent of the police station there, which was assessed as follows:—

Stretford.

No. of Assess., 36.

Superintendent Bent, House Schedule B. £50
ditto House Duty, £50

The county constabulary of Lancashire was established under the statute of the 2nd & 3rd Vict. c. 93.

The county is divided into police districts or divisions, and station houses and strong rooms have been built and provided under the statute of the 3rd & 4th Vict. c. 88.

The force is annually inspected by a government officer, and if his report is satisfactory, a grant is made by the Treasury amounting to one half of the expense of the pay and clothing of the force in aid of the police rates.

The house in which the appellant resided was included within the boundary of certain premises known as the Old Trafford police station, which comprised other buildings and offices provided for the purposes of the Manchester police district.

In addition to the communication between the appellant's house and the drill yard there was a further communication between the drill yard and the cell yard which adjoined, and into which the cells opened.

It was necessary for the police purposes of the district of Manchester that the appellant should reside in the house in question for the due performance of his official duties.

The appellant was compelled to live on the premises in question, and the house in which he resided was liable to be used for such purposes connected with the police force as the chief constable of the county might direct, and the appellant was further liable to be removed from station to station at any time.

There was no accommodation in the appellant's residence beyond that which was actually necessary for the requirements of himself and his family and the transaction of his business as superintendent of police, and he would not be permitted to make use of the premises for any other purpose.

The appellant was not assessed to the poor rate.

The appellant admitted that the house which he occupied was separate from the police station, but added that there was a communication with the station yard by a doorway in his own yard wall. The front entrance was quite distinct. He said that he himself possessed the keys of the house, and that he and his family alone had access thereto; that it was wholly occupied by himself and family, and furnished throughout with his own furniture; that it might occasionally be used as a place of detention for prisoners, and that on one occasion he had admitted a female prisoner there for a few hours who was not in very good health and who was of a more respectable class than prisoners ordinarily are.

He contended that he was not liable to house duty nor to schedule B of the income tax beyond the amount of his rental, 10l. 8s. per annum, and the reasons assigned were that the house was a part of the police station, it being included within the boundary wall known as the Old Trafford police station, which,

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in addition to the house occupied by the appellant, comprises other buildings and offices provided for the police purposes of the Manchester police division; that the force was annually inspected by a government officer, and that the whole of the premises was used for the purposes of the county constabulary, and being so used was used for government purposes and was exempt from assessment as being occupied for the purposes of the Crown, and that in any case the house in question ought not to be separately assessed, but should be included in one charge with the police station, some of the apartments of which were occupied by police constables who paid rent for them. In support of his opinion he cited *The Queen v. St. Martin's, Leicester* (1).

The appellant admitted that he was an officer of the county and was paid out of the county fund.

The surveyor submitted that the case referred to did not apply, and that as the house in question was admissibly separate and distinct from the police station, its front entrance facing the street or road (formerly an ancient foot-path), and the only communication with the station yard being by a doorway in the wall of its yard, which doorway could easily be closed up, and its being moreover furnished throughout by Mr. Bent as a private residence, it was to all intents and purposes a private house, and was separately assessable upon its full annual value for which Mr. Bent was liable, he being the beneficial occupier.

Judge's Case, No. 2,827, was referred to in support of this view.

After considering the statements of the appellant and the surveyor, the Commissioners were of opinion that the superintendent was the servant of the county and not of the Crown, and that the house being separate and distinct from the police station, the only communication being by a door in the yard wall to the drill ground, and being furnished by the superintendent at his own expense, was liable to be assessed upon

its full annual value, and from its position was separately chargeable, and they confirmed the assessment.

By 48 Geo. 3. c. 55, schedule B, duties were "to be charged annually on the occupier or occupiers for the time being of every dwelling-house." By 14 & 15 Vict. c. 36. s. 1, it is enacted that "there shall be assessed upon inhabited dwelling-houses the duties set forth in the schedule." The schedule provides that "duties shall be payable for every inhabited dwelling-house not occupied and used for any such purpose" as therein mentioned.

By 5 & 6 Vict. c. 35, schedule B, duties of income tax are chargeable for "all lands, tenements and hereditaments in respect of the occupation thereof."

Gorst (Hulton with him), for the appellant.—In the first place the appellant was not an occupier of the house. He was a mere servant of the county constabulary, and had no rights of his own in respect of it.

[POLLOCK, B., referred to the series of registration cases which had been decided on this.]

Clarke v. The Overseers of St. Mary, Bury St. Edmunds (2) is a good example of these cases. [He was stopped by the Court.]

Dacey, for the Crown, contended that physical occupation was all that was required. This was at least a "use" within the schedule of 14 & 15 Vict. c. 36. The point now raised by the appellant was not the substantial question in the case, which was, whether the house was exempt as used for the purposes of the Crown.

KELLY, C.B.—The question in this case is, whether the appellant is the occupier of the premises in question, within the meaning of the Inhabited House Duty Act, or within the meaning of the Income Tax Act. It appears according to the statement of the case before us that the appellant has been assessed under both statutes, the Inhabited House Duty Act and the Income

(1) 8 B. & S. 536; s. c. 36 Law J. Rep. M.C. 99.
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(2) 1 Com. B. Rep. N.S. 23; s. c. 26 Law J. Rep. C.P. 12.

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Tax Act, in respect of the year's occupation, from the month of April, 1875, to the month of April, or to the end of the month of March, 1876, and that the sums payable to the Crown in respect of which these assessments have taken place, if they could be sustained, would be payable on the 1st of January, or at all events, in the month of January, 1876. The question which we have to determine is, whether the occupation and the use of these premises by the appellant, in the manner and under the circumstances stated in this case, render him liable to either the one or the other of these assessments. I am clearly of opinion that he is not liable to either the one or the other. If the case were confined to what is stated in one only of the paragraphs, a question might well arise as to whether he might or might not be liable. It appears that "the appellant admitted that the house which he occupied was separate from the police-station, but added that there was a communication with the station yard by a doorway in his own yard wall. The front entrance was quite distinct. He said that he himself possessed the keys of the house, and that he and his family alone had access thereto, that it was wholly occupied by himself and family, and furnished throughout with his own furniture; that it might occasionally be used as a place of detention for prisoners, and that on one occasion he had admitted a female prisoner there for a few hours who was not in very good health, and who was of a more respectable class than prisoners ordinarily are." Now if it had stopped there, and had contained nothing else to assist in determining whether this was an occupation within either of these Acts of Parliament, the question might well have been arguable, but when we refer to another paragraph we find that the appellant, who it appears is an officer of the constabulary of Lancashire, is by the duties of his office, and under the circumstances in which he holds that office, compelled to live on the premises in question, and that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may

direct, and the appellant is further liable to be removed from station to station at any time.

Now anyone of these portions of this paragraph would, in my opinion, be perfectly fatal to the argument on the part of the Crown, that the appellant is such an occupier of these premises as to render him liable to either of these assessments; and the first is that he is compelled to live on the premises. A man who pays rent for premises has the right to live upon the premises, and is entitled to occupy them under his contract with his landlord. No such case exists here. What is called a rent in the case before us is clearly no rent at all. It is stated that the appellant is an officer of the constabulary of the county of Lancaster, and that he is compelled to live upon these premises, but the payment made by him amounts to nothing more than this, that the authorities by whom he is employed think fit to deduct from the salary that they pay him a certain sum, namely, 8*l.* 10*s.* a year, in consequence of the benefit he derives from lodging in this house with his family during whatever time they may compel him to remain there. That is not a rent at all, it is not a tenancy at all, it is not an occupation at all in view of the Acts which regulate and determine either of these assessments, and, therefore, were it upon that ground alone, I should hold that this is not an occupation within the meaning of either of these Acts of Parliament. But the case goes on to say that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct. Under this power in the chief constable he might either, upon a particular occasion or on any number of occasions, where the proper conducting of the business of the police might require it, send any number of persons who might be taken into custody, and who were to remain in custody until the following morning before they would be taken before the magistrate, into this house, and put half a dozen of them into half a dozen of the beds in the different rooms of this house, and they might if they thought fit in order to do so (and it

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might be a public duty on their part that they should do so) confine him to a single bed in a room at the top of the house, or they might desire him to lie upon the floor all night in order that these several prisoners should be in safe custody. That alone is inconsistent with the beneficial occupation or use of the house by a tenant who is liable to assessment under these Acts of Parliament; and, therefore, if it stood alone upon this second clause of the seventh paragraph it also would be fatal to the question of occupation. But then when we come to the last provision in this paragraph we find that the chief constable "may direct," and that the appellant is therefore liable to be removed from station to station at any time. Here is a man assessed for the income-tax for the year, and assessed to the inhabited house duty for the year, who might, if it were thought fit, a week or a month, or even a single day after the assessment to the income-tax and to the inhabited house duty, be removed to another place altogether, and might not occupy the house for a single day after the notice or the command is issued to him to quit the station and remove himself to another station. It is not arguable whether or not this could be an occupation within the meaning of these Acts of Parliament. I am clearly of opinion, therefore, that he is not an occupier, he is merely a servant of the constabulary put into the house for their purposes, with liberty and permission to live in that house just as long as they think fit, and no longer, just as long as it suits the public service to station him there, and it is expedient that he should remain an officer in their establishment, and no longer. Under these circumstances it clearly is not an occupation within these statutes.

CLEASBY, B.—I must say that I was a good deal surprised at the statement of the learned counsel for the Crown, that the point intended to be raised here was a different one from that which we are now considering. I refer to the case, and I see that this is the only point upon which the case is stated. It says, "After considering the statements of the appellant and the surveyor, the Commissioners were

of opinion that the superintendent was the servant of the county, and not of the Crown, and that the house being separate and distinct from the police-station, the only communication being by a door in the yard wall to the drill-ground, and being furnished by the superintendent at his own expense, was liable to be assessed upon its full annual value." They state everything connected with the place to shew in what way it is connected with the police-station, and not deciding anything upon the other question, the Commissioners decide that it is to be regarded as if he were living apart from the police-station altogether in a street in the town. If that were the case, although he is paid by the police authorities, or there is an allowance made for it, and he is removable to a different station, it would be quite a different thing. Passing by other questions altogether, the Commissioners hold that in this case he occupies the premises so separated from the police premises, and furnishing them at his own expense he is liable to be assessed. Upon this question, which is mainly a question of fact, we come to a different conclusion. I will only say with reference to the case which has been referred to, which case was not referred to in the Judge's case, that the question there considered was a totally different one. What we have to consider is simply whether the superintendent is regarded as a person occupying or living upon these premises in any other sense than that he is allowed to live there upon part of the police premises. I apprehend that if the police premises were shut in by an outer door and among the other uses to which the station was put this man had the house within that outer door, no question whatever could possibly arise. No one would contend that he was the occupier of the house within these Acts of Parliament, although he was the only person living in it. How can it be that it makes a difference if, for the more convenient enjoyment by their servant of the particular house, and to make it more comfortable for him, they, with all the internal communications requisite for the discharge of his duties, allow him to have an outer door into

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the footpath or street. It appears to me not of the slightest importance.

POLLOCK, B.—I also think that there is ample material for a decision in this case contained in the argument addressed to us by Mr. Dicey, which turns upon the meaning of the word "occupier" in schedule B of the 48 Geo. 3. c. 55, and the facts stated in this case, upon which we have to draw inferences of fact as well as of law. It is sufficient to say that such a so-called occupation as is shewn to exist in this case is not such an occupation as makes the man an occupier within the meaning of the statute.

Judgment for the appellant, with costs.

Solicitors—The Solicitor of Inland Revenue, for the Crown; Ridsdale, Craddock & Ridsdale, agents for Birchall, Wilson & Hulton, Preston, for appellant.

[IN THE COMMON PLEAS DIVISION.]

1877. }
Nov. 27. }

FORD v. TAYLOR.

County Court—Cause sent for Trial under 19 & 20 Vict. c. 108. s. 26—New Trial—Right to Trial by Jury.

Where a cause ordered under 19 & 20 Vict. c. 108. s. 26, to be tried in a County Court, has been tried there accordingly, and afterwards a new trial has been ordered, either party has a right to require a jury on the second trial, notwithstanding the order for the second trial does not direct how the cause shall be tried, and the first trial was by the Judge without a jury.

Action on a bill of exchange for 23l. 11s. drawn by the plaintiff upon and accepted by the defendant. The defence, in substance, amounted to a failure of consideration by reason of certain roofing tiles, for the payment of which the bill had been accepted, being of a defective quality, and not such as they had been warranted by the plaintiff, and the de-

fendant by way of counter-claim claimed damages for such breach of warranty. The issues raised were by an order made under 19 & 20 Vict. c. 180. s. 26, directed to be tried in the County Court of Surrey, holden at Reigate, and such trial accordingly took place on the 18th of May, 1877, before the County Court Judge without a jury, and after viewing the roof on which the tiles had been placed the County Court Judge, on the 14th of June following, gave judgment for the defendant, and adjudged him 50l. damages, which he ordered the plaintiff to pay.

The plaintiff, thereupon, applied to this Division of the High Court for, and obtained, a rule for a new trial. Before this second trial came on to be heard, due notice in writing of a demand of a jury was given on behalf of the plaintiff in exercise of the right to a trial by jury given by 9 & 10 Vict. c. 95. s. 70. When the cause again came on for trial in the County Court, which it did on the 15th of August, 1877, the County Court Judge refused to try it with a jury because the rule ordering the new trial contained no direction that it was to be so tried, and that therefore it was to be tried in like manner as the first had been tried, namely, without a jury. The County Court Judge accordingly again tried the action without a jury, and found again for the defendant, though for a less amount than on the first trial. A rule *nisi* for a new trial was again obtained on behalf of the plaintiff on various grounds, and *inter alia* on the ground of the refusal of the County Court Judge to allow the action to be tried by a jury. Against this rule,

Cooke now shewed cause (1).—The action was sent for trial in the County Court under section 26 of 19 & 20 Vict. c. 108, and the County Court Judge had no power to try it with a jury. The

(1) A preliminary objection was taken on shewing cause by the counsel for the defendant, that the County Court Judge's notes had not been obtained, although the counsel for the plaintiff who had obtained the rule had not been present at the trial, but it became unnecessary to determine this matter as the counsel for the plaintiff now rested his right to make the rule absolute on the Judge's refusal to have the action tried with a jury.

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26th section enacts that where in any action of contract brought in a Superior Court, the claim, &c., does not exceed 50l., "a Judge of a Superior Court on the application of either party after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name, and thereupon the plaintiff shall lodge with the Registrar of such Court, such order and the issue, and the Judge of such Court shall appoint a day for the hearing of the cause, . . . and after such hearing the Registrar shall certify the result," &c. That differs from section 7 of the 30 & 31 Vict. c. 142, which empowers a Judge of the Superior Courts in certain cases to order a cause to be tried in the County Court, as in that 7th section it is expressly enacted after the order has been lodged with the Registrar, "that the cause and all proceedings therein shall be heard and taken in such County Court as if the action had been originally commenced in such County Court." It cannot, therefore, be inferred that when a cause is sent under section 26 of the former Act to a County Court for trial, it is to be tried according to the practice of the County Court. If either party wished the trial to be with a jury in the County Court he should have got the rule or order to state that it was to be so tried, as was, in fact, done by the order of Erle, J., in *Wheatcroft v. Foster* (2). The plaintiffs never asked to have the cause tried by a jury on the occasion of the first trial in the County Court, and therefore when a new trial was ordered, it was to be presumed that the second trial was to be tried in like manner as the first, that is to say, without a jury.

THE COURT then called on

Woolf to support the rule.—The case of *The Queen v. Harwood* (3), shews that where a cause is tried before a County Court Judge without a jury, and a new trial is granted generally, a party has a right to have it on the second occasion tried by a jury. It is true that that was

not a case sent under the statute for trial in the County Court, but was a case brought originally in the County Court, and in which the County Court Judge had himself granted a new trial; but it was argued that as the Judge had granted a new trial generally it was to be taken that he meant a new trial of the same kind as the first, which had been without a jury; but Erle, J., distinctly says, "The parties have the same right on a second as they have on the first trial, to require a jury to be summoned," and he made absolute the rule which had been obtained for the County Court Judge to hear the cause, he having refused to try it with a jury. Then, although it was decided in *Balmford v. Pledge* (4) that where a cause is sent to the County Court for trial under 19 & 20 Vict. c. 108. s. 26, the application for a new trial must be made in the Superior Court; yet Blackburn, J., points out in that case that the Judge of the County Court is to try it "in the same way as a plaintiff brought in his Court either with or without a jury;" and that learned Judge repeats this in *The Ipswich Gas Light Company v. Norman* (5), where, during the argument, he says, "when once a cause gets into the County Court the trial and its incidents are governed by the practice of that Court." In *Fletcher v. Baker* (6), the cause was sent under 19 & 20 Vict. c. 108. s. 26, to be tried in a County Court, and a party was held not entitled to avail himself of his right to a jury unless he gave the notice required by the County Court Rules made under 9 & 10 Vict. c. 95. rules 1 and 2 of Order XVI. of the County Court Rules, 1875, are substantially the same as the County Court Rules referred to in *Fletcher v. Baker* (6).

Cooke contra.—The rules and practice of the County Court do not apply to a cause sent for trial under 19 & 20 Vict. c. 108. s. 26. A cause so sent does not ever leave the Superior Court which sends it, and such Court continues its control over it, and is

(4) 7 B. & S. 425; s. c. 35 Law J. Rep. Q.B. 169.

(5) 7 B. & S. 847.

(6) 43 Law J. Rep. Q.B. 112; s. c. Law Rep. 9 Q.B. 370.

(2) E. B. & E. 737; s. c. 27 Law J. Rep. Q.B. 277.

(3) 22 Law J. Rep. Q.B. 127.

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alone the Court to which an application for a new trial can be made. It may, under section 26, order the trial in the County Court to be on such terms as it should think fit, and where, as here, on the order for the second trial, it did not impose any particular terms, the presumption is that it ordered the second trial to be tried like the first, which was without a jury. There is no power under any County Court Act which enables a party in an action sent for trial in the County Court under 19 & 20 Vict. c. 108, s. 26, to require a jury to be summoned.

GROVE, J.—I regret to say that I feel obliged to give way to the arguments of Mr. Woolf on behalf of the plaintiff, and to the case which he has cited of *The Queen v. Harwood* (3). I very much regret that our making absolute this rule will prevent the exercise of that summary jurisdiction which it was considered better that the County Court should have instead of a protracted litigation. Still one must act according to decisions and the legal rights of the parties. Now where the order sending a cause for trial in the County Court does not impose any terms, it would generally be obvious that the cause would be tried not otherwise than any cause would ordinarily be tried in such County Court. At first it struck me that as on the first trial the cause was tried by the Judge without a jury, it might reasonably be supposed that an order granting a new trial without imposing any terms as to the mode of trial, would be deemed to mean that the second trial should be one of the same nature as the first. But I think that this point has really been decided by the case of *The Queen v. Harwood* (3), and that we are bound by that decision. It is true that was a case where a new trial had been granted by the County Court Judge under the 9 & 10 Vict. c. 95, but the words of the 89th section of that Act are, as regards granting a new trial, the same as those of section 26 of 19 & 20 Vict. c. 108. The 89th section of the one Act says that the Judge shall have the power, "if he shall think fit, to order a new trial to be had upon such terms as he shall think reason-

able;" whereas the 26th section of the other Act says, "may, in his discretion, and on such terms as he shall think fit." There is, therefore, no substantial difference, and by one of the rules of the County Court Rules, 1875, it is, like the 9 & 10 Vict. c. 95, s. 70, made lawful for the plaintiff or defendant to require a jury. Then this case of *The Queen v. Harwood* (3) decides that the mere fact of a new trial having been granted generally, does not import that the second trial is to be in the same way as the first, and in his judgment in that case Erle, C.J., says, "The ground taken by the County Court Judge was that he was empowered to refuse to try the case by a jury. I think that on that point he was wrong;" "the parties have the same right on a second as they have on a first trial to require a jury to be summoned." Now it cannot be contended that on the trial of a cause sent to the County Court under 19 & 20 Vict. c. 108, s. 26, the parties have not as in any other cause in the County Court a right to require a jury, and this case of *The Queen v. Harwood* (3) decides that they have the same right on the second trial as they had on the first. I therefore feel that I have no option, however much I may regret it, but that I must, acting judicially, make absolute this rule for a new trial.

LINDLEY, J.—I am of the same opinion. This is an action commenced in one of the Superior Courts which was sent for trial in the County Court under section 26 of 19 & 20 Vict. c. 108. That section is as follows [the learned Judge here read that section]. Under this section the first question is whether, when the order ordering the cause to be tried in the County Court does not say in what particular mode it is to be tried, how is it to be tried? The answer must obviously be that it is to be tried according to the practice of the County Court, that is to say, in the same way as any County Court case. If so, by the 9 & 10 Vict. c. 95, s. 70, and by the County Court Rules, 1875, either party is entitled to require a jury, and the present is governed by that of *The Queen v. Harwood* (3). Consequently the plaintiff was entitled to have the

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cause tried with a jury, although the order ordering a new trial was silent as to the mode of such second trial. The rule will, therefore, be made absolute for a new trial, the costs to abide the event.

Rule absolute accordingly.

Solicitors—Nicolson & Jones, agents for C. J. Grece, Redhill, for plaintiff; J. E. L. King, for defendant.

1877. { MEGGY (TRUSTEE, ETC.) v. THE
Dec. 3, 7. { IMPERIAL DISCOUNT COMPANY
(LIMITED).

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 125—Joint and Separate Estates under Liquidation—Discharge granted by joint Creditors only—Property left in Possession of Debtor or subsequently acquired.

A trustee under a liquidation, who, with the authority of the creditors, permits the debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that the debtor was holding himself out as the real owner and dealing with it as such, forfeit his right to it so long as there has been no closing of the liquidation or order of discharge; and his right to it and to any after-acquired property cannot be defeated by a bill of sale given by the debtor subsequently to the liquidation.

Where a liquidating debtor has separate as well as joint creditors and assets, an order of discharge by the joint creditors will not operate to discharge him from his separate debts, and any after-acquired property will therefore vest in the trustee appointed under the liquidation.

This was an action tried at the Guildhall, before Lush, J., and was brought by the plaintiff as trustee under the liquidation of one Beverley against the defendants, to recover the value of some furniture which had been seized and sold by the defendants under a bill of sale.

The learned Judge reserved his judgment.

Beverley & Schliemann carried on business in partnership till November,

1872, when a joint petition for liquidation was presented, and the plaintiff was appointed trustee. There were separate as well as joint creditors and assets, and the separate assets of Beverley consisted of furniture in his house of the estimated value of 500*l.* His separate liabilities were 450*l.*, of which his brother-in-law, one Digby, was creditor for 350*l.* Digby and another man were appointed by the separate creditors to act as a committee of inspection in regard to the separate estate, and they told the plaintiff as trustee not to take any steps to obtain possession of the furniture until further instructions should be received from them. Accordingly the furniture remained in Beverley's possession until in February, 1876, the plaintiff heard that Beverley had filed another petition for liquidation, and upon informing the committee of inspection of this, was ordered by them at once to take possession. On his proceeding to do so, he discovered that another man was already in possession on behalf of the defendants under a bill of sale dated the 21st of January, 1876, and granted by Beverley upon it and some other furniture which he had acquired since the original petition, to the defendants, as a security for an advance of 500*l.*

No order of discharge had been granted, nor resolution for closing the liquidation passed by the separate creditors; but a joint order of discharge to Beverley & Schliemann had been given by the partnership creditors in July, 1873, before the purchase of the after-acquired property. The trustee under the second liquidation repudiated any claim upon the proceeds of the sale, and the question was solely as to the right of the plaintiff as against the defendants, notwithstanding Beverley's discharge, and his having been left in apparent possession of the property.

Holl and Fullarton, for the plaintiff
J. C. F. S. Day, Lumley Smith and Hardcastle, for the defendants.

Cur. adv. vult.

LUSH, J. (on Dec. 7) delivered judgment:—

The plaintiff is the trustee under

Meggy v. Imperial Discount Co.

a liquidation arrangement, obtained upon the joint petition of Beverley & Schliemann, who were partners in trade. There were separate creditors as well as joint creditors, and separate as well as joint assets. The separate assets of Beverley consisted of furniture in his dwelling-house at No. 5, Regent's Park Terrace. His separate creditors appointed a committee of inspection, and they, as an act of indulgence to Beverley, instructed the plaintiff as trustee not to take any steps for realising the furniture until he received further orders from them. This occurred towards the end of the year 1872. No further orders were ever given, and the insolvent continued in possession of the furniture until the 21st of January, 1876, when he mortgaged it, together with other furniture which he had acquired subsequently to his petition, to the defendants, for a sum of 500*l.* He afterwards filed another petition for adjudication. This proceeding coming to the notice of the plaintiff, he put in his claim to the furniture, and then found that the defendants had already and before the second liquidation taken possession under their bill of sale. No resolution had ever been made for closing the liquidation, nor was any order of discharge ever given by the separate creditors, but an order of discharge had been given by the joint creditors before the purchase of the after-acquired property.

Upon this state of facts two questions arise—first, whether the plaintiff, the trustee under the liquidation, had not by lying by and allowing the insolvent to remain in possession of the furniture as the apparent owner, forfeited his right to claim that property as against the holder of the bill of sale; and secondly, if not, whether the order of discharge did not operate as a discharge from his separate as well as from the joint debts, in which case the after-acquired property would be his, and would consequently pass to the defendants by virtue of the bill of sale.

Several authorities were cited, which I have consulted, and have come to a conclusion against the defendants upon both points. If the trustee had authorised the insolvent to trade with the assets

which belonged to the estate, and the insolvent had contracted debts in the course of that trading, the new creditors would have had an equitable claim to the assets for payment of their debts. Or if the trustee had known that the insolvent was holding himself out as the owner of the furniture, and was endeavouring to raise money upon it, and had with that knowledge abstained from interfering or giving notice of his title, so as to prevent the persons who were negotiating from being imposed upon, he would in that case also have been precluded from setting up his title against the bill of sale. But he had no knowledge of any such attempts or purpose. He was merely passive, and was in ignorance that the insolvent was attempting to take any such advantage of the indulgence shewn him. To hold that under the circumstances the trustee had forfeited his right to the furniture, would be to import without statutable authority the doctrine of reputed ownership into merely private transactions between debtor and creditor. I am constrained to hold that the furniture remained his for the benefit of the separate creditors, and that the bill of sale conferred on the defendants no right to take possession of it as against the trustee.

Upon the second point the law appears to me to be equally clear. The separate creditors were no parties to the order of discharge made by the joint creditors, and that order could only discharge the insolvent from the debts of the firm. He remained liable as before to his separate creditors, and as no resolution had been made for closing the liquidation, his after-acquired property belonged to the estate.

The result is, that the plaintiff is entitled to recover the proceeds of the sale of all the furniture, and my judgment must be for him for the agreed amount, which is 302*l.* 17*s.* 3*d.* and costs.

Judgment for plaintiff.

Solicitors—Lewis, Munns & Longden, for plaintiff; E. H. Barlee, for defendants.

IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1876.
Dec. 20, 21. }
1877.
Jan. 15. }
Nov. 19. }

HYDE v. WARDEN.*

Specific Performance—Parol Agreement—Acceptance of Title—Waiver of Objections to Title—Reasonable Covenants—Right of Re-entry—Severance of Reversion.

Taking possession of land under a parol agreement for a lease is not in itself an acceptance of the title, but merely evidence of such acceptance which may be rebutted. But taking possession without taking objection to known defects in title amounts to a waiver of such objections.

A person who agrees to accept an assignment of an underlease is not to be held to have constructive notice of the terms of the original lease, unless he has had a fair opportunity of ascertaining its terms.

The defendant, having agreed to take an assignment of an underlease from the plaintiff, found on examining the lease that it contained a covenant by the plaintiff not to underlet without the consent of the lessor, the lessor agreeing not to withhold his consent from any assignment to a respectable and responsible person:—Held, that the fact that the lessor's consent had not been obtained at the time of the agreement to take an assignment was not enough to enable the defendants to resist a claim for specific performance.

Semble, a power of re-entry on non-performance of covenants does not entitle the lessor to re-enter for breach of a negative covenant, such as a covenant not to assign without consent.

A covenant by the lessee not to mow meadow-land more than once in a year is not so unreasonable or unusual as to form a valid objection to the lessee's title on the part of a proposed assignee.

But a covenant that the lessor and his assigns shall have a right of re-entry on the bankruptcy of the lessee or his assigns, or if execution should issue against him, is a valid and fatal objection, disentitling the

lessee to specific performance of an agreement to accept an assignment.

B. was in possession of two farms, of one as freeholder, and of the other for a term of years ending Michaelmas, 1889. B. leased the whole to N. for fourteen years, from Michaelmas, 1870, subject to a covenant for re-entry in case of the lessee's bankruptcy, and the plaintiff became the assignee of N.'s lease. During the plaintiff's term, B. granted to him a lease of the leasehold farm from Michaelmas, 1884, for five years, ending at the same time as the original lease to B.:—Held, that the last-mentioned lease, as it conferred merely an "interesse termini" on the plaintiff, was no severance of the reversion, such as to extinguish the right of re-entry by the original lessor.

And further, that such lease for five years, being expressed to be made subject to the former lease, would not affect the right of entry thereby reserved.—*Doe d. Freeman v. Bateman* (2 B. & Ald. 168), approved of.

Where two distinct properties, held under separate titles, are comprised in one lease, and the reversion of one of them becomes vested in the lessee, this does not extinguish a right of re-entry in respect of the property of which the reversion remains in the lessor; the rules as to severance of reversion by assignment to third parties not being applicable to cases where a portion of the reversion is vested by assignment in the lessee himself.

Where land is purchased for immediate occupation the Court will not direct a general enquiry as to title, so as to give the vendor an opportunity of making good defects which existed in the title when possession should have been given.

This was an appeal from a judgment of the Exchequer Division.

It was an action for specific performance of an agreement to accept a lease of certain lands.

The lands in question were comprised in a lease from one Bayntun to one Nicholas for fourteen years from Michaelmas, 1870, of which lease the plaintiff was assignee.

They consisted of two farms, Freek's Farm and Bridge Farm. Freek's Farm

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* *Coram* Cockburn, L.C.J.; Brett, L.J.; Amphlett, L.J.

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was Bayntun's freehold; Bridge Farm was held by him for a term of years ending Michaelmas, 1889.

The defendant, when he agreed to become the assignee of the plaintiff's lease, believed it to be a lease of one farm at one rent and with one title. He entered upon the land, and made certain alterations in the premises pending the negotiations. But on finding out the nature of the title, and that there were certain provisions in the lease of an objectionable character, he refused to carry out the agreement. The principal objections to the lease were that it contained—

A covenant that the lessee should not assign without the consent of the lessor, which was not to be withheld in case of an assignment to any respectable and responsible person.

A covenant not to mow meadow land more than once in a year.

A covenant that on the bankruptcy of the lessee the lessor might re-enter upon the demised lands as for a forfeiture.

At the trial, Lord Coleridge asked the jury:—

Was there in fact such parol contract as was alleged?

The jury answered the question in the affirmative, and a verdict was entered for the plaintiff; but no judgment was entered.

On motion for judgment, the Exchequer Division gave judgment for the defendant on the ground that the lease contained onerous and objectionable covenants, which formed a valid objection to the plaintiff's title, and which the defendant had not waived.

On appeal, the plaintiff brought additional evidence to shew that there had been a severance of the reversion of the premises demised, so that the right of the lessor to re-enter for the bankruptcy of the lessee was extinguished.

For this purpose the plaintiff relied on two deeds, one dated the 21st of January, 1874, whereby Bayntun granted to the plaintiff a reversionary lease of "Bridge Farm," to commence at the expiration of the plaintiff's existing lease, and terminating with the original lease of Bridge Farm to Bayntun; the other was a deed

dated the 9th of September, 1875, the terms of which are set out at length in the judgment, the effect of which was to transfer Bayntun's interest in Bridge Farm to the plaintiff, reserving Bayntun's right in respect of the recovery of rent under the lease from him to Nicholas.

The facts of the case will be found more fully set out in the judgment.

Fry (Langworthy and Bompas with him), for the plaintiff.—The jury have found that there was such a parol contract as is alleged, and that possession was taken by the defendant in part performance of the contract. On these findings the plaintiff is entitled to specific performance. The effect of part performance of the agreement in taking the case out of the Statute of Frauds is shewn in *Mundy v. Jolliffe* (1), and in *Wilson v. The West Hartlepool Railway Company* (2). Even if the covenants are unusual, they must be considered binding. They refer to the subject-matter of the lease, and are connected with the occupation of the land. Covenants *dehors* the subject-matter of the lease no doubt would not be enforced. As to the defendant's ignorance of the nature of the lease, he has acted as if he knew all about it; both the conversations and the correspondence are consonant with a complete agreement. As to the objection that the defendant would be liable to be ejected by the superior landlord in case of the bankruptcy of the lessee, as a matter of fact the superior landlord has no such right, for, by the indenture of the 21st of January, 1874, and that of the 9th of September, 1875, or either of them, there has been a complete severance of the reversion, under the second resolution in *Knight's Case* (3). They also cited *Co. Litt.* (215a, 303b); *Palmer v. Edwards* (4); *Baker v. Gorlling* (5);

(1) 5 Myl. & Cr. 167; s. c. 9 Law J. Rep. Chanc. 95.

(2) 2 De Gex, J. & S. 475; s. c. 34 Law J. Rep. Chanc. 241.

(3) 5 Rep. 55a; s. c. Moore, 199.

(4) 1 Dougl. 186.

(5) 1 Bing. N.C. 19; s. c. 3 Law J. Rep. C.P. 272.

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Shelford's Real Property Statutes, p. 711 (8th ed.), note; *Oliver v. Beaumont* (6); *Gaston v. Frankum* (7); *Upperton v. Nicholson* (8).

The Solicitor-General and Serjt. Ballantine (Day and Finlay with them), for the defendant.—The parol contract to take an assignment of the lease was only conditional on the terms of the lease being found to be reasonable. The part performance of the agreement does not bind the defendant. The plaintiff could not give what the defendant was prepared to accept. There are many valid objections to the lease, which have not been waived; the principal one being the right of re-entry by the lessor on the lessee's bankruptcy. This right is still subsisting, for there has been no severance of the reversion. The second resolution in *Knight's Case* (3) is intended to meet a particular hardship. It is to exempt the tenant from liability to re-entry or distress by many different landlords at once; but "*cessante ratione cessat ipsa lex*." No such inconvenience occurs here. The lessor maintains all his rights, and there is no reason why he should not retain the right of re-entry. The terms of the deed of the 21st of January, 1874, shew that it is not a lease of a reversion, but a reversionary lease, which leaves untouched all the provisions of the original lease. Even suppose the reversion to be severed, the rights of the original lessor being reserved he can enter for a condition broken, though he has no reversion—*Doe d. Freeman v. Bateman* (9). As to the other deed, time is of the essence of a contract where a particular time is named for taking possession; and possession means "possession with a good title"—*Tilley v. Thomas* (10). A defect of title cannot be cured after action brought. Besides, there is really

no assignment of anything but the profit rental from Bayntun to Hyde. The general effect is to preserve all the rights of the landlord under the original lease.

Cur. adv. vult.

The judgment of the Court (11) was delivered on the 19th of November by

BRETT, L.J.—This action was brought to enforce specific performance, or in the alternative to recover damages for breach of a parol contract, alleged by the plaintiff to have been entered into by the defendant to accept a lease of a farm in Sussex, called Freek's Farm, under the following circumstances:—By an indenture dated the 10th of October, 1870, and made between Robert Collins Bayntun of the one part and John Nicholas of the other part, in consideration of the rent and covenants thereafter reserved and contained, and on the part of Nicholas, his heirs, executors, administrators and assigns, all of whom were thereafter included in the word lessee, to be paid and observed, Bayntun granted to Nicholas a lease of the said Freek's Farm, therein described as a portion of a larger farm of the same name, and also of another farm called Bridge Farm, which was adjoining or near to Freek's Farm, for the term of fourteen years, from the 29th of September, 1870, at one undivided rent of 330*l.* per annum. The lease contained, among other covenants not necessary to be stated, a covenant on the part of the lessee not to mow meadow land more than once in a year, and not to assign or underlet the said premises or any part thereof for all or any part of the term without the previous consent in writing of the lessor, such consent, however, not to be withheld from any assignment or underlease to any respectable or responsible person. There was also a provision that if at any time the rent should be in arrear, or if the said lessee should fail or neglect to perform any of the covenants and agreements on his part, to be done and performed, or if the lessee should be-

(11) This judgment was prepared by Amphlett, L.J., who resigned before it was delivered.

(6) 1 De Gex & S. 397.

(7) 2 De Gex & S. 561.

(8) 39 Law J. Rep. Chanc. 758; s. c. Law Rep. 10 Eq. 228; on appeal, 40 Law J. Rep. Chanc. 401; s. c. Law Rep. 6 Chanc. 436.

(9) 2 B. & Ald. 168.

(10) Law Rep. 3 Chanc. 61.

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come bankrupt or make any composition with his creditors, or if any execution should issue against him, in either of such cases the lessor might re-enter. By an indenture dated the 22nd of December, 1871, Nicholas assigned the said lease to one Mills, and by another indenture dated the 10th of October, 1873, Mills assigned the same to the plaintiff. The rent of 330*l.*, reserved by the lease, appears to have been, under some circumstances not stated to us, and doubtless immaterial so far as this action is concerned, reduced to 310*l.*, which will therefore be hereinafter referred to as the actual rent payable under the said lease. It may be useful to observe, with reference to the contention between the parties on some points in this case, that Bayntun was the freeholder of Freek's Farm, but that he only held the Bridge Farm under a lease, dated the 6th of June, 1869, from two persons, named Benjamin Alfred Arnold and Charles Edwin Ogden, for twenty-one years from the 29th of September, 1868, which would therefore expire on the 29th of September, 1889, just five years after the expiration of the said lease from Bayntun to Nicholas of the 10th of October, 1870.

The plaintiff, for some time after the said assignment to him from Mills, occupied both the farms himself, but in the spring of 1875 he became desirous of underletting Freek's Farm, and hearing that the defendant, who was a gentleman of responsibility living in a house very near to Freek's Farm had been making some enquiries with a view of taking it, the plaintiff wrote to the defendant a letter dated the 11th of May, 1875, in which he said that he had decided to let Freek's Farm, and amongst other things stated expressly that the rent he paid for it was 220*l.* per annum. A negotiation then ensued between the plaintiff and the defendant for an underlease of Freek's Farm, and on the 18th of May they went over the farm together, and in answer to an enquiry from the defendant the plaintiff informed him that he held the same under a lease of which he believed eight or nine years to be unexpired, and that he was willing to transfer to the defendant the remainder of the term on the same

terms and conditions as those on which he held it. In fact, however, the plaintiff held under no separate lease of Freek's Farm at 220*l.* or any other sum, but, as has been stated, he held both Freek's and Bridge Farm as assignee of the lease from Bayntun to Nicholas of the 10th of November, 1870, at an undivided rent of 310*l.* per annum. It follows that either farm might be distrained upon for the whole of this amount, and the tenant of either farm might be evicted for a breach of covenant committed by the tenant of the other.

On the same 18th of May, after going over the farm, the plaintiff and defendant went together into the defendant's house, and it was there arranged that the defendant should take the farm upon the terms offered by the plaintiff, and that complete possession should be given to the defendant on the 24th of June then next, and that the defendant should also have the right of sporting over the farm on payment of 100*l.*, being the same sum which the plaintiff had paid for it to Bayntun; and that certain provisions should be made for the valuation of stock and crops, to be taken to by the defendant, which are not necessary to be here stated.

There is no dispute as to the terms of this arrangement, but the plaintiff has all along contended that the agreement was a final and concluded agreement, while the defendant contends that it rested on negotiation only and was subject to the approval of his solicitors.

A draft agreement was afterwards sent by Messrs. Parkers, the plaintiff's solicitors, to the defendant, accompanied by a letter dated the 25th of May, 1875, which was as follows:—"At the request of Mr. Hyde, of Bridge-house Farm, who, we understand, has agreed to let you Freek's Farm for the rest of his tenancy, we have prepared and herewith send you the draft of such an agreement as, we think, should be signed between yourself and Mr. Hyde. Would you kindly peruse it, and as we presume you will wish to have it approved by your solicitors, forward it to them and request them to return it approved to us."

On the same 25th of May the defend-

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ant being in want of keep for his cows obtained the plaintiff's consent to take possession of one of the fields belonging to the farm and turned out his cows therein, and with the knowledge and without any objection on the part of the plaintiff made a cesspool thereon for the convenience of his house, and exercised other acts of ownership thereon. On the 24th of June, the day fixed for that purpose, the plaintiff was let into possession by the defendant of the remaining part of the farm.

In the meantime the defendant's solicitors, Messrs. Black, Freeman & Gell, to whom the defendant had sent the draft agreement, requested Messrs. Parkers to furnish them with a copy of the lease referred to in the draft as that under which the plaintiff held, being the lease from Bayntun to Nicholas of the 10th of October, 1870, and the same was sent to them on the 3rd of June, 1875.

On the 14th of June, Messrs. Black, Freeman & Gell, in reply to a letter from Messrs. Parkers, pressing for a return of the said draft approved, wrote to them as follows: "*Warden v. Hyde*. In reply to your favour of Saturday, the terms of the original lease are of such a nature that we really cannot advise Mr. Warden to accept the tenancy. We hope to-morrow to return your draft with our remarks thereon, to see whether the superior landlord can release any of the covenants. Some of them are extremely objectionable, namely, the power to resume for building purposes, and the determination on the bankruptcy of the lessee, and there are some other points as to the farm." On the 19th of June Messrs. Freeman & Gell returned to Messrs. Parkers the copy lease, having placed marginal notes against the clauses to which they objected. The only objections so taken, which were relied upon by the defendant in the argument before us, were first to the covenant not to mow meadow land more than once a year, it being suggested that there could be no objection to mowing more than once a year if an equivalent was put on the land; and, secondly, to the provision giving a right of re-entry if the lessee should become bankrupt or make any composition with his creditors, or if any

execution should issue against him. An interview afterwards took place between the solicitors, when the objections to the provisions of the lease were discussed, and on the 28th of June Messrs. Parkers wrote to Messrs. Black, Freeman & Gell a letter containing the following passage: "After seeing you on Saturday last we called upon Mr. Waugh at Cuckfield. Mr. Waugh is Mr. Bayntun's solicitor, and on our explaining matters to him he has agreed to grant an entirely new lease of Freek's Farm to Mr. Hyde, omitting the clauses to which you object, with the exception of the clause relating to the mowing of the pasture twice in one year. This Mr. Waugh will not give way upon, although we offered that an equivalent in manure should be put upon the land. We hope, therefore, you will see your way to waiving this objection."

In a letter of the 1st of July, 1875, Messrs. Black, Freeman & Gell suggested to Messrs. Parkers that if a new lease were to be granted it should be to the defendant direct. This suggestion was communicated by Messrs. Parkers to Mr. Waugh, the solicitor of Bayntun, in a letter dated the 2nd of July, with an intimation that on behalf of the plaintiff they did not see any objection to that suggestion being acted upon. Various attempts were thereupon made, on the part as well of the plaintiff as of the defendant, who at that time at all events was very anxious to take Freek's Farm, to obtain a new lease from Bayntun, which it was stated in Messrs. Parkers' said letter of the 28th of June he had agreed to give, and a long correspondence ensued on the subject between Messrs. Parkers and Messrs. Black, Freeman & Gell and Mr. Waugh, Bayntun's solicitor, which it is unnecessary further to notice; but it was ultimately found impossible to obtain any such new lease, either to the plaintiff or direct to the defendant, except upon terms to which the plaintiff would not submit, and in consequence the defendant in the month of August declined to accept the proposed underlease from the plaintiff alone, and offered to re-deliver possession of the farm, which was at first declined by the plaintiff, but was afterwards accepted upon the terms

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that such acceptance should be without prejudice to the rights of the parties.

Under these circumstances this action was commenced on the 21st of August, 1875, seeking the specific performance of the parol contract, and the same came on for trial before Lord Coleridge at Lewes, on the 9th of March, 1876.

It was not disputed that if there was a concluded parol agreement the taking possession and acts of ownership were sufficient to take the case out of the Statute of Frauds, and the only issue of fact on that trial was whether there had been such a concluded agreement, or, as the defendant contended, only a negotiation for an agreement, and upon that issue a verdict was found for the plaintiff. It was assumed throughout the trial by all parties that the question of title was to be left open and not affected by a verdict in favour of the contract, and accordingly Lord Coleridge did not direct judgment to be entered but reserved liberty to either party to apply to the Court above for judgment, when the question of title would be more conveniently discussed.

The cause accordingly came on before the Exchequer Division on the 24th of May, 1876, upon a motion by the plaintiff that judgment should be entered for him for the specific performance of the agreement and for consequential directions, and upon a motion on the part of the defendant to make absolute a rule *nisi*, which he had obtained for a new trial; and the Court being of opinion that the plaintiff was not in a position to grant such an underlease as the defendant was entitled to, without the assistance of the inferior landlord, which could not be obtained, directed judgment to be entered for the defendant without costs, and that the plaintiff should have his costs up to the time of the payment of a certain sum of money into Court in respect of damage alleged to have been done by the defendant while in possession, as to which no further question arises.

This decision was challenged by the present appeal on the part of the plaintiff, and the defendant gave notice that on the hearing of such appeal he should apply that the judgment of the Exchequer Division might be varied by

directing the plaintiff to pay to the defendant the defendant's costs of the action, and that he should, if necessary, rely upon the rule for a new trial (on which no opinion was expressed by the Exchequer Division) and apply to the Court of Appeal for a new trial accordingly, or for judgment upon the ground that no agreement was proved which was sufficiently complete to be the subject of a claim for specific performance, as well as on the grounds on which judgment was given in the Exchequer Division.

Before discussing the objection raised to the plaintiff's title it will be as well to notice the contention of the plaintiff that the defendant had, by taking possession, accepted the title. We think that this contention cannot be sustained, for where possession is taken, as in this case, with the knowledge and consent of the grantor, it amounts only to evidence of an acceptance of the title which may be rebutted by circumstances shewing that it was not intended by the parties to have that effect. In this case we think that the conduct of the parties shews conclusively that there was no such intention, since at the time when possession was given of the main part of the farm, on the 24th of June, objections to the title had been distinctly raised by the plaintiff's solicitors, and correspondence respecting the same between the solicitors was continued for a considerable period after such possession had been taken. In fact, although the taking possession was in such correspondence, and throughout the proceedings in the action, insisted upon as a part performance, so as to take the case out of the Statute of Frauds, it was never alleged on behalf of the plaintiff, until the hearing of the appeal before us, that such taking possession had the further effect of being an acceptance of the title. But then it was urged on the part of the plaintiff that the defendant, by contracting for an underlease, must be taken to have had constructive notice of the provisions of the original lease when he took possession of a portion of the premises on the 25th day of May, and that at least all objections apparent on the face of the lease were thereby waived;

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and the case of *Crosser v. Collinge* (12) was relied upon in support of that proposition. But we think it may be considered as settled that the principle of that case can only be applied where, as, indeed, was the fact in *Crosser v. Collinge* (12), the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease—see *Grosvenor v. Green* (13) and *Smith v. Capron* (14). In the present case there was no such fair opportunity before the copy lease was sent to the defendant's solicitor as hereinbefore mentioned. For the contract was made at the defendant's house, when it is not pretended that the plaintiff had with him the lease or any copy thereof. And indeed the fact that the plaintiff, as he admits, informed the defendant that he held Freek's Farm on a lease at 220*l.* per annum, which was entirely incorrect, affords abundant evidence that such was not produced, nor its provisions properly explained to the defendant at the time when the contract was entered into. It is true that the defendant had not merely constructive, but actual notice of the provision of the original lease when he took possession of the remaining part of the property on the 24th of June; but that, as has been already observed, was, after certain specific objections to those provisions had been taken, and had become the subject of a correspondence between the solicitors, which continued for some time after, without any waiver of such objections being insisted upon or even mentioned. Under these circumstances we are of opinion that such specific objections to the provisions of the original lease have not been waived, and must be considered on their merits. It is quite a different question whether it is now open to the defendant to take other objections to those provisions not specified in the margin of the copy lease when returned to the plaintiff's solicitor. We are of opinion that it is not so open to him where such objections were known and

might have been insisted on before possession was given; and that such objections, even if valid, ought to be considered to have been waived. This disposes of one objection urged before us to the title which would otherwise have been fatal, viz., that the original lease was not, as represented, a lease of Freek's Farm at a rent of 220*l.*, but of the two farms at an undivided rent of a greater amount; for this objection was patent upon the lease itself, and yet was not noticed in the margin of the copy lease when returned, nor indeed at any time during the correspondence which ensued, and must, therefore, in our opinion, be considered as having been waived by the taking of possession.

We proceed to consider the objections to the title which have not been waived. The first was that there was no evidence of the consent in writing of Bayntun or his mortgagees to the proposed underlease. We think that this objection cannot be sustained. It was stipulated that such consent should not be withheld from an assignment or underlease to a respectable and responsible person; and no imputation has been made against the respectability or responsibility of the defendant, and consequently any attempt on the part of Bayntun or his mortgagees to reject the defendant on the ground that no consent in writing had been given would fail—see *Treloar v. Brigge* (15). Moreover we should, if it were necessary, be prepared to hold that the contention of the plaintiff is correct, that the power of re-entry being only in the event of the lessee wilfully failing or neglecting to perform any of the covenants, does not apply to a breach of a negative covenant—see *West v. Dobb* (16).

The only remaining objections necessary to be considered are those taken to two of the provisions of the lease, viz., the unqualified covenant not to mow meadow land more than once a year, and the power of entry in case of the bankruptcy of the lessee, both of which pro-

(12) 3 Myl. & K. 283; s. c. 1 Law J. Rep. Chanc. 130.

(13) 28 Law J. Rep. Chanc. 173.

(14) 7 Hare 192; s. c. 19 Law J. Rep. Chanc. 322.

(15) 43 Law J. Rep. Exch. 95; s. c. Law Rep. 9 Exch. 151.

(16) 39 Law J. Rep. Q.B. 190; s. c. Law Rep. 5 Q.B. 460.

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visions were said, on behalf of the defendants, to be unusual and unreasonable.

With regard to the first of these provisions we think that the objection fails. For although it is undoubtedly very common in framing leases to qualify a covenant not to mow meadow-land more than once a year by excepting from its operation cases where an equivalent in the shape of manure is bought on the land, it is by no means invariable to do so, and, in our opinion, the omission of such qualification is not sufficient to make the covenant so unreasonable or unusual as to give a right to the defendant to object to the title on that account. But as to the other provision objected to, namely the power of re-entry, not only if the lessee (which word is expressly declared to include assigns), should become bankrupt, or make any composition with his creditors, but also if any execution should issue against him, such provision appears to us unusual and unreasonable, especially in the present case, where the defendant would be liable to be evicted for the breach of the condition not only by himself but by the original lessee, Nicholas, of whose circumstances he might very probably know nothing. The Court, therefore, ought not, in our opinion, to compel the defendant to take an underlease if he would thereby be exposed to such a liability.

So matters stood upon the evidence presented to the consideration of the Court below; but the plaintiff, in pursuance of notice, applied to us for leave to produce additional evidence for the purpose of shewing that there had been a severance of the reversion in the two farms comprised in the original lease from Bayntun to Nicholas, which, according to the doctrine established in *Knight's Case* (3), and in *Twynam v. Pickard* (17), would absolutely destroy the power of re-entry reserved in the lease, and thus cause the defect in the title lastly discussed, and the defendant, not objecting, we allowed such additional evidence to be given. It consisted of three indentures, the effect of which it will be convenient to consider separately.

(17) 2 B. & Ald. 105.

The first of these indentures, dated the 21st of January, 1874, was made between Bayntun of the one part and the plaintiff of the other. By this indenture, after reciting the assignment of the 10th of October, 1873, from Mills to the plaintiff, of the residue then unexpired of the term granted by the lease from Bayntun to Nicholas of the 10th of October, 1870, and that Bayntun had agreed to grant to the plaintiff an extension of his term so far as regarded Bridge Farm, together with certain rights of sporting not affecting the questions arising in this action, it was witnessed (among other things) that Bayntun demised to the plaintiff the Bridge Farm for a term of five years from the 29th of September, 1884 (that being the day when the former lease of the 10th of October, 1870, would expire), but subject to the last-mentioned lease, as long as the same should subsist, at the rent of 180*l.* during the said term of five years thereby granted, being an improved rent of 100*l.* over and above the 80*l.* reserved in the original lease of Bridge Farm to Bayntun, of the 6th of January, 1869. It is argued on the part of the plaintiff that as the said further lease of Bridge Farm for five years from the 29th of September, 1884, would expire at the same time as the original lease of the Bridge Farm to Bayntun, of the 6th of January, 1869, such further lease would, according to the decisions in *Parmenter v. Webber* (18) and *Beardmore v. Wilson* (19), amount to an assignment of the original lease, and thus effect a severance of the reversion. But it will be observed that such further lease is not to commence until the 29th of September, 1884, when the former lease granted by Bayntun to Nicholas and then vested in the plaintiff would expire. It was not, therefore, a lease of the reversion, but a reversionary lease, or in other words, an *interesse termini*, which is only a right, and not an estate, and, according to a well-established principle of law, would neither prevent nor cause a merger. In the meantime, therefore, until the *interesse termini*

(18) 8 Taunt. 593.

(19) 38 Law J. Rep. C.P. 91; s. c. Law Rep. 4 C.P. 57.

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ripens into an estate, which will not be until the expiration of the lease of Bayntun to Nicholas, the reversion will continue in Bayntun, and there will be no severance, and consequently no destruction of the right of re-entry. In fact, until that time, it cannot be ascertained whether the further lease will, or will not, operate as an assignment; for if, during the pending of the lease from Bayntun to Nicholas, Bayntun should obtain from the superior landlord an extension of his term in Bridge Farm, his further leave to the plaintiff would undoubtedly operate according to its purport as an underlease, and not as an assignment. Moreover the grant of the further lease is expressly made subject to the former lease from Bayntun to Nicholas of the 10th of October, 1870, which, even if the said grant had operated as an immediate assignment of the reversioner in Bridge Farm, would have kept alive the right of re-entering over Bridge Farm, and *a fortiori* over Freek's Farm, even if it would have been otherwise destroyed—see the case of *Doe d. Freeman v. Bateman* (9), where it was held that if A, being possessed of a term of years, demised his whole interest to B, subject to a right of re-entry on the breach of a condition, A might, by virtue of the agreement between the parties, re-enter for the condition broken, although he had no reversion.

The second of the said indentures relied on by the plaintiff, dated the 9th of September, 1875, was made between the said Benjamin Alfred Arnold and Charles Edwin Ogden of the first part, one Sarah Ann Arnold of the second part, the plaintiff of the third part, and Bayntun of the fourth part. After reciting the said lease of the Bridge Farm from Arnold and Ogden to Bayntun, of the 6th of January, 1869, and that, under and by virtue of the lease from Bayntun to Nicholas of the 10th of October, 1870, and of the said assignment thereof from Mills to the plaintiff of the 10th of October, 1873, and of the said further lease from Bayntun to the plaintiff of the 21st of January, 1874, the plaintiff was lessee or assignee under Bayntun of the Bridge Farm for the residue of the term created by the said lease

from Arnold and Ogden to Bayntun of the 6th of January, 1869, and of other hereditaments the property of Bayntun, meaning Freek's Farm, at the rent of 310*l.*, until Michaelmas, 1884, and thereafter at the rate of 180*l.* for the Bridge Farm alone during the residue of the said term; and further reciting that on the 18th of January, 1875, an action of ejectment had been commenced by Arnold and Ogden and Sarah Ogden against Bayntun and the plaintiff for the recovery of the possession of Bridge Farm, for an alleged forfeiture by breaches of several of the covenants contained in the same lease of the 6th of January, 1869, and reciting that by an order made in the said action by consent of all parties thereto, it was ordered that the proceedings in the said action should be stayed upon the terms following, that is to say—

1. Hyde to continue tenant of the Bridge Farm.

2. Bayntun to assign from Lady Day, 1873, all his interest in the lease from Arnold and Ogden to himself, with the license and approval of Arnold and Ogden, such assignment to be prepared by their solicitor, and the costs thereof to be paid by Hyde.

3. Arnold and Ogden to waive all claims in respect of any breach or breaches of covenant under the said lease, and Hyde to be allowed till Michaelmas, 1876, to remedy all existing breaches of covenant.

4. Hyde to pay Arnold and Ogden direct the rent payable under the said lease.

5. Bayntun to be released by Arnold and Ogden from all liability in respect of covenants in the said lease past and future.

6. All payments of rent made under proviso No. 4 by Hyde to Arnold and Ogden, to be allowed by Bayntun in settling rent as between Hyde and Bayntun.

By 7, 8 and 9, certain payments are provided for, not necessary to be here stated.

10. Subject to provisions 4 and 6, the rights to and relating to the recovery of rent, whether by action, distress or otherwise, from Hyde to Bayntun to remain as under existing leases from Bayntun and Nicholas and Bayntun to Hyde.

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It was witnessed that Arnold and Ogden and Sarah Ann Arnold, in pursuance of the said order and in part performance thereof, released Bayntun from all covenants, clauses and agreements in the said recited indenture of lease contained, and from all liability past, present and future in respect thereof, provided that nothing therein contained should extend to put an end to or determine the said lease, or the said indentures of the 10th of October, 1870, the 10th of October, 1873, and the 21st of January, 1874, or otherwise vary or affect the same, save as appeared by these presents; or to release or discharge the plaintiffs in the said recited action from payment to Bayntun of the improved rent reserved under the said last-mentioned indenture, during the then residue of the said term granted by the indenture of lease of the 6th of June, 1869, or to in any way prejudice the right of Bayntun to and relating to the recovery of such rent, save that the plaintiff should pay direct to the persons entitled thereto, the rent of 80*l.* reserved by the lease of the 6th of January, 1869, instead of paying the same through Bayntun.

It was contended on behalf of the plaintiff that the effect of the said indenture, taken in conjunction with the consent order in the action therein recited, was in equity to transfer all Bayntun's interest in Bridge Farm to the plaintiff, except only the rights to and relating to the recovery of rent under the said lease from Bayntun to Nicholas of the 10th of October, 1870, and of the said further lease of Bayntun to the plaintiff of the 21st of January, 1874; and thus to create a complete severance in the reversion of the two farms. Now, assuming this construction of the indenture and order to be correct (which we think it is, subject to an observation to be made presently as to the terms on which an actual assignment of such interest would probably be directed by the Court), the question arises, whether the assignment by the lessor of the reversion in one of two farms comprised in the same lease to the lessee himself, falls within the principle of *Knight's Case* (3), so as to destroy the right of re-entry over both farms. Although we are not

aware of any authority one way or other on the point, we think it has not that effect. Where, indeed, the reversion is so dealt with as to be vested in two different persons other than the lessee himself, the inconvenience and hardship upon the lessee of being exposed to two actions of ejectment for breach of condition in the lease may well explain and justify the rule. But where the reversion of one of the farms is assigned to the lessee himself, there is obviously no such inconvenience or hardship. Such an assignment would cause a merger and determination of the term in the farm of which the reversion is so assigned. But as both the terms reversion will continue in the other farm, it is not easy to assign any satisfactory reason why the right of re-entry and other incidents to the reversion in that farm should not also remain intact. But further, if there is any doubt on this point, it must be observed that Bayntun has not yet executed any assignment of his interest in the lease of Bridge Farm of the 6th of January, 1869, as directed by the order in the hereinbefore cited action. And we think that no such assignment would be directed by the Court if applied to without providing that it should not affect the right of re-entry over Freek's farm, which it clearly was not the intention of either party to disturb.

The third and last of the indentures relied upon by the plaintiff was dated the 3rd of March, 1876, and was made between Arnold and Ogden of the first part, Sarah Ogden of the second part, and the plaintiff of the third part, whereby it is recited that the Bridge Farm had become vested in the plaintiff for the residue of the term of twenty-one years granted by the lease of the 6th of January, 1869, to Bayntun; and fresh arrangements are come to between the lessors and the plaintiff upon that footing. But as Bayntun was no party to that deed, his rights cannot be affected by its contents, and no further notice, therefore, need be taken of it.

Under the circumstances it appears to us that none of those deeds have the effect contended for of destroying Bayntun's right of re-entry over Freek's Farm

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in the event of the bankruptcy of the lessee, and the objection to the title on that ground, therefore, is not cured. No doubt, with the assistance of Bayntun, this objection could be so removed, and a good title could be made, and we were pressed to direct a general enquiry as to title, in order that the plaintiff might have an opportunity of trying again to obtain Bayntun's concurrence. But no evidence was adduced before us that there was a better prospect of obtaining it now than when he refused to give it in 1875, and considering that Freek's Farm was, as both parties know, required by the defendant for immediate occupation as a farm, we quite agree with what is said in the judgment in the Court below, that it would not be right or just to allow further delay upon the mere chance of obtaining such concurrence. It remains to consider the cross-notice of the defendant.

That part of the motion which sought to have the judgment of the Court below varied with respect to the costs, was abandoned by counsel on the hearing of the appeal, and the view we have taken on the question of title makes it unnecessary for us to express any opinion as to the rest of the motion, and we think under the circumstances that no costs ought to be given of the notice to either side.

Upon the whole, we think that the decision of the Court below was right, and must be affirmed, and that the appeal must be dismissed with costs; and that no order ought to be made on the defendant's cross motion as to costs or otherwise.

Judgment affirmed.

Solicitors—Parkers, for plaintiff; Tilleard, Godden & Holme, agents for Black, Freeman & Gell, Brighton, for defendant.

[IN THE COURT OF APPEAL.]

1877. } LEWIS v. THE GREAT WESTERN RAILWAY COMPANY.*
Dec. 20, 21. }

Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7—Conditions limiting Liability of Company for Damage—"Just and reasonable"—Alternative Rate of Charge—Wilful Misconduct of Servants of Company.

The defendants charge two rates for the conveyance of certain articles—one the ordinary parliamentary rate, when they take the ordinary liability of the carrier, and the other a reduced rate, in which case they make it a condition of carriage that the sender relieves them of all liability for loss or damage, except upon proof that such loss or damage arose from wilful misconduct on the part of the company's servants:—

Held, that under these circumstances, the condition relieving the company when goods are carried at the lower rate is "just and reasonable," within section 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

The plaintiff's agent sent cheeses, one of the articles conveyed at the lower rate, from London to Shrewsbury. The cheeses were improperly packed into the train by the company's servants in London, and in consequence arrived at Shrewsbury in a greatly damaged condition:—

Held, that though there was clear evidence that the cheeses had been in fact improperly packed, yet, as there was none to shew either that the packers knew that they were packing them in a manner likely to damage them, or that it had been brought to their knowledge that that mode of packing might lead to such damage, and that they had then packed the cheeses in that mode, careless whether it would result in such damage or not, there was no evidence of wilful misconduct on their part, so as to render the defendants liable.

This was an appeal of the plaintiff from the judgment of Lopes, J., at the trial of this action before him without a

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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jury, at Shrewsbury, on the 24th of July, 1877. The facts of the case were as follows:—

The plaintiff, a cheesemonger, in a large way of business at Market Drayton, had consigned a number of cheeses to his agent in London, W. J. Hutchinson, a cheese factor, for sale there. As the cheeses were not disposed of, after some months the plaintiff instructed Hutchinson to separate the sound cheeses from the others, and send them by Great Western Railway to Shrewsbury. The defendants have two rates of carriage for the conveyance of cheeses—one the ordinary rate, when cheeses are conveyed at the usual carriers' risk; and the other, a lower one, when they are conveyed at "owner's risk." When cheeses are conveyed at the lower rate it is usual for the consignor to sign a yellow consignment note, worded as follows:—

" GREAT WESTERN RAILWAY.

" Consignment of goods to be carried at owner's risk.

"The Great Western Railway Company hereby give notice that they have two rates for the conveyance of certain articles—one, the ordinary rate, when they take the ordinary liability of the carrier; the other, a reduced rate, adopted when the sender relieves them of all liability of loss, damage or delay, except upon proof that such loss, damage or delay arose from wilful misconduct on the part of the company's servants.

"To the Great Western Railway Company.

" Station, 187 .

"Receive and forward the undermentioned goods, to be carried at the reduced rate, below the company's ordinary rate, in consideration whereof I undertake to relieve the Great Western Railway Company and all other companies over whose lines the goods may pass, from all liability in case of damage or delay, except upon proof that such loss, detention or injury arose from wilful misconduct on the part of the company's servants."

"I also agree to the conditions and regulations on the back of this note.

"Signature of sender or his representative.

"Address, ."

[Then follow columns for scheduling the goods, charges, &c., and on the back are conditions which are not material to this case.]

In the present instance the yellow consignment note was not used, but the cheeses were entered in the following consignment note, one in ordinary use by Hutchinson, and printed on blue paper. The italicised words were in writing in the original.

"Tooley Street, corner of Dean Street,
London, July 8th, 1876.

Mr.

The Great Western Railway Company.

Please receive and forward to Mr. G. Lewis's order, Shrewsbury,

Mark.

91	5	Cheshire cheese
30	30	" "
75	5	" "
	10	" "

Owner's risk.

From W. J. Hutchinson."

It was admitted by Hutchinson that he well knew the contents of the yellow or "owner's risk" note, had constantly sent goods on the terms of it, and knew perfectly well that when he was sending cheeses at "owner's risk" he was sending them on the terms of the yellow note.

The cheeses on arrival at Shrewsbury were in a greatly damaged condition, and it was shewn by witnesses from the neighbourhood of Shrewsbury that the mode of packing was wrong, and was the cause of the damage. The cheeses were packed on their rims, instead of on the flat, and were disposed in several layers, instead of in a single one, and whereas at least three waggons were necessary for their conveyance, only one had been employed. No evidence was given on the part of the defendants, and it was agreed that the damages, if any, should be assessed at 70l.

On these facts the learned Judge held that the defendants were excused from damage, except that caused by the wilful misconduct of the company's servants,

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and that there was no evidence of such wilful misconduct. He therefore entered a verdict, and gave judgment for the defendants. From this decision the plaintiff now appealed.

Powell and Rose, for the plaintiff.—The yellow note cannot be looked at, as the blue note was the one actually signed, and contains no reference to the former. The Court must, therefore, interpret the expression "owner's risk" without regard to the conditions on the yellow note. The expression "owner's risk" cannot relieve the company from damage caused by packing in a totally erroneous manner, otherwise, for example, the company would be relieved if they put a horse into an open carriage truck from which he jumped out and was killed. This would be absurd. A condition so relieving them would be unjust and unreasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31. s. 7). The conduct of the servants of the company, moreover, amounted to wilful misconduct, and was, therefore, not within the exemption of the conditions. They cited *Robinson v. The Great Western Railway Company* (1), *D'Arc v. The London and North-Western Railway Company* (2), *Macmanus v. The Lancashire and Yorkshire Railway Company* (3), *Peek v. The North Staffordshire Railway Company* (4), *Allday v. The Great Western Railway Company* (5).

H. Matthews and Bosanquet, contra, cited *Beale v. The South Devon Railway* (6), *Harrison v. The London, Brighton and South Coast Railway* (7), *M'Cance v. The London and North-Western Railway Company* (8), *Gregory v. The West Midland Railway Company* (9), *Rain v. The*

Glasgow and South-Western Railway Company (10), *Glenister v. The Great Western Railway* (11), *Gallagher v. The Great Western Railway* (12), *Webb v. The Great Western Railway* (13).

Powell, in reply.

BRAMWELL, L.J.—I think this judgment should be affirmed. What was signed by the plaintiff was the blue ticket, and no doubt under section 7 of the Railway and Canal Traffic Act, as is shewn by the decision in *Peek v. The North Staffordshire Railway Company* (4), a special contract is not binding unless it be signed. We must, therefore, look at the blue ticket and interpret it, but we must do so according to the rule expressed by Baron Parke in *Neilson v. Harford* (14), and cited by Mr. Justice Blackburn in *Peek v. The North Staffordshire Railway Company* (4)—namely, "The construction of all written documents belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury." Here the contract on the face of it bears these words, which are the only words relevant to the matter in hand; namely, "owner's risk." Now, I do not think that properly speaking—speaking with great strictness—you ought to look at the yellow document. It is not referred to in the blue one; it is not incorporated with it; and if the two were put together, there would seem to be no necessary reference to the yellow one in the blue. But, according to the rule which I have stated—there being here words which have not an express meaning—you must—not *may*, but *must*—look at the surrounding circumstances and the course of dealing between the parties, and then see what the meaning of those words is when used in reference to those surrounding circumstances and the course of deal-

(1) 35 Law J. Rep. C.P. 123.

(2) Law Rep. 9 C.P. 325.

(3) 4 Hurl. & N. 327; s.c. 28 Law J. Rep. Exch. 353.

(4) 32 Law J. Rep. Q.B. 241; s.c. 10 H.L. Cas. 473.

(5) 5 B & S. 903; s.c. 34 Law J. Rep. Q.B. 5.

(6) 5 Hurl. & N. 875.

(7) 2 B. & S. 122; s.c. 31 Law J. Rep. Q.B. 113.

(8) 7 Hurl. & N. 477; s.c. 31 Law J. Rep. Exch. 65.

(9) 2 Hurl. & C. 944; s.c. 33 Law J. Rep. Exch. 155.

(10) 7 Scotch Sess. Cas. (3rd series) 439.

(11) 29 Law Times, N.S. 423.

(12) 8 Ir. Com. L. 326.

(13) 26 W. R. 111.

(14) 8 Mee. & W. 823; s.c. 11 Law J. Rep. Exch. 24.

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ing. Now, I cannot doubt that here there was a course of dealing between these parties—that is to say, the consignor and the Great Western Railway Company—by which goods were sent under two different contracts. One of these was when the goods were sent and carried by the company with an ordinary carrier's liability, that is, the liability of insurance, and were charged at the rate of 60*s.* a ton; and the other was when the goods were charged at the lower rate of 40*s.* a ton, and were sent with what was compendiously termed "owner's risk," which, when you look at the course of business between the parties, means at the risk of the owner, *minus* the liability of the company for the wilful misconduct of their servants. That being so, I think the proper interpretation of the words "owner's risk" was that it referred to the course of dealing in the latter of these two cases.

One may put illustrations in this way:—If there were a written contract for the sale of goods, which contained the words, "I buy of you so much goods at the price I mentioned yesterday," why, it would not be a contract in writing under the Statute of Frauds; or if the words were, "I will pay you 50*l.* for such and such goods at the credit I mentioned yesterday," that would not do. But suppose the words were, "I will buy such and such goods for 50*l.* at the usual credit," and then it had been shewn that there had been a course of dealing between the parties for years and there had been a usual credit, surely that might have been given in evidence, and it could not be said that there was not an adequate contract under the Statute of Frauds. Again, if the words were "prompt as customary," surely you might shew what that was in the trade, or if they were "according to the rules of the Liverpool Cotton Association," you might shew what those rules were.

We now come to consider whether this contract is a just and reasonable one. Now it is possible that there may be some conditions so utterly preposterous that they could not be just and reasonable, and the man who entered into the bargain must have done so in a state of hallucina-

tion or something of that sort, but it would require the very strongest possible evidence to satisfy me that where a special contract was entered into between a carrier and a man—not a child but a grown-up man of business—who was in the habit of employing that carrier, and had the option of entering into the contract in the form in which it was, or of entering into another contract with the usual liability of a carrier at a higher rate, in that case the contract so entered into was not just and reasonable. The case of *Peek v. The North Staffordshire Railway Company* (4), which was much relied on, has nothing to do with the matter in hand, because there the alternative presented was as much an alternative as if you put your pistol to a man's head and said, "You shall send either with a shot through your head, or upon cheaper terms and no liability on us." It was impossible to suppose that an option was given there. The company there practically said, "We will not take your goods on reasonable terms as insurers, but we will take them on lower terms, we not being insurers." That is no real alternative. But that is not the case here, because here the higher rate, the 60*s.* rate, is a sum that their Act authorises the company to take. In *Peek v. The North Staffordshire Railway Company* (4), the defendants could not possibly say that they had a right in any sense of the word to exact the sum there mentioned. Here then there was a distinct option, in the one case to pay the parliamentary 60*s.* rate and to have all liability, except for what is termed the "inherent vice" of the goods, borne by the defendants, and in the other to pay the reduced sum of 40*s.* and to bear all liability except for damage caused by the wilful misconduct of the company's servants. Now, how can that be said to be unreasonable? Could it be even if the wilful misconduct was not excepted? Does not one know perfectly well that the man who entered into this contract, if he were adjured upon the next occasion not to enter into it, and were told that his learned counsel had addressed a most eloquent speech to the Court to shew the great folly and improvidence of doing so, and that the three Judges of whom the Court was constituted had all

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held that the contract was unreasonable, and that he was a foolish person for entering into it, would go and do it again. Would he not, and every other reasonable being, go to the company and say, "I know I brought an action for damages against you and somehow recovered, but pray take 40s. instead of 60s. for carrying these other cheeses"? Then suppose the company were to say, "Put down in writing that you have had what the contract amounts to explained to you, and you know what it means, that you succeeded in the action you brought against us on the ground that it was unreasonable, but still you now entreat us to carry on the same terms again." What are we to do if the case comes before us again? Are we to say that the contract is not just and reasonable? How, with any regard for common sense, can we do so? It is impossible. To take now the extreme case, and suppose that the exception of wilful misconduct was not part of the contract. Why on earth should not the railway company say to a consignor, "the actions we get brought against us for wilful misconduct are a great nuisance, name your own terms and let us off any enquiry as to any damage." If that were explained to a man and he agreed to name his own terms and send the goods, I cannot see how any Court or Judge could say the contract was not just and reasonable.

I do not think that taking the contract as it really was it would absolutely protect the company except for wilful misconduct, for if the directors had ordered that wherever goods came on the lower rate they should be put into trucks not proper for the conveyance of the goods, then if that was done it would not be wilful misconduct on the part of the servants of the company doing it, as they would only be obeying orders, and yet I am very much inclined to think that in such a case the company would be held liable.

As to the question of the burden of proof of reasonableness, I suppose it is upon the company, but to my mind the most cogent evidence is afforded by the fact that the plaintiff has entered into this arrangement.

The only remaining question is, whether this damage was caused by the wilful

misconduct of the company's servants. The argument of the plaintiff's counsel comes to this: "Their conduct led to the loss, therefore it was misconduct; it was not accidental, therefore it was wilful." That comes pretty much to this—unless a thing is a pure accident it is wilful. If a man were walking along and tripped over some goods lying in the path which he did not happen to see, the plaintiff's counsel would say that that was the result of his conduct, and that that conduct was misconduct, and that it was not accidental but wilful; that wilfulness is not looking out. Now it is all very well to deal with the matter in that way, but that is not the practical and real way of dealing with it. What is meant by "wilful misconduct" is misconduct to which the will is a party, it is something opposed to accidental or negligent; the mis part of it, not the conduct must be wilful. If a person knows that mischief will result from his conduct, then he is guilty of wilful misconduct if he so conducts himself. Further, I think it would be wilful misconduct if a man misconducted himself with an indifference to his duty to ascertain whether such conduct was mischievous or not. Now, is there any evidence of such wilful misconduct here? I really think that there is not. It is said that more cheeses were packed in the truck than there ought to have been, and that they were packed in the wrong way. I think there is abundant evidence that that was so, and I think that if these cheeses had been packed at some place in Cheshire or Shropshire where they are commonly packed, in order to come to London, they would have been packed differently, and I am very much inclined to think that if the cheeses had come from such a place and had been packed as these cheeses were, the right conclusion for the learned Judge to have come to would have been, that the men who were in the habit of packing them and usually packing in a different way, must have known that in packing the cheeses in this way they were packing them in an unusual way, and consequently presumably in a wrong way. I cannot, however, say that there was evidence here to shew that the packers who were in London, which is not a great place for

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the exportation of Cheshire cheeses, knew that they were doing wrong, or at all events that they were aware that there might be mischief resulting from it, and that they improperly did not inform themselves as to whether there would be, or would not be, mischief resulting. It would be enough for me to say that the learned Judge has found the other way, and that I ought not to reverse his decision unless I am satisfied that he was wrong. I am, however, not only not satisfied that he was wrong but I think that he was right, and therefore in the result the appeal must fail.

BRETT, L.J.—The first question in this case is whether the Great Western Railway Company have obtained such a document as gives them any absolution from their ordinary liability as common carriers of these cheeses. Now, they have a paper containing conditions as to the carriage of the goods which is admitted to be signed by the consignor—namely, the blue paper; and unless the terms of that paper are unreasonable, it is a sufficient putting into writing, signed by the consignor, of the conditions of carriage. Then the question is, What is the proper construction of that document? It has no words in it referring to any other document; therefore, I apprehend that it must be construed by itself, and, as has often been said, “within the four corners of it,” and nothing must be introduced into it that is on the yellow note by reason of reference to the latter from the former. There are no words of reference in the one to the other, and, therefore, they cannot be considered as incorporated by reason of reference. But in construing the blue note we have a right to avail ourselves of all the ordinary rules of construction and of all the recognised aids which Judges are entitled to make use of in order to construe a written document. The Court is, I apprehend, entitled to have all the facts which were existing at the time the written contract was made, and which were known to both parties. Such facts are sometimes customs of trade, or the ordinary usages of trade, sometimes they are the course of dealing between the parties,

and sometimes they are a knowledge of what the matter was about which the parties were negotiating. All these facts you are entitled to have, not because they are customs of trade or the course of business between the parties, &c., but because they are facts which were existing at the time and which have a relation to the written contract, and which are things that must be taken to have been known to both parties to the contract. Now here there were certain facts given in evidence which, I think, we are entitled to look at to enable us to construe the phrase “owner’s risk.” The facts known to both parties were that the Great Western Railway Company had two rates of charge, and that when persons elected to send goods at the one rate, the company and they both understood that the goods were to be taken with the common carrier’s risk, and that when they elected to send goods at the other rate, both parties knew that the company were taking them upon different terms; and, more than that, it was proved here that both these parties, the consignor and the company, knew what those other terms were—namely, that the company should be absolved from all risks except the wilful misconduct of their servants, and both parties knew that the phrase “owner’s risk” was used commonly between them when one of those two liabilities was intended to be incurred. These facts being known to both parties, we have to construe the phrase “owner’s risk.” If the words were inconsistent with either of the liabilities I have mentioned, we could not attribute them to that one. With all your knowledge, you must not construe words so as to be inconsistent with any proper construction of them. But here “owner’s risk” might properly be applied to the more limited liability of the company in the form of contract under which both parties knew the company was in the habit of carrying. Under those circumstances, it seems to me that within the very terms of the blue paper itself, and in construing the phrase which is in it—namely, “owner’s risk”—we must construe those words as meaning between the parties, that the company are to be

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absolved from all liability for damage in the carriage of these goods unless the damage was caused by the wilful misconduct of their servants.

That being the interpretation of the contract, the question then arises whether the condition which limits the liability of the company is just and reasonable. If there had been no real alternative rate in this case which the consignor might elect to take, I should have said that the cases shew that the condition which absolved the company from the negligence of their servants would be unjust and unreasonable; but it has been held, and I think we ought to hold and are bound to hold, that where there is a real alternative rate, and so a real power of choice left to the consignor as to the rate at which he can consign his goods, that that is a power given to the consignor which may make conditions reasonable and just which would be unjust and unreasonable if there was not the power of election. So far, therefore, the contract having this exception in it as to the wilful misconduct of the defendants' servants, I think we ought to say that the conditions here are just and reasonable, and I think there is authority in the cases which have been cited for so saying.

Although there be an alternative rate, still if the exception as to the wilful misconduct of the company's servants had not been in the document, I confess I should, to say the least, have hesitated very much before I could have held or consented to a judgment affirming that the terms were just and reasonable. I am not prepared to say that the agreement of parties to specific conditions is conclusive proof that those conditions are just and reasonable, even although there is an alternative rate. I am not at all prepared to say that; and I am sorry to say that I cannot, as at present advised, agree with what my Lord has said upon that subject. On the contrary, the inclination of my opinion is that, even though the parties had agreed to them and they were specified, and even though that should happen which my Lord has suggested—namely, that after a decision of

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the Court the consignors should again agree to send their goods on the same terms—the inclination of my opinion is that it would be for the Court, notwithstanding, to say, when all the facts were before them, whether the conditions were just and reasonable or not; and if they were unjust and unreasonable on the first occasion, then, as far as I can see, on the second supposed occasion they would be equally unjust and unreasonable. The conduct of the parties does not make that reasonable and just which the Court is of opinion is unjust and unreasonable. I should, therefore, hesitate to go so far as my Lord, but the point is not necessary to the decision of the case.

The only question now remaining is whether the learned Judge can be said to have been wrong in finding that there was not wilful misconduct on the part of the company's servants.

In a contract where the term wilful misconduct is put as something different from and exceeding negligence—negligence of every kind—it seems to me that it must mean the doing or omitting to do something which it is wrong to do or to omit, the person who is guilty of the act or the omission knowing that the act which he is doing or omitting to do, is a wrong thing to do or to omit; this involves the knowledge of the person that the thing which he is doing is wrong. If a servant of the company knows that what he is doing will seriously damage the goods of a consignee, or if it is brought to his notice that what he is doing or omitting to do may seriously endanger the goods, and he wilfully persists in doing that against which he has been warned, careless whether he may be doing damage or not, then I think he is intentionally doing a wrong thing, that is, he is guilty of wilful misconduct. If what he does or omits to do is something which everybody must know is likely to endanger or damage the goods, it follows that he is doing that which he knows to be a wrong act. I think you must take care that it is not only misconduct but wilful misconduct that he is guilty of; and I think that those two terms together import a knowledge of wrong on the

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part of the person who is supposed to be guilty of the act or omission.

That being the construction of the words, the question is whether the learned Judge was right in the decision to which he came. Considering that these cheeses were sent from London, that there is no evidence of any peculiar knowledge on the part of the railway officials there as to the mode of loading such goods, there is really no evidence as to any knowledge on the part of the actual packers of the proper mode. I therefore think not only that my brother Lopes was right, but confess it seems to me that there really was no evidence which could have been properly submitted to a jury as to any wilful misconduct on the part of the packers. I think, therefore, that the judgment of my brother Lopes was right and must be affirmed.

COTTON, L.J.—The first question that we have to consider here is what is the contract between the parties, and it is conceded by the plaintiff's counsel that what has been called the blue note must be considered as the contract signed by him within the Act. The question is, what the conditions of it are? We must construe this document as we should construe any other, subject to this, that the Act of Parliament requires that there should be a good written contract, the conditions of which must be reasonable, to absolve the company from liability. The only material part of the contract for our consideration is the words "owner's risk." Now the blue note does not in any way refer to the yellow one, and I do not deal with the matter as though it embodied it. Nor do I refer to the yellow ticket as enabling us by itself to put a construction upon the contract contained in the blue note; but in this case, as in all others, we are entitled to look at the surrounding circumstances. We cannot look to the acts of the parties for the purpose of seeing what their intention was, but we may look to the course of dealing between them to see whether they have given a conventional meaning to any terms used in the contract, and then the question is one simply of the construction of the con-

tract; what, as between these parties, is the construction of the words we find in the contract, that is to say, what is the contract between the parties? Now the evidence comes to this, that the plaintiffs' agent had sent goods to the defendants previously in the same way as he did in this case, namely, under a consignment note, or call it what you please, containing the words "owner's risk," and that the railway company had acted on this by sending the goods at the lower rate, and in fact with the condition that the company was not to be liable except for the wilful misconduct of their servants. The plaintiff's agent knew that, and that he and the company had treated the words as meaning the same thing. Therefore we are justified in arriving at the conclusion that upon a proper construction of this document it was a contract, as between the plaintiff and the defendants, by which the plaintiff contracted to send his goods, subject to that condition, under which they agreed to take them at the lower rate.

There now comes the question whether or no, having regard to the 7th section of the Railway and Canal Traffic Act, and the decision of the House of Lords in the case of *Peek v. The North Staffordshire Railway Company* (4), the condition is a just and reasonable one. Of course in considering whether a thing is reasonable or not you must of necessity have regard to the circumstances of the case. You cannot possibly say that a thing is reasonable in the abstract; you must, in dealing with it, take into consideration the facts, with reference to which it would be reasonable or unreasonable. One of the facts you have to take into consideration in the present case is, whether or no the party who signed the contract had it forced on him without the option of anything else, or whether he had an option fairly given him by the company of having his goods carried in some other way. The alternative contract is therefore no doubt a circumstance, and a most material one, in considering the question of the reasonableness; and in the present case, having regard to the fact that there was an alter-

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native contract open to the consignor, upon which to have the goods carried at the parliamentary rate, with all the liability upon the railway company of common carriers, and having regard to the decisions upon this actual condition, I certainly think we ought to hold that the condition is a reasonable one; but I must not be at all considered as assenting to the proposition which was at one time pressed upon us in argument, that if there is an alternative contract open to the parties sending goods, no condition of the contract which he signs can, within the meaning of the Act, be held to be unreasonable. If it were necessary to decide any such question, I certainly should take time to consider it.

The question then really amounts to this, whether there was wilful misconduct on the part of the company's servants? There cannot, I think, be any doubt that wilful misconduct is something entirely different from negligence, something far beyond it, whether it is what is called culpable or gross or anything of the sort. There must be a doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless of whether or no it will cause injury. Mr. Rose asked whether it would not be wilful misconduct on the part of the company's servants to put a horse into an open carriage truck? Certainly it would, because no one could be ignorant that putting a horse into an open truck, out of which he could jump, would, in all probability, unless the horse was very different from all other horses, lead to his jumping out and being injured. But here we have the packing of cheeses, a matter certainly not within the experience of all men, and there is no evidence that it was in the special experience of the packers in London, who, though they may have unpacked cheeses from various parts, would not be in the habit of packing them, and could hardly be expected to have closely observed the different methods adopted in packing cheeses from different districts, and even if they had, would not know that the

particular mode in which cheeses of one district were packed was the only way in which they ought to be packed. I think, therefore, not only that the learned Judge was not wrong, but that I should have come to the same conclusion myself.

Judgment affirmed.

Solicitors—J. & F. Needham, agents for H. Morris, Shrewsbury, for plaintiff; R. R. Nelson, for defendants.

[IN THE EXCHEQUER DIVISION.]

1877. { ANDREW KNOWLES AND SONS, LI-
Dec. 5. { MITED (*appellants*) v. M'ADAM,
SURVEYOR OF TAXES (*respondent*).

Income Tax—Profits—Consumption of Capital—Mines and Minerals—Colliery Company—5 & 6 Vict. c. 35. s. 60, schedule A, No. III.; s. 100, schedule D, Case 1, Rules 1 and 3; s. 159—29 & 30 Vict. c. 36. s. 8.

A colliery company claimed to deduct in their assessment to the income tax on the profits of their business a sum for the lessening of the quantity of coal in their mines by getting and selling the coal:—Held, that they were entitled to the deduction, having regard to the provision of 29 & 30 Vict. c. 36. s. 8, as to assessing certain concerns mentioned in schedule A according to the rules of schedule D, this being, in estimating "the balance of profits or gains" under rule 1 of case 1 of schedule D (in 5 & 6 Vict. c. 35. s. 100), a deduction proper to be made, and not prohibited by rules 1 and 3 of case 1, or by section 159.

CASE stated under 37 & 38 Vict. c. 16, by Income Tax Commissioners.

The appellants, a company carrying on business as colliery proprietors, appealed to the Commissioners against an assessment, for the year ending April 5, 1875, in the sum of 226,824*l.*, made on them under Schedule D of 16 & 17 Vict. c. 34, in respect of the profits of their

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business as colliery proprietors. They claimed, in addition to a reduction which was allowed by the Commissioners, and which reduced the assessment to 216,827*l.* 2*s.* 10*d.*, that a sum of 10,424*l.* 15*s.* 3*d.* should be deducted, on the ground that at the end of their first year's working, which was the year of the assessment in question, the value of their coal mines was, by reason of the coal gotten and sold during the year, diminished by that sum below the sum for which they had purchased the mines at the commencement of the year. The company's property comprised both freehold and leasehold mines, the price paid for the leasehold coal mines, subject to an average royalty rent of 7*d.* per ton, and having an average of thirty-two years to run, being 717,421*l.*, the purchase-money for the freehold mines being 67,550*l.* From the company's leasehold collieries 844,677 tons, and from their freehold pits 62,000 tons, of coal had been gotten and sold in the year. Of the sum of 10,424*l.* 15*s.* 3*d.* the sum of 721*l.* 17*s.* 11*d.* represented the diminution in value of their freehold mines, and the balance that of the leasehold.

The Commissioners were of opinion that they were precluded, by the third rule applicable to the first case of schedule D, in section 100, of 5 & 6 Vict. c. 35, and by section 159 of that Act, from allowing the deduction claimed, and confirmed the assessment in the sum of 216,827*l.* 2*s.* 10*d.*

The appellants being dissatisfied, a case was stated, which, with amendments made upon the case being remitted by the Court (consisting of Cleasby, B., and Pollock, B.), to be more clearly stated, was to the effect above appearing (1).

(1) The enactments referred to in argument were the following:—5 & 6 Vict. c. 35. s. 100, schedule D, case 1 ("duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act"), rule 1: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern, upon a fair and just average of three years and shall be assessed, charged and paid without other deduction than is hereinafter allowed"

Herschell (T. J. Sanderson with him), for the appellants.—The question is whether, as the appellants contend, a colliery company assessed to the income tax on the profits of their business are to be

Rule 3. "In estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains, on account of any sum expended for repairs of premises" . . . or "for the supply or repairs or alterations of any implements . . . beyond the sum usually expended for such purposes according to an average of three years . . . nor on account of loss not connected with or arising out of such trade, manufacture, adventure or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern; nor for any capital employed in improvement of premises . . . ; nor on account . . . of any interest which might have been made on such sums if laid out at interest; nor for any debts except bad debts proved to be such to the satisfaction of the Commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity."

Section 159. "In the computation of duty to be made under this Act in any of the cases before mentioned . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments; nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed or of loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation."

29 Vict. c. 36. s. 8. "The several and respective concerns described in No. III. of schedule A of the said Act 5 & 6 Vict. c. 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by schedule D of the said Act, so far as such rules are consistent with the said No. III.; provided that the annual value or profits and gains arising from any railway shall be charged and assessed by the Commissioners for special purposes." (Among the concerns described in No. III. of schedule A of 5 & 6 Vict. c. 35. s. 60, are "mines of coal." This body of clauses, No. III. of schedule A, is headed "Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned which are not to be charged according to the preceding general rule.")

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allowed a deduction for the coal gotten from their mines. The Crown does not dispute the amount of the deduction claimed, but the deduction itself. The enactment which governs this case is 5 & 6 Vict. c. 35. s. 100, schedule D, case 1, rule 1, enacting that the duty to be charged "shall be computed on a sum not less than the full amount of the balance of the profits or gains" of the trade, manufacture, adventure or concern. The argument for the Crown must be that the appellants have made "profits" to the amount at which they are assessed. But "profits" do not, either in political economy, or in trade, or in common sense, begin till capital exhausted in acquiring that which is to be called profit has been replaced. And the coal gotten and sold clearly is capital exhausted. Minerals are not like growing crops. As was said by Lord Cairns in *Gowan v. Christie* (2), "there are no periodical harvests. A mineral lease is really a sale out and out of a portion of the land." None of the deductions specifically prohibited by rule 3 of case 1, or by section 159, is applicable. As to the words of section 159, prohibiting a deduction "on account of diminution of capital," whatever may be the meaning, it cannot be such as would be flatly inconsistent with the Act itself, and if these words are relied on by the Crown such a meaning clearly must be attached, for this prohibition is coupled with a prohibition of any deduction on account of "loss." The meaning, having regard to the context, seems merely to be that in the assessment of income from fixed property or from any office of profit no set-off is to be allowed for loss, whether by diminution of capital or otherwise, in a trade, profession or other business; but whatever may be the meaning of the provision, it is inapplicable. As to the general prohibition in section 159 against making any other deductions than such as are allowed in the Act, and to the similar prohibition in rule 1 of case 1 of section 100, they must not, any more than the specific prohibitions, be read in such a way as to make the Act inconsistent with itself.

(2) Law Rep. 2 H.L. Sc. App. 273 at p. 284.

Dicey, for the Crown.—First, the case is to be decided under schedule A, not under schedule D. Mines clearly were originally under schedule A, by 5 & 6 Vict. c. 35. s. 60, schedule A, No. III.; and, notwithstanding 29 & 30 Vict. c. 36. s. 8, they still are under schedule A for the purposes of this case. The 29 & 30 Vict. c. 36. s. 8 relates only to the procedure as to assessment, in extension of 23 Vict. c. 14. s. 7, giving an appeal to the Commissioners for Special Purposes instead of the Commissioners for General Purposes; it does not apply to substantial questions of assessment; moreover, by the express words of the enactment the rules prescribed by schedule D are only to be applied "so far as such rules are consistent with the said No. III." Minerals are to be treated as the produce of the land. "Annual value" is the question as to assessments under schedule A, and the value of a mine is what is got out of it. Secondly, even if the case is to be treated as under schedule D, the deduction cannot be allowed. Rule 3 of case 1 of schedule D, 5 & 6 Vict. c. 35. s. 100, expressly prohibits the deduction by its enactments that no deduction shall be made "on account of any capital withdrawn," nor "for any sum employed or intended to be employed as capital." The deduction is prohibited also by sec. 159, especially by the general provision that no other deductions are to be made than such as are expressly allowed by the Act, and likewise by the provision similar to this last in rule 1 of case 1 of section 100. The Income Tax Acts frequently depart from the rules of political economy. They have, for instance, treated as "trades" several things which would not be so treated in political economy. *Forder v. Handyside* (3) is directly in point against the appellants, and is decisive of this case.

Herschell, in reply.

KELLY, C.B.—I am at the disadvantage, as compared with my learned brothers, of not having heard the former argument, but, looking to the nature of

(3) 45 Law J. Rep. Exch. 809; s. c. Law Rep. 1 Exch. Div. 238.

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the income tax, and the plain meaning of the word "profits," I have not the smallest doubt upon the case.

Under the 29 & 30 Vict. c. 36. s. 8, it appears to me that the question is transferred from schedule A to schedule D, and we have therefore only to consider the construction of schedule D, and the different provisions applicable to schedule D, to which reference has been made on either side.

In the first place let us take the provision upon which the whole question turns unless it is qualified by something else. That provision, 5 & 6 Vict. c. 35. s. 100, sched. D, case 1, rule 1, is that "The duty to be charged in respect thereof," that is in respect of any trade, manufacture or adventure, which now must be taken to include a coal mine, "shall be computed on a sum not less than the full amount of the balance of the profits or gains of" such trade, manufacture or adventure. Now what is "the balance of the profits or gains of" such adventure? Let us take the simplest case that can be imagined. If a man purchases at a wholesale warehouse a bale of cotton or chest of tea for 40*l.*, and then sells it to some retail dealer for 45*l.*, what is his profit? Expenses apart, his profit is 5*l.* Why? Because it is the balance which remains to him after having repaid himself everything he has expended in order to obtain the price of 45*l.* Now let us suppose he had become the owner of a bale of cotton and a chest of tea of the value of 20*l.* each, but the bale of cotton he had purchased for 20*l.* whereas the chest of tea had been given or bequeathed to him. He sells these two articles for 45*l.* What is his profit? His profit again is 5*l.* What he has gained in the way of a profit is the sum for which he has sold less the price which he has paid, or, if he has paid no price, the market value or that which he would have had to pay if he had purchased in the market. If we multiply one or two transactions into many the result is still the same. Let us apply this to mines. Suppose a mining lease for one year only; the lessee pays 1,000*l.* for the lease, at the end of the year he has got from the mine coal which he has sold for 12,000*l.*, and has paid a certain

sum for machinery and labour. Is his profit the whole sum of 12,000*l.*? To apply the term "profit" to anything of that kind is an abuse of the English language. His profit is the sum which he has received less the expenditure which he has had to incur in order to acquire that sum, *i.e.*, less the sum paid for the lease, which is now gone, and the cost of machinery and labour. Now if that be the case with regard to one year, what is the case having regard to a lease for thirty-two years? There is clearly no difference of principle. Assuming the working to have been alike during all the thirty-two years, it will be necessary, in order to arrive at the yearly profit, to set off against the gross receipts, divided equally among the thirty-two years, the expenditure, including rent, premiums and cost of labour, divided equally among the thirty-two years.

Then is there anything to qualify the result of those words which I have read from rule 1, taken alone? I see nothing either in rule 3 or in section 159 to prohibit this deduction. The words which most require attention in rule 3 are the words which say that in estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from such profits or gains "for any sum employed or intended to be employed as capital." But those words rightly considered mean something additional to the capital employed in realizing the profit acquired during the year, something which consequently, however proper to be deducted in calculating future profits, ought not to be deducted in calculating current profits. I therefore think the appellants are entitled to our judgment.

CLEASBY, B.—The present case, involving the application of the rules for assessing income tax, appears to me to be of a class in which we must be careful not to generalise so as to include, or appear to include, different cases. This is not the case of an owner of land opening a quarry or a mine and letting it at a royalty or working it himself. I do not say anything about such a case as that; it must be understood, as far as I am concerned,

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that I am not dealing with that case at all. In the present case I take it to be quite clear, that the 29 & 30 Vict. c. 36. s. 8 places the assessment under the rules prescribed in schedule D. The words are:—"The several and respective concerns described in No. III. of schedule A," which includes coal mines, "shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by schedule D of the said Act, so far as such rules are consistent with the said No. III." Unless the enactment applies to the case of a colliery company, formed for the purpose of carrying on the business of working coal mines, no case can, in my opinion, be suggested to which it can apply, and it must be struck out altogether. I think that this is clearly a case to which it was intended to apply. I do not express any opinion whatever as to how far it applies to the case of an owner of land, as I said before, opening a quarry and letting or working it. It is possible that that case ought to come under schedule D, and that it would be consistent with No. III. of schedule A to bring it under schedule D; but I do not say whether that would be so or not.

Now, having settled this point, we have only to apply the words of schedule D, treating this, as it ought to be treated; as a trade or business. The words in rule 1 of case 1 are "amount of the balance of profits or gains," followed no doubt by the words "without other deduction than is hereinafter allowed." Now, as was asked by Mr. Herschell, how can you get at the balance of the profits of trade without stock-taking—how can you get at the balance of the profits of trade for a year without stock-taking at the beginning of the year and at the end of the year? The whole argument appears to me to turn upon the application of the language of rule 3. Some of the rules of the Income Tax Acts are inconsistent with economics; and if there is anything in rule 3 which we can see to be applicable to the present case, we are bound to adopt it, although we must be guided by the proper rule of taking the ordinary balance of profits. I can, however, find nothing in rule 3 to call

upon us in this case not to have that sort of stock-taking, to which I have referred, for the purpose of arriving at the balance of profits. I do not think it is worth while that I should go through the whole of the rule and shew how no part of it applies. The part which, in my opinion, comes nearest to being applicable is "capital withdrawn from the concern;" but to call this "capital withdrawn from the concern" is entirely erroneous. The proper description of it is "capital consumed in making the profits." With regard to *Forder v. Handyside* (3), that case seems to me to have no bearing on this case. There can be no doubt that the principle of the Income Tax Acts is to take the result of one year, by itself or on an average of years, and to require every person to pay something out of the profits of that year, so considered, not out of what may result eventually from the transactions of that year; and you cannot, besides deducting your repairs belonging to the year or the average of years, put by a sum of money for the purpose of meeting depreciation. That case is, to my mind, quite inapplicable to the present case. I think, therefore, that the appellants are entitled to our judgment.

POLLOCK, B.—I entirely agree. The first point to determine is, by what Act of Parliament is this case governed? Now the 29 & 30 Vict. c. 36. s. 8 provides that any concern such as this shall be charged and assessed in the manner mentioned in No. III. of schedule A of 5 & 6 Vict. c. 35 "according to the rules prescribed by schedule D of the said Act, so far as such rules are consistent with the said No. III." And no inconsistency is shewn to exist between No. III. of schedule A and the rules prescribed by schedule D. The rest of the case appears to me really to have been matter of doubt only through a misapprehension caused by the directors of the company having, in their report to the shareholders, put down this sum of 10,424*l.* 15*s.* 3*d.* as "depreciation" for the year. This phrase having been explained, can there be any doubt that before any question of prohibited deduction at all arises, we are thrown back upon the question, what has been the balance of

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profits or gains of the concern? And when we ask ourselves what is the profit or gain of this concern we clearly must set against the gross receipts of the sale of the coal what has been paid by way of rent, premium or the like, duly distributing premium, of course, over the years of the lease.

Judgment for the appellants with costs.

Solicitors—H. T. Chambers, for appellants; Solicitor of Inland Revenue, for respondent.

1877.
Nov. 15. } CAMPBELL v. ROTHWELL—
Dec. 21. } (sued with others).

Principal and Surety—Rights of Surety—Right to after acquired Securities—Discharge of Surety.

A surety is entitled to the benefit of any security which the creditor has received for the debt, though he has received it after the contract of suretyship; and therefore, where the creditor has so dealt afterwards with such security that on payment by the surety it cannot be given to him in the same condition as it was when the creditor first acquired it, the surety is discharged to the extent of such security.

This was an action against Daniel Chadwick as the acceptor, James O'Neill Mackle as the drawer, and Ephraim Rothwell as the indorser of five bills of exchange; the first dated 1st of August, 1876, for 95*l.* 10*s.*, three months after date; the second dated 8th of August, 1876, for 100*l.* three months after date; the third dated 11th of August, 1876, for 75*l.* 10*s.* three months after date; the fourth dated 12th of August, 1876, for 96*l.* 14*s.* 6*d.* four months after date; and the fifth dated 14th of August, 1876, for 16*l.* 10*s.* three months after date.

The defendant E. Rothwell, whose liability was the only one in dispute, pleaded in his statement of defence,

inter alia, paragraph 7, that he indorsed the said bills as surety for the defendant James O'Neill Mackle, and that the plaintiff held them without value, and also, paragraph 10, which was as follows:—"That he was induced to indorse the said bills as surety, as aforesaid, and at the time of such indorsing plaintiff held certain goods, or had a lien upon them, as security for the payment of the amounts mentioned in the said bills, and afterwards received other securities, for the same purpose of securing the payment of the amounts mentioned in the said bills; and if the defendant E. Rothwell were liable on and had to pay the said bills, he would have been entitled to the said securities, or the benefit thereof, and they would have been sufficient to cover his liability; and the plaintiff, without the knowledge or sanction of the defendant E. Rothwell, has so dealt with the said securities that he has materially altered the position of E. Rothwell as such surety, and has by his own acts disentitled himself from giving the said E. Rothwell the said securities, or the benefit thereof, on his paying the said bills, and the said E. Rothwell has lost the benefit thereof."

To this 10th paragraph the plaintiff replied as follows:—

"As to paragraph 10, the plaintiff admits that at the time of the indorsing of the said bills, the goods referred to were in his possession, but he had no lien thereon as security for the payment of the said bills; the plaintiff further admits that afterwards he did receive a certain other bill of exchange and a lien on the said goods as further security for the payment of the said bills; the plaintiff, however, denies that he has so dealt with the said securities last named as to alter the position of the defendant E. Rothwell in any way, the said goods still remaining in his possession, and three judgments having been recovered against the respective parties liable on the said last-named bill, but no proceeds realised, and that any right or benefit to which the defendant E. Rothwell may be entitled as against the said securities remains still in the same position and unimpaired."

The cause was tried before Denman, J., at the last Liverpool Summer Assizes,

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when it appeared that the defendant Rothwell indorsed the several bills sued on as surety for the defendant Mackle, and that certain goods sold by the plaintiff to Mackle, and for the payment of which three of the said bills, namely, those for 100*l.*, 75*l.* 10*s.*, and 96*l.* 14*s.* 6*d.*, amounting to 272*l.* 4*s.* 6*d.*, had been given, were at the plaintiff's warehouse on 7th of September, 1876, when Mackle signed a document (which is set out in the judgment of Denman, J.), by which he stated that he gave the plaintiff a lien on these and other goods therein referred to, for the balance due to him from Mackle, as well as for the bills which had been so indorsed by Rothwell, as Mackle's surety. Afterwards, on 28th of October, 1876, Mackle gave one John Daniel Murphy, to whom he was indebted in 100*l.*, an order on the plaintiff, authorising the plaintiff to deliver to him, Mackle, the said goods, and the plaintiff, to whom this order was sent, undertook to deliver the goods to Murphy on payment of 143*l.*, which was the amount of the plaintiff's claim against Mackle, exclusive of the bills for 272*l.* 4*s.* 6*d.* Murphy had not yet paid this 143*l.*, and therefore the goods still remained with the plaintiff.

The question was whether, by reason of the plaintiff having so agreed to give up the goods to Murphy he had not so dealt with the security he had acquired by the document of 7th September, 1876, as to discharge the surety of the defendant Rothwell, notwithstanding such security had been acquired after the bills had been indorsed by him as such surety. This question was reserved for further consideration, and was argued afterwards before Denman, J., on the motion to enter judgment for the plaintiff, by

Gully, for the plaintiff, and

French, for the defendant Rothwell.

[The arguments and cases cited are sufficiently set out in the judgment.]

Cur. adv. vult.

DENMAN, J. (on Dec. 21), delivered the following judgment:—

This was an action brought against one Daniel Chadwick, as the acceptor, one James O'Neill Mackle, as the drawer,

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and the defendant Ephraim Rothwell, as the indorser of five bills of exchange.

The liability of the defendant Rothwell was the only matter in dispute at the trial. Several defences were pleaded by him which failed of proof at the trial; but the tenth paragraph of the statement of defence was as follows. [The learned Judge read that paragraph.] To this paragraph the plaintiff replied as follows. [This also the learned Judge read.]

It was agreed upon the trial that certain affidavits made on behalf of the plaintiff upon an application before the District Registrar, if admissible—which, upon the subsequent argument before me and upon the authority of *Brickell v. Hulse* (1) and other cases cited in 1 *Taylor on Evidence*, p. 691; I held them to be—should not be read at length upon the trial, but be taken to be in evidence, and referred to by either party on the argument upon further consideration. It appeared from these affidavits and from the evidence at the trial that three of the bills, amounting altogether to 272*l.* 4*s.* 6*d.*, were given by Mackle to the plaintiff for cloths supplied by the plaintiff to Mackle, and that the name of the defendant Rothwell was given as surety. As to another bill for 16*l.* 10*s.*, it was given for money lent. The remaining bill sued upon—namely, that for 95*l.* 10*s.*—was given for a debt due from Mackle to plaintiff for other matters. After the giving of the bills on the 7th of September, 1876, the goods sold by plaintiff to Mackle still remained at the plaintiff's warehouse, when Mackle executed a document, of which the terms were as follows:—

“ Liverpool, Sept. 7, 1876.

“ To Messrs. Campbell Brothers.

“ Gentlemen,—In consideration of your shipping me cloths and goods amounting to about 400*l.*, being about 128*l.* more than my bills to you (100*l.*, 75*l.* 10*s.* and 96*l.* 14*s.* 6*d.*—in all, 272*l.* 4*s.* 6*d.*), I hereby give you a lien on the said goods and cloth and a carriage in your possession for the said balance due by me to you, and also for cash lent by you to me, and I also give you a lien on the same

(1) 7 Ad. & E. 454; s. c. 7 Law J. Rep. Q.B. 18.

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for bills drawn by me on Messrs. Daniel Chadwick & Co., and endorsed by Mr. E. Rothwell, as my surety to you, until the said bills are paid and discharged and all expenses incidental thereto; and I further undertake to keep Mr. Rothwell clear of all liability on the said bills indorsed by him for me to you so far as I am able.

"J. O'Neill Mackle."

The plaintiff's affidavit stated that Mackle then contemplated going to America with the goods, and that the goods still remained ready for shipment at plaintiff's office. On the 28th of October Mackle gave to one Murphy an order on the plaintiff as follows:—

"Liverpool, Oct. 28, 1876.

"To Saml. Campbell, Esq., Campbell Brothers.

"I hereby authorise you to deliver the goods you hold of mine and settle up with Mr. John D. Murphy, who will act for me and on my behalf and settle all matters between us to date, and pay your claim as between yourselves.

"J. O'Neill Mackle."

This order was sent by Murphy to the plaintiff, who wrote, in reply, that he held the goods to his order, "subject to the condition therein mentioned," which I understand to mean the payment of the plaintiff's claim against Mackle. Murphy, whose affidavit was used by the plaintiff before the District Registrar and by the defendant on the argument before me, stated that the plaintiff had undertaken to deliver the goods to him (Murphy) on the payment of 143*l.*, the amount he claims from Mackle, exclusive of the bills for 272*l.* 4*s.* 6*d.*; but Murphy, not having paid that amount, the goods still remained in the plaintiff's hands at the time of action brought. Under these circumstances, it was contended for the defendant that, he being a surety, was discharged by reason of the plaintiff having dealt with an after-acquired security in a manner detrimental to his interests.

The main question which was argued in relation to this contention was whether a security which was not in existence at the time of the contract of suretyship is to be taken into account to relieve the surety. In *Newton v. Charl-*

ton (2), Wood, V.C., in an elaborate judgment, decided that it could not; and though in a subsequent case of *Pledge v. Buss* (3) the same learned Judge said that he could no longer hold that opinion to be law after an opinion of the Lords Justices to the contrary, it is remarkable that beyond a mere *dictum* not necessary to the decision of the case in which it was pronounced—*Pearl v. Deacon*, only reported in 2 Jur. 839—as an interlocutory remark during the argument of the case, counsel were unable to find any judicial opinion overruling that of Wood, V.C., in *Newton v. Charlton* (2). The cases of *Lake v. Brutton* (4), and *Pearl v. Deacon* (as reported in 24 Beav. 188; s. c. 1 De Gex & J. 461, and 26 Law J. Rep. Chan. 761) were referred to, but in neither case, nor in the case of *Pledge v. Buss* (3)—in which Wood, V.C., alluded to *Newton v. Charlton* (2), as above mentioned—was it necessary to overrule that decision. Under these circumstances, I have felt great doubt whether I ought not to adhere to the doctrine laid down in *Newton v. Charlton* (2), but, upon the whole, I think it is more probable that *Pledge v. Buss* (3), though not raising the same point, contains the expression of the final opinion of the Courts of Equity, including that of Wood, V.C., than the decision of *Newton v. Charlton* (2). I find that *Newton v. Charlton* (2) has been treated as overruled in the last three editions of *White & Tudor's Leading Cases* (see 5th ed. vol. ii. p. 1026), and I can see nothing unreasonable in the doctrine that a surety is discharged if the creditor has so dealt with any security he possesses that he cannot, on payment by the surety, give him all the securities he possesses, whether in existence at the time of the contract of suretyship or subsequently, in the same condition as they were when he first acquired them.

In the present case the plaintiff, as appears by the affidavit, has made an arrangement by which he has bound himself at any time to give up the goods

(2) 10 Hare 646; also reported in 2 Drew. 323.

(3) 1 John. 663.

(4) 18 Beav. 134; s. c. 8 De Gex, M. & G. 440; s. c. 25 Law J. Rep. Chan. 842.

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which from the 7th of September, 1876, he held as a security for the whole of the moneys due to him from Mackle, upon receiving 143*l.* from Murphy. This appears to me so wholly inconsistent with the security upon the goods given to the plaintiff for the express benefit of the defendant Rothwell by the document of the 7th of September, 1876, as to have materially diminished, if not entirely destroyed, the benefit of that security; and on that ground I think that the defendant Rothwell is released, and I give judgment for him accordingly.

Judgment for defendant Rothwell.

Solicitors—Rickards & Walker, agents for W. Williams, Liverpool, for plaintiff; Venn & Son, agents for J. Quinn & Sons, Liverpool, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1877.

Nov. 7.

Dec. 6.

CLARKE v. ROCHE.

Stamp Acts—Deed—Appointment of Trustee—Evidence—Statute 33 & 34 Vict. c. 97. s. 17.

Before a deed can be admitted in evidence it must be proved to the satisfaction of the Judge that the instrument is duly stamped, not only at the time of its production but also in accordance with the law in force at the time when it was first executed.—*Gatty v. Fry* (46 Law J. Rep. Exch. 605) distinguished.

SPECIAL CASE stated on appeal from a decision of a County Court Judge.

This was a suit brought under the County Courts Equitable Jurisdiction Act, 1865, 28 & 29 Vict. c. 99. s. 1, in the County Court of Gloucestershire, to restrain the defendant from acting as trustee under the will of Patience Clarke, deceased.

Patience Clarke, of Cheltenham, in the county of Gloucester, deceased, by her will dated the 27th of July, 1863, appointed John Pleydell trustee and executor thereof.

The testatrix died on or about the 1st day of October, 1866, without having altered or revoked her will.

On the 13th of November, 1870, John Pleydell being desirous of retiring from the trusts of the will executed a deed which purported to appoint the defendant a trustee in his stead.

The said deed upon its production at the trial in June, 1875, was found to bear date the 3rd of February, 1875, and was stamped with a 10*s.* stamp (such stamp being insufficient, according to the law in force at the time of the execution of the deed); the learned Judge therefore refused to admit the said deed in evidence.

It was proved that the said deed had not been stamped until 1875, but it was not shewn that the defendant was aware that the deed had not been duly stamped at the time.

The question for the opinion of the Court was whether, upon the above facts, the learned County Court Judge was right in declaring that the defendant was not trustee of the will of Patience Clarke.

Chadwyck Healey, for the defendant, who appealed.—The deed appointing the defendant a trustee ought to have been admitted in evidence. At the time of its production the stamp upon the face of the instrument was sufficient, and *Gatty v. Fry* (1) shews that nothing further was required. There, Cleasby, B., in delivering the judgment of the Court, points out the inconvenience that would be caused in the administration of justice by a Judge being interrupted by collateral enquiries before being able to determine whether an instrument was sufficiently stamped.

Archibald Brown, for the plaintiff.—The decision in *Gatty v. Fry* (1) had reference to a cheque and is not applicable to non-negotiable instruments such as a deed.

[COCKBURN, L.C.J.—Baron Cleasby's remarks about the inconvenience of going into collateral matters would apply equally to non-negotiable instruments.]

Moreover the statute, 33 & 34 Vict. c. 97. s. 67, expressly enacts that an instrument shall not be given in evidence

(1) 46 Law J. Rep. Exch. 605; s. c. Law Rep. 2 Ex. Div. 265.

Clarke v. Roche, Q.B.

unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Healey replied.

Cur. adv. vult.

The judgment of the Court (2) was now (Dec. 6) delivered by

MELLOR, J.—This was an appeal from the decision of the Judge of the County Court of Gloucestershire under the County Courts Equitable Jurisdiction Act of 1865. We felt some difficulty in ascertaining, from the contention of counsel and the statement of the case, what it was that we were really called upon to consider. The contention ultimately was reduced to the question whether the Judge was right in declaring that the defendant, James Roche, was not trustee of the will of Patience Clarke, deceased. This appeared to depend upon whether the Judge was right in refusing to receive in evidence the deed referred to in the case. This point is not expressly stated as a question for us, but we assume that it is involved in the question put to us.

It appears that John Pleydell, the trustee under the will of Patience Clarke, was desirous of being released from the trusts of such will, and accordingly, by a deed executed by him, sought to devolve the further execution of such trusts upon the defendant. On the proof being given of the execution of the deed in question it appeared to have been executed by John Pleydell on or about the 13th of November, 1870; but on its production at the trial it was found to bear date on the 3rd of February, 1875, and to be stamped with a 10s. stamp only, which stamp was insufficient according to the law in force at the time when such deed was executed. The Judge thereupon rejected the deed, and without it there appeared to be nothing to shew the authority of James Roche to act in the administration of the trusts of the will of Mrs. Clarke.

The case of *Gatty v. Fry* (1) was referred to in order to shew that the Judge ought to have received the deed in evidence, but we think that that case has no application to the present. That was an

(2) Cockburn, L.C.J., and Mellor, J.

action upon a cheque, which was in fact post-dated, and the judgment was based entirely upon the provisions of the 33 & 34 Vict. c. 97.

The stamp was sufficient on the face of it, and the judgment was based entirely upon the provisions relating to the stamps affecting cheques under that statute. In the present case the objection was raised on the proof of the execution of the deed, and 33 & 34 Vict. c. 97, after prescribing the terms upon which certain unstamped or insufficiently stamped instruments may be received in evidence, by section 17 enacts that "save as aforesaid, and except in criminal cases, no instrument executed in the United Kingdom shall be given in evidence unless it is duly stamped at the time when it was first executed."

We are, therefore, of opinion that the Judge of the County Court was right in the conclusion at which he arrived. The appeal must therefore be dismissed.

Judgment for the plaintiff.

Solicitors—William Rogers, agent for W. H. Powell, Birmingham, for appellant; Cordwell & Tasman, for respondent.

1877. } *HALL AND OTHERS v. THE*
Dec. 11, 21. } *MAYOR, ETC., OF BATLEY.*

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 21, 23 and 41—Construction of Drain communicating with Sewer—Contract by Local Authority with Owners of Premises to construct necessary Drain—Liability of Local Authority for Negligence.

Where a local authority by agreement with the owner of premises constructs, so as to communicate with their sewer, a drain from his premises which they could have required him to make under section 23 of the Public Health Act, 1875, such agreement is not ultra vires, and they are responsible to him for any damage caused to his premises by the negligent construction of the drain.

This was an action tried before Lush, J., at the Summer Assizes for the West Riding of Yorkshire at Leeds.

Hall v. The Mayor, &c., of Batley.

The plaintiffs, woollen manufacturers and owners of a mill at Batley, sued the defendants, the Local Board of Health, for damages to compensate them for the fall of their mill, which occurred, as it was alleged, by reason of the negligence of the defendants in digging a drain in the street upon which the mill abutted.

The defendants alleged that the drain in question was made by the foreman and workmen of the corporation at the request of the plaintiffs, and was done under the superintendence of the plaintiffs and according to their directions, and not under the authority of the corporation; and that if the work were done under any contract with the corporation, such contract was *ultra vires*.

The drain was in substitution for an old one which had been discovered to be choked up, and which ran down Providence Street to its junction with Wellington Street, along which last mentioned street the defendants had lately constructed a sewer. With this new sewer and the old drain a communication had been made at the plaintiffs' request and at their expense, and when a new drain became necessary the plaintiffs applied to the defendants to construct it for them. The foreman obtained the sanction of the defendants' engineer, and having communicated to the plaintiffs the probable cost of the work, proceeded to execute it by the workmen in the defendants' employ and pay, and under his own direction.

On the question of fact as to the way in which the work was executed, the jury found in favour of the plaintiffs, that they had not misled the foreman or prevented his taking proper precautions, and that in the course of the work he was able to see for himself the depth and character of the foundations, and could have acted accordingly.

The damages being referred to an arbitrator,

LUSH, J., reserved for consideration the question whether the verdict for the plaintiffs was sustainable in point of law.

Waddy and Forbes, for the plaintiffs.

Cave and Wills, for the defendants.

Our. adv. vult.

LUSH, J.—The question reserved by me at the trial, and which was argued a short time ago is, whether the defendants, being the Urban Authority of the Borough of Batley under the Public Health Act, 1875, are liable for the negligence of their servants in the mode of constructing a drain for the plaintiffs, leading from their mill to a common sewer, whereby the front wall of the mill sank, and considerable damage was caused to the building.

The facts are these: In May, 1876, the defendants constructed a sewer in Wellington Street in the borough, and in so doing they came across an old drain of the plaintiffs which led from their mill, and which emptied into an ancient common drain which ran along that street. On opening out the plaintiffs' drain it was found to be choked up, and at the instance of the plaintiffs, and with a view to the future construction of a new drain in substitution for the old one, the foreman of the defendants who had charge of this description of work done by them as the urban authority, put in an elbow so as to connect the drain with the newly constructed sewer. The expense of this communication between the drain and the sewer was charged to the plaintiffs, and paid by them to the corporation.

In the following November it was found that the time had arrived when the new drain must be made. The foreman of the defendants, by whom the elbow had been put in, was sent for by the plaintiffs and told that they wished the drain to be made by the defendants, and after some enquiry as to the quality and size of the pipes which would be required, and probable cost of the work, it was arranged that the foreman should apply to the engineer of the defendants for his sanction, and that being obtained, should proceed at once with the work. Shortly afterwards the work was commenced by and under the direction of the foreman, and was done by workmen in the employ and pay of the defendants.

The drain was commenced at the point of junction with the sewer, and carried up under the street for a part of the way. It then diverged towards, and was carried on to the mill under the paved footway, and the trench dug for it opposite

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the mill was dug close to, and was considerably deeper than the foundation of the building. The digging of this trench along the whole line of frontage at once, instead of opening it by degrees, and underpinning the wall as it proceeded, was the negligence complained of which caused part of the mill to sink. There was considerable contest at the trial as to whether the line of the drain was selected by the plaintiffs or by the foreman; also whether the foreman had been misled by any representation of the plaintiffs as to the depth of the foundation; and the questions put to the jury, which were agreed by the counsel on both sides to be the questions raised by the evidence were—first, whether the foreman was misled and prevented from taking such precautions as he otherwise would have taken; and secondly, if he was, whether, in the course of the digging, the foundations were disclosed so that it could be seen what their depth and character were.

The jury found against the defendants; and it was agreed that the damages should be referred to arbitration if the verdict was sustainable in point of law.

The objection taken at the trial, and which has been elaborately argued before me, was that the act of the urban authority in doing such work as volunteers at the request of the plaintiffs was *ultra vires*, and therefore, although the individuals who did or who sanctioned the doing of it might be responsible in their own persons, this action which sought to charge the liability upon the rates could not be maintained.

Agreeing as I do with the general scope of the arguments on the part of the defendants, I am of opinion that it is not applicable to this particular work. It is not like the case put, of the urban authority entering into a contract to build a house, or a wall, or to do any other work unconnected with their functions as a sanitary body. The 21st section of the Act gives a right to every owner of property in the district to construct his drain so as to cause it to empty into the sewer, on giving notice and complying with the requisition of the urban authority in respect of the mode of communication; and the 23rd section makes

it the duty of the urban authority, when a house is without a drain sufficient for effectual drainage (which was the case here), to require the owner to make a drain so as to carry off the sewerage from his premises.

It is true that they could not have compelled the plaintiffs to carry their drain as far as Wellington Street, because the sewer there was more than one hundred yards distant from the mill; but if the plaintiffs had refused to do so, they might have compelled them to empty into some cesspool. By some means or other they might have compelled them to carry off the drainage from the mill, so that it should not become a nuisance, and in the event of their not complying with such a requisition, might have done what they actually did, namely, make the drain themselves and charge the plaintiffs with the cost of the work.

The conditions prescribed by the 23rd section as a preliminary to the sanitary body taking the work out of the hands of the owner have regard solely to his rights. They are designed to control the action of the board as against him, and not to limit their capacity to do the work. It is not permitted to them arbitrarily to interfere and do the work at the owner's expense without first giving him an opportunity of doing it himself. But if they were to do so, he is the only person who could complain. The Act requires that the work shall be done by the one party or the other, and surely the owner may waive the option given him by the Act, if he pleases, and agree with the urban authority that the drain shall be made by them as if the preliminaries had been observed. So far from this being work impliedly forbidden by the Act to be done by the urban authority, which is the point of the argument, it is precisely the work which they are required to do, in the event of the owner declining to do it himself. The objection therefore entirely fails.

It is too late to contend, after the cases which were cited in the argument, that the defendants are not responsible for this negligence. The persons who were guilty of it were their servants employed by them to do this particular

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work. If damage ensues as the consequence of work properly done, it must be sought for by a claim for compensation; but if, as the result of negligence in the doing of it, it is properly the subject of an action. My judgment therefore is for the plaintiffs.

Judgment for the plaintiffs.

Solicitors—Layton & Jacques, agents for Scholefield & Taylor, Batley, for plaintiffs; J. F. Webster, agent for Dean & Son, Batley, for defendants.

[IN THE QUEEN'S BENCH DIVISION AND
IN THE COURT OF APPEAL.]

1878. }
Jan. 11, 30. } WELPLEY v. BUHL.

Practice—Cause remitted to County Court—31 & 32 Vict. c. 142. s. 10—Cause when actually transferred from Superior Court—Enlargement of Time for giving Security.

Where the time limited by an order made under section 10 of 30 & 31 Vict. c. 142, remitting an action for trial to a County Court unless plaintiff give security for costs, has expired, the action nevertheless remains in the Superior Court until the plaintiff has lodged the original writ and order with the Registrar of the County Court; and until this has been done, a Master has jurisdiction to grant to the plaintiff further terms as to his giving security, upon compliance with which he will be at liberty to proceed in the Superior Court notwithstanding his disobedience to the first order.—So held by the Court of Appeal, affirming the decision of the Queen's Bench Division.

An action having been begun for false imprisonment the defendant, on the 7th of December, obtained an order from a Master in these terms—"I do order that unless the plaintiff shall within one week give full security for the defendant's costs to the satisfaction of one of the Masters of this Court, the cause be remitted for trial before the Westminster County Court pursuant to 30 & 31 Vict. c. 142. s. 10." The amount was afterwards fixed by a Master, but on the attendance of the parties on the 14th of December, the

Master decided that the bond offered was insufficient. A summons was a few days later taken out by the plaintiff, and an order made thereupon on the 21st of December, giving the plaintiff liberty within three days to give full security or to pay the sum fixed into Court, notwithstanding the expiration of the time limited by the order of the 7th of December. The money was accordingly paid in on the same day, the 21st of December; but Fry, J., on appeal, set aside the last mentioned order on the ground that the Master had no jurisdiction to make it, the cause being then in the County Court by virtue of the order of the 7th of December.

C. Russell (Tapping with him) appealed to the Court to rescind the order of Fry, J.

Anderson, contra, for the defendant.

COCKBURN, L.C.J.—I think that the order of Fry, J., must be set aside, and the order of Master Manley Smith restored.

This is a case in which the defendant having applied for security for costs, the Master of the Court out of which the writ had issued, had authority to make one of two orders under section 10 of 30 & 31 Vict. c. 142, either that the action should be stayed, or in the alternative that the cause be transferred to the County Court. Here the Master made an order that in the event of security not being given within a week the cause should be transferred. It turned out that security was not given within the time prescribed by the Master. If the matter remained there, it is clear that the plaintiff could not have gone on with his action in the Superior Court. But how does an action remitted under this section get to the County Court? The Act says that the plaintiff shall take it to the County Court; if he does not, the County Court has no jurisdiction, for the only way in which the County Court obtains jurisdiction over these actions begun in a Superior Court, is by the plaintiff taking what I may call the record there and lodging it with the registrar. Till this is done where is the cause? The plaintiff having taken no step, the cause is, as it seems to me, still in the Superior Court. I feel the

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force of Mr. Anderson's contention that the plaintiff cannot keep it indefinitely there. But what is the remedy if he attempted to do so? The defendant must get an order compelling him either to abandon his action or to go with it to the County Court. If the Master had stayed the action, it would no doubt have been still in the Superior Court, and it does not seem to me to make any substantial difference that his order is in the other alternative. The Master had, therefore, as I think, jurisdiction to make this order, and the plaintiff has availed himself of it and paid the money into Court. Under these circumstances effect must be given to the Master's order, and the order of Fry, J., rescinded.

MANISTY, J.—I am of the same opinion. The statute has prescribed a mode by which an action begun in the Superior Court may be removed for trial to a County Court; and till it is so removed it is in the Superior Court, although proceedings in it may be stayed. When, then, is it removed? When the plaintiff lodges the original writ and order with the registrar, then it is, according to the words of the section, just as if the action had been commenced by plaint in the County Court. I agree, therefore, with the Lord Chief Justice that the Master had jurisdiction to make this order, because the County Court had no jurisdiction whatever in the cause till the writ and order were lodged.

Order rescinded.

From this decision an appeal was brought in the Court of Appeal, and the case, on appeal, was heard on the 30th of January, 1878.

O. H. Anderson argued for the defendant. *Tapping*, for the plaintiff, was not called on to argue.

THEIR LORDSHIPS (1) dismissed the appeal, and affirmed the decision for the reasons and on the grounds given in the above judgments of the Queen's Bench Division.

Solicitors—J. E. S. King, for plaintiff; Alsop & Co., for defendant.

(1) *Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.*

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
Jan. 11. } WHISTLER v. HANCOCK.

Practice—Order XXIX. rule 1—Action dismissed for want of Prosecution—Order LVII. rule 6—Power to enlarge Time.

Where the time limited by an order dismissing an action for want of prosecution unless statement of claim be delivered within that time, has expired, and the plaintiff has not then delivered his statement of claim, the action is dead, and a master has no jurisdiction upon a subsequent application to grant the plaintiff further time for delivering a statement of claim.

In this case a writ had been issued under the Bills of Exchange Act, on the 5th of October, and the defendant had on the 19th of October obtained leave to appear on the ground that a bill was running for the amount of the debt arising on the cheque sued upon.

On the 15th of December the defendant obtained an order from a Master, under Order XXIX. rule 1, dismissing the action for want of prosecution unless statement of claim be delivered within a week. The plaintiff did not comply with this order nor appeal against it, but on the 22nd of December took out a summons to set aside the appearance in the action.

On the 27th of December this summons was indorsed "No order," and the plaintiff gave notice of appeal against the Master's refusal to make the order; and on the 29th of December delivered notice in lieu of statement of claim. On the 1st of January, plaintiff obtained an order from a Master giving him a week further within which to deliver statement of claim, but this order was rescinded by Fry, J., and the plaintiff now appealed to the Court against the decision of the Judge at chambers.

Jelf, for the plaintiff, cited *Re Jones—Eyre v. Cox* (1).

Lyon, for the defendant.

COCKBURN, L.C.J.—I think the learned Judge was right in rescinding this order which the Master had no jurisdiction to

(1) 46 Law J. Rep. Chanc. 316.

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make. If, before the expiration of the time limited by the order of the 15th of December, and before the plaintiff fell under the operation of that order, he had obtained an order calling on the defendant to shew cause why the appearance should not be set aside, he might have succeeded upon the merits, but he did not do this while the action was in existence. Therefore, before he could make good any ground against the defendant's right to appear, the plaintiff himself ceased to have any right to go on with his action. In face of these circumstances it cannot, I think, be contended that this order was good, for the action being then dead, the master exceeded his powers in making it.

MANISTY, J.—The mistake made by the plaintiff was in not including in his summons to set aside the appearance a summons to set aside the order of the 15th of December. As he did not do this, the latter took effect; and I think the learned Judge at chambers was quite right in holding that the Master had after that no jurisdiction to make the order which he assumed to make on the 1st of January.

Appeal dismissed.

Solicitors—Richard Jones & Co., for plaintiff;
H. R. Jones, for defendant.

[IN THE EXCHEQUER DIVISION.]

1877. } THE CHARTERED MERCANTILE
Dec. 5, 6. } BANK OF INDIA v. WILSON.

Revenue—Inhabited House Duty—Exemption of Tenement “occupied for Purposes of Trade only”—Telegraph Company—32 & 33 Vict. c. 14. s. 11—“Dwelling House.”

Premises occupied for the purpose of carrying on the business of a telegraph company held (dissentiente CLEASBY, B.), to be premises occupied for the purposes of trade within 32 & 33 Vict. c. 14. s. 11, and exempt from inhabited house duty.

A building was occupied by a bank and a telegraph company in such a way

that all the ground-floor and basement except the telegraph company's entrance hall, and the basement under it, were the bank's, and the upper floors the telegraph company's, but there were doors between the telegraph company's entrance hall and the bank's lobby, which were open during banking hours to give a second access to the telegraph company's premises, and a caretaker lived on the third floor to protect the entire building:—Held, to be a dwelling-house within the Inhabited House Duty Acts.

CASE stated under 37 Vict. c. 16. s. 9, by the Commissioners of Income Tax and Inhabited House Duty for the city of London.

At a meeting held on the 10th of June, 1874, the Chartered Mercantile Bank of India, London and China appealed against an assessment to the inhabited house duty for the year ending the 5th of April, 1874, upon 5,500*l.*, the full value of the whole of the premises Nos. 65 and 66, Old Broad Street.

The premises are situated at the corner of Old Broad Street and Austin Friars, and are occupied by the bank and the Eastern Telegraph Company Limited. The bank premises, No. 65, consist of the whole of the ground-floor and basement of the building, except a part of the ground-floor occupied by the telegraph company's entrance-hall and the basement under it.

No. 66 consists of the whole of the upper floors, with an entrance-hall on the ground-floor and a basement under it.

No. 66 is occupied by the telegraph company except two rooms on the third floor occupied by a care-taker.

The basements of Nos. 65 and 66 are completely severed by brick walls one from the other and approached by separate staircases from the ground-floor. The door of the telegraph company's premises, No. 66, is in Austin Friars. The door of the bank's premises, No. 65, is in Old Broad Street. The telegraph company's entrance hall adjoins a lobby in the occupation of the bank, at the end of which, towards Old Broad Street, is the bank's door. Between the telegraph company's entrance hall and the bank's lobby are iron

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doors, which are allowed by the bank to be open during banking hours so as to give the customers of the telegraph company access from Old Broad Street. At the close of the bank business of the day the iron doors are, together with the entrance in Old Broad Street, closed and locked by the bank porter, who keeps the keys of both doors, and when this is done the bank premises are completely shut off from the rest of the building, and the only approach to the telegraph premises is in Austin Friars.

The first, second and part of the third floors are occupied by the telegraph company solely for the purpose of carrying on the business of the company. The whole of the orders for the management of the business of the company are issued from the premises so occupied, and all the accounts between the company and their customers and between the company and their own shareholders, are kept on such premises. The bank premises are used for the purpose of carrying on business as bankers.

The two rooms on the third floor are occupied by a care-taker, employed by the bank, and his wife, who reside there for the protection of the entire premises. With this exception no person sleeps on any portion of the premises.

In the valuation list made in 1870, under the Valuation Metropolis Act, 1869, the premises were valued as one building, and were thenceforth, and until 1875, rated to the poor as one building, but on the appeal of the bank against the new valuation list in 1875 the assessment has been divided, and the bank and telegraph premises are now separately assessed and rated to the poor.

The Commissioners confirmed the assessment, whereupon the secretary to the bank required them to state a case.

The inhabited house duty is levied on "dwelling-houses" under 14 & 15 Vict. c. 36 under the rules of 48 Geo. 3. c. 55, Schedule B.

By 32 & 33 Vict. c. 14. s. 11, "Any tenement or part of a tenement occupied as a house for the purposes of trade only or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house,

or building used as a shop or counting-house shall be exempt from inhabited house duties, although a servant or other person shall dwell in such tenement or part of a tenement for the protection thereof."

F. M. White, for the appellant.—These premises are two separate tenements and not one house, and ought to be separately assessed—*The Attorney-General v. The Mutual Tontine Westminster Chambers Association* (1). Secondly, they are exempt as being used solely for the purposes of trade. It is not denied by the Crown that the part of the building used as a bank is used for a trade purpose. The business of a telegraph company is a trade.

The Solicitor-General (Sir H. Giffard), *Dicey* with him, for the Crown, on the question of exemption, cited *The Edinburgh Life Assurance Company v. The Solicitor of Inland Revenue (Cases in Court of Session, 4th series, vol. 2, p. 394)*, in which the business of a life insurance company was held in the Court of Session in Scotland not to be a trade within the meaning of this exemption. "Trade" means buying and selling (*Webster's Dictionary* and *Richardson's Dictionary*). Bankers have been looked upon as traders because of their buying and selling bills. Otherwise it would be arguable whether they are traders. Buying and selling was the primary test of a trader under the Bankruptcy Acts.

KELLY, C.B.—With regard to the question whether this was really to be deemed one tenement, and so liable to the duty in question, I might, independently of the authorities, be disposed for myself to entertain some doubts, but my learned brethren are decidedly of opinion that it is to be deemed one tenement, and that therefore it is liable to duty, and on looking to the authorities, whatever doubts I might have been disposed to entertain, I do not feel disposed to differ with my brethren. Upon that point, therefore, so far as it can be im-

(1) 44 *LAW J. Rep. Exch.* 146; s. c. 45 *LAW J. Rep. Q.B. C.P. Exch.* D. 886.

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portant, the judgment of the Court must be considered as given in favour of the Crown. But with regard to the question whether this tenement or whatever it may be called, which is demised to and in the possession and occupation of the telegraph company is to be deemed occupied as a house for the purpose of trade only, I am clearly of opinion that it is to be deemed a house so occupied. The main ground upon which I found that opinion is that in these days, and in this great commercial country, we are bound to put a large and liberal construction upon the terms of Acts of Parliament, where the construction proposed to be put upon it is in favour of the trade and commerce of the country. Undoubtedly, if we are to take the terms "for the purposes of trade," as relating only to an occupation or a business of buying and selling, no one can say that there is any buying and selling in carrying on the business of a telegraph company. It was never the intention of the Legislature in a provision of this nature so to limit the meaning of the word "trade." It is not only the literal meaning of the word which is to be regarded. In literature of all descriptions, both in prose and verse, whether with regard to commerce or with regard to any other subject with relation to which the term may be used we find that the word "trade" is often used in a much more extensive signification than merely the operation or occupation of buying and selling. And why are we to limit it to buying and selling when we find now that from improvements in machinery and the advancement of science a vast addition to the operations of the world has been made, and the word "trade" is used not singly and simply by itself but in a provision of this nature? I cannot feel any doubt but that really the object of the section was to protect all the commercial business of the country. Whatever might be the precise nature of the occupation, if it was one which was practised for the commercial benefit of the country, it was intended to exempt those operations from the liability to this tax. We find the word does not stand alone. The section says, "part of a tenement occupied as a house for the pur-

poses of trade only." That is the first exemption. Then come the words "or as a warehouse for the special purpose of lodging goods, wares or merchandise therein." Now I apprehend that throughout a very great portion of the commerce of the country, not only in the city of London and the metropolis but in Manchester, Liverpool and all the great commercial towns, a warehouse is the scene of larger and more numerous commercial operations than any description of building that can well be imagined. Yet there may be warehouses where there is nothing like buying and selling, but where goods are deposited, and there may be persons who may be traders in other respects, and who likewise carry on that business independently of their own particular trade. We then come again to the words, "shop or counting-house." Now a shop undoubtedly is a place in general in which nothing is carried on but buying and selling. But a counting-house is a building or apartment in which every description of commercial business which can be imagined is usually carried on. A tradesman doing any large amount of business has, independently of his shop, a counting-house in which the counting-house business of the concern is carried on. Merchants have it who live by buying and selling and a variety of descriptions of commercial men, in fact almost every description of man of business has something like a counting-house in which he carries on his business or a portion of his business. Therefore here again we have one of the largest and most comprehensive terms which the English language contains introduced into this provision for exemption.

I think, therefore, applying the maxim *noscitur a sociis* we may reasonably infer that the Legislature never intended by the use of this word "trade" to limit the business carried on, which is to exempt the occupier of the tenement from the tax in question, to purely buying and selling. We may reasonably say that it was intended to embrace a great variety of different operations, though all of a commercial character, illustrated by a warehouse or shop or counting-house, so that the sta-

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tute is to be construed, in my opinion upon the same principle of construction, namely, to put a large and liberal interpretation upon the exemption.

I have only a word to say about the Scotch case which has been cited. I have the greatest respect for the decisions of the Court of Session in Scotland, though undoubtedly not always for their decisions upon purely commercial questions. Still, now that the trade and manufactures of Scotland have become of a vast degree of extent and importance, I receive with great attention every decision in the Court of Session in Scotland, even upon commercial questions. But when we consider that the judgment of the learned Judges in that case related to a life assurance company, there is something so totally different in a life assurance company from anything in the nature of a telegraph company that I cannot think the authority in question has any bearing upon the present case. The difference is substantial in every way. A life assurance company in one sense may be said to be a commercial undertaking, but on the other hand it is one of a very peculiar character, and indeed of a very limited character. A policy of assurance is an agreement or contract which is made between one man and another or between an individual and the company, that in consideration of an annual payment during his life, the executors of the one party shall, at his death, become entitled to a particular sum of money. I do not know that there is anything of a commercial nature or of a commercial character in a transaction of that kind. It is quite different from the business of a telegraph company. I content myself, therefore, with saying that in my opinion the difference between a telegraph company and a life assurance company is so manifest, both in principle as well as in fact, that I do not consider the case in Scotland at all applicable to the case which is now before the Court. Under these circumstances, it appears to me that we are bound to put a large and liberal construction upon the exemption, and that therefore upon these points the appellant is entitled to the judgment of the Court.

CLEASBY, B.—I confess I think that judgment ought to be given for the Crown, although I deemed it quite unnecessary to have any further argument because we are all agreed upon the question which the learned Solicitor-General has not argued. Now as to the first question I do not entertain any doubt that these premises are to be regarded for the purpose of applying the law of inhabited house taxation as an inhabited house. It is a question of considerable difficulty when you consider it by itself, but it has really been decided already, and it is impossible, I cannot help saying, without great waste of time in every case, where no essential difference exists, to go back and have a difficult question, which has already been settled by authority, argued over again.

As to the other part of the case, even after what I have heard from my Lord, I cannot say that I come to the same conclusion. I quite agree that the Scotch decision is not upon the same facts as the present case, because you can see a considerable difference between an insurance society and a telegraph company, and passing by the case of a mutual insurance society, it appears to me that the principles laid down in that case are quite correct, and that if you apply them to the present case we should come to the conclusion that the telegraph company does not come within the exemption of the section. It is necessary, however, to go back to the history of the legislation upon the subject in order to see how one arrives at this conclusion, because it is to a certain extent a system of legislation, and you cannot take one part of it alone without regard to the rest. I will begin taking the learned Solicitor-General's suggestion that every house that is occupied is an inhabited house. Then you have an exemption made by the 57 Geo. 3. c. 25 and the importance of referring to this Act arises from the fact that the language of the 57 Geo. 3. is the same as the language of the 32 & 33 Vict. I have very little doubt that I am almost repeating the previous argument of the learned Solicitor-General, but not having had the advantage of hearing it, I must

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give it as my own view. It is said there that "whereas it is become usual in cities and large towns and other places for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings for the purposes of trade, or as warehouses for lodging goods, wares or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime only for the purposes of such trade respectively which have been charged with the said recited duties." With regard to this question before us, the words which are important are "for the purpose of trade;" it does not say for the purpose of trade only. There is clearly no difference between that Act of Parliament and the one we are now considering in the recital, though perhaps it may occur in the enacting part. A little further on we come to the enactment which says, "as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house." This enactment having been made and acted upon was felt to be a grievance to a certain class of persons who did not occupy premises for the purposes of trade, but who occupied premises for the purpose of some employment, by which they gained their livelihood. This led to the enactment of the 5 Geo. 4. c. 44, s. 4 of which is in these terms: After reciting the Act of the 57 Geo. 3. it says, "Whereas by an Act passed in the 57th year of Geo. 3. provision is made for granting exemptions" (I will not read them in detail), "and whereas it is expedient to extend the same exemptions to the cases herein mentioned; be it further enacted that upon all assessments to be made for any year commencing from and after the 5th day of April, 1824, the provisions in the said Act contained for granting exemptions from the said duties to persons in trade in respect of houses, tenements or buildings, in the said Act described shall, and may be, extended and applied by the respective

commissioners and officers acting in the execution of the said Act, and of this Act, on due proof to all and every person or any number of persons in partnership together for and in respect of any house, tenement or building, or part of a tenement or building in the said Act described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business or calling by which such person or persons shall seek a livelihood or profit." You have here, therefore, in reference to this particular subject of taxation, a clear distinction drawn between premises occupied for the purposes of trade, or as warehouses or counting-houses or shops; and premises which are occupied as offices or counting-houses for the purposes of carrying on any business or profit. That is the way which the law stood until we come to the Act of the 32 & 33 Vict. The Acts of Parliament hitherto did not allow any person to sleep on the premises at all. They must be on the premises by day only. When the enactment took place which we are now considering, whether intentionally or unintentionally, it is not for me to say, it may have been intended or it may not have been intended, the enactment is made to apply only to those premises mentioned in the 57 Geo. 3, that is to say counting-houses, and so on, and it is not made to apply to those matters enumerated in the 5th of Geo. 4, where persons occupy offices or counting-houses for the purpose of carrying on any business, whereby they obtain a livelihood. The language of the larger section, which I am now considering, is precisely the same as the 57 Geo. 3, with the exception of the addition put at the end, which I do not think can have any bearing upon the present question, "or being used as such" in addition to the words "being occupied as such." They proceeded in the Scotch case on the distinction drawn by the legislature between premises used for the purposes of trade, and offices or premises occupied for the purposes of carrying on any vocation or business. Those are the Acts of Parliament, and there is a dis-

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tion, and there is nothing whatever to repeal it, and I should feel myself departing from the distinction which the legislature itself has pointed out, if I were to say that these premises which would, in my opinion, clearly come within the 57 Geo. 3, as being offices for the purposes of carrying on business, were offices or premises occupied for the purposes of trade only. I think we should be saying that there is no distinction between the two when the Act of Parliament says there is, for these are plainly the offices of the telegraph company, and occupied by them, and would be exempt from taxation as an inhabited house if no person slept there by night, and if they were only used by day; but if a person does sleep there by night they do not come within the words of this exemption. For the reasons which I have stated I think the Crown is entitled to our judgment.

POLLOCK, B.—In my judgment the appellant is entitled to have judgment, and inasmuch as there is no difference of opinion, or any reasonable doubt after so many decisions upon the same subject with regard to the character of the premises, I think it would be quite sufficient for me to give my reasons for agreeing with my Lord upon the question of whether or not this telegraph company can be said to be using these premises for the purposes of trade. Now no precise description of the business of this company is given to us, but there is some material, although not much, for us to infer what is the nature of the business. They are described in the case as a telegraph company, limited. It is said that these premises are occupied by them solely for the purpose of carrying on the business of the company. The whole of the orders for the management of the business are issued from the premises so occupied by the company, and all their accounts between the company and their customers, and between the company and their own shareholders, are kept on such premises. Now as I understand the business of a company like that, they have not merely to transmit by electric apparatus messages from one part of the world to another; but they have also to

do all those things which are conditions precedent to their doing so in the way of acquiring machinery and telegraph communication by wires and cables, and arrangements for the repairs of their cables, involving either the direct purchase of the materials or the entering into contracts for their repairs by others who do purchase those materials, and they have also to keep up correspondence and communication with many parts of the world, receiving money and paying money, and having clerks who keep their accounts. Now that being so, is this business which is carried on by them such as can properly be said to be within the meaning of this Act of Parliament, or these series of Acts of Parliament? I entirely agree with my brother Cleasby that we must take them as a series with which we have to deal. But does the telegraph company come within the words, so that they can be said to occupy these premises for the purpose of trade? There is one rule for construing statutes which I think is perfectly clear, and I find it so well expressed by Sir Peter Maxwell in his very able work on the Interpretation of the Statutes, that I will take his words rather than use my own. He begins his second chapter in this way—"in interpreting a statute it is to be borne in mind at the outset that language is always used *secundum subjectam materiam*, and that it must therefore be understood in the sense which best harmonises with the subject matter." Now that being so, what was the subject-matter of this statute, and what was the spirit of the distinction to be created? It was a distinction between persons who inhabited houses for the purpose of residence and persons who occupied houses, as they were then called, for the purposes of trade, and you find coupled with the word "trade," as my Lord has said, such places as warehouses for lodging goods, wares and merchandise therein, or shops or counting-houses, thereby expressing that as the antithesis, as it were, which it is the intention of the statute to establish. Now I think if I am right in the construction which I have put upon the statute, and the spirit in which I

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construe it, that it would be a somewhat dangerous rule to depart from the meaning which the words would require upon that principle, because I find in the subsequent statute other words introduced for a more extended purpose by the legislature. If it is for me to choose between the two rules of construction I would rather prefer the construction adopted by my Lord, than that which has been adopted by my brother Cleasby in the construction of the latter statute; but I regard it as a very important matter, and do not think that it is a matter to be treated lightly, nor do I think it is a question which is perfectly free from doubt, but I have applied my mind as best I can to see what is the fair and reasonable meaning of the words "for the purposes of trade" in the section. Now some citations were made in the course of the argument from dictionaries, and I would only say that I would personally avoid citing any word from dictionaries as implying in any sense a definition; but one may cite from a dictionary, or a work of good repute, to see what is the common acceptance of a word. Yesterday *Richardson's* and *Websters Dictionaries* were cited for the purpose of giving us a definition of the term, but I have found a definition in *Johnson's Dictionary* which appears to me to be more near the spirit in which I am construing the words. It is the second meaning which he gives, in which trade is described as an "occupation or particular employment, whether manual or mercantile, as distinguished from the arts or learned professions." That is a very fair expression of the meaning of the word in common parlance when you are asking whether a person exercises a profession or whether he carries on a trade, and in the same way whether a person occupies a house for the purpose of dwelling therein personally, or whether he occupies it for the purpose of carrying on a trade.

Now another head of argument, and one, of course, to which we ought to attend with the greatest care, is that which is used by the learned Solicitor-General in regard to the Bankruptcy Act, and no doubt the word trade was

originally there intended as applying only to persons who either bought or sold, or whose business was immediately cognate to the buying or selling of goods; but even then you find from time to time the words used in a much looser sense, and although we have no right to refer to the enlargement of the number of persons who have been made liable to become bankrupts by different statutes from time to time, we may look at the statutes to see in what sort of sense they used the word themselves. I find in one statute, as far back as James I, that a scrivener may be bankrupt. In the 21 James I. c. 19, s. 2, the words used are, "Or that shall use the trade or profession of a scrivener receiving other men's moneys or estates into his trust or custody." Therefore even there you find the word used in a wider sense than that of mere buying or selling, and in *Ohristian's Bankruptcy Law* you find thirty or forty pages devoted to considering all the different cases in which, apart from the statute law, persons have been made bankrupt who have not actually been traders in the limited sense of buying, selling or bartering. I do not think, however, myself, that that is a true guide to our conclusion in this case. I would rather say that although the statutes relating to bankruptcy present some analogy, they do not present a true analogy because the contemplation of the statute and the common law too was devoted to a very different purpose from that which is now under our consideration. Upon these grounds I think that the appellant is entitled to our judgment.

Judgment for the appellant.

Solicitors—The Solicitor of the Inland Revenue, for the Crown; *Clarkes, Rawlins & Clarke*, for appellant.

1877. }
 Nov. 14. } MOSS v. JAMES.
 Dec. 21. }

Landlord and Tenant—Fixtures—Leave to remove—Surrender of Lease—Removal within Reasonable Time.

The defendant was lessor of certain premises, of which Jackson was tenant under a lease for fourteen years from April 2, 1876. During his tenancy Jackson erected a greenhouse, the defendant undertaking to allow him to remove the same. The greenhouse was so affixed to the soil that it would not, in the absence of agreement, have been removable. Subsequently Jackson granted a bill of sale to H., whereby he assigned, amongst other things, "all the greenhouses on the premises," and gave the assignee power to enter and sell the same. H. having entered on April 4, 1877, the greenhouse was advertised for sale at an auction of Jackson's chattels, held on May 4, but was not then sold. After the auction the plaintiff made an offer for the greenhouse which was accepted on June 7. In the meantime the auctioneer, who had been in possession for H. under the bill of sale, and kept the keys of the premises, had, on May 11, sent the keys to the defendant, and on May 14 the defendant had taken possession. On June 7 notice was sent to the defendant of the sale to the plaintiff, and that the purchaser was about to remove the greenhouse. The defendant having denied the plaintiff's right to remove,—

Held, that a surrender of the term had taken place on May 14, that no claim to remove was made within a reasonable time after, and that therefore the greenhouse was not removable by the plaintiff. (Saint v. Pilley, 44 Law J. Rep. Exch. 33.)

This was an action set down for trial before DENMAN, J., at the Liverpool summer assizes, 1876, and reserved for further consideration.

The statement of claim alleged that one Jackson, a lessee of a certain messuage and premises of the defendant situate at Wavertree, near Liverpool, by a bill of sale dated the 4th of April, 1877, and made between himself of the one part and John Hargrove of the other

part, assigned unto the said Hargrove certain goods and chattels therein described, and then being on the said premises, including amongst other tenant's fixtures, a certain greenhouse or conservatory. That the said Hargrove, in pursuance of the power in that behalf given to him by the said bill of sale, sold the greenhouse or conservatory to the plaintiff; and that the defendant having taken possession of the said premises at Wavertree aforesaid, the plaintiff requested the defendant to permit her to remove the said greenhouse or conservatory, but the defendant refused and wrongfully kept possession of the same. The plaintiff claimed (1) delivery of the said greenhouse or conservatory; (2) 10*l.* damages for its detention; (3) in the alternative 200*l.*, the value thereof.

By the statement of defence the defendant, after denying the allegations contained in the statement of claim, and after denying that the said greenhouse was ever a tenant's fixture, or removable as such by the lessee, alleged in the alternative, that even if such allegations were true, that long prior to the alleged sale of the said greenhouse and conservatory to the plaintiff, and to the demand by her to be permitted to remove the same, the said lessee Jackson had, by reason of a breach of covenant, forfeited his lease of the said messuage and premises, and the defendant the lessor had, under the powers reserved to him by the said lease, re-entered upon the said messuage and premises, and re-possessed the same, and the said tenancy and the possession of the said lessee had determined and ended, and the said fixtures had become the property of the defendant, and the plaintiff was not, nor is, entitled to remove the same. And further that the alleged sale to the plaintiff, and the alleged demand by her for permission to remove the said fixture, did not take place until after the said Jackson, the lessee, had, with the knowledge and consent of the said Hargrove, surrendered his lease of the said messuage and premises to the defendant, and given up to the defendant possession of the same; and the tenancy had been determined by the said surrender,

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and the defendant had re-entered upon possession of the same, and the said fixture had become the property of the defendant, and that under the circumstances aforesaid, the plaintiff was not entitled to remove the same.

And further that even if the plaintiff ever acquired any right to remove the said fixture by reason of the said alleged sale, the plaintiff did not remove or seek to remove the same within a reasonable time after the surrender of the lease.

Herschell, for the plaintiff.

Charles Russell and *W. R. Kennedy*, for the defendant.

The arguments and facts appear sufficiently in the judgment. In addition to the cases cited in the judgment the following were referred to:—*Ruffey v. Henderson* (1) *Heap v. Barton* (2), *Pugh v. Arton* (3), *Lee v. Gaskell* (4), *Oastler v. Henderson* (5).

DENMAN, J. (on Dec. 21), delivered judgment as follows:—

This was an action brought to try the right of the plaintiff to remove a greenhouse, which the defendant denied, on the grounds to be mentioned presently.

The defendant was the owner of certain premises of which one Jackson was tenant under a lease for fourteen years from the 2nd of April, 1876. Jackson being anxious that the defendant should put up a greenhouse for him, and this having been refused, on the 4th of May, 1876, a letter was sent to him by the defendant's agent containing the following words:—"Mrs. James is willing to give you an undertaking that you shall be at liberty to remove any glass houses you wish to put up." Thereupon Jackson erected the greenhouse in question, at a cost of 200*l.*, which was so imbedded in brickwork and deep in the soil that it was admitted that it could

not, in the absence of agreement, have been removable.

On the 4th of April, 1877, Jackson's partners in business having discovered that he was indebted to the firm, he gave them a bill of sale whereby he assigned to one Hargrove, amongst other things, all the greenhouses and conservatories on the premises, and gave the assignee power to enter and sell the fixtures covered by the bill of sale. Hargrove entered on the 4th of April, and the greenhouse in question was advertised for sale, and offered for sale at an auction of Jackson's chattels, but not then bought. The auction took place on the 2nd, 3rd, and 4th of May, 1877. After the auction the plaintiff, Mrs. Moss, entered into negotiations with the auctioneer. On the 10th of May she made an offer of 15*l.*, which was increased to 20*l.* on a subsequent day, and accepted on the 7th of June. In the meantime the auctioneer who had been in possession for Hargrove under his bill of sale, and kept the keys of the premises, on the 11th of May, 1877, through Messrs. Forshaw & Hawkins, Hargrove's solicitors, sent the keys to the defendant's solicitors, and on the 14th of May the defendant took possession. On the 7th of June notice was sent to the defendant's solicitors of the sale to the plaintiff, and that the purchaser was about to remove the greenhouse. They denied the plaintiff's right to remove.

There was a covenant in the lease providing that a forfeiture should be created by any alienation of the premises without leave of the lessor, and one question argued was whether the assignment of the greenhouses and conservatories had of itself worked such a forfeiture as from the day of the assignment, the 4th of April, 1877. To this it was answered that Hargrove, after the assignment, had paid a quarter's rent, due the 1st of May, to the defendant's solicitor, which it was contended would amount to a waiver of the forfeiture, but inasmuch as it was proved that when that rent was received the solicitor was not aware of the assignment, I think that that answer failed. I am, however, of opinion, that it was not ne-

(1) 17 Q.B. Rep. 574; s. c. 21 Law J. Rep. Q.B. 49.

(2) 21 Law J. Rep. C.P. 153.

(3) 38 Law J. Rep. Chanc. 619; s. c. Law Rep. 8 Eq. 626.

(4) 45 Law J. Rep. Q.B. 540; s. c. Law Rep. Q.B. D. 700.

(5) 46 Law J. Rep. Q.B. 607; s. c. Law Rep. 2 Q.B. D. 575.

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cessary to resort to the supposed waiver for an answer to the supposed forfeiture on the 4th of April, for I think that it would not have been competent for the defendant to treat the bill of sale as a forfeiture so long as the term was in existence. The bill of sale was only a conveyance of chattels and of a greenhouse, which during the term it would have been impossible for the defendant to touch, and I think it would be wholly inequitable to hold that during the term the lessee might not have given Hargrove full power to enter and sell a greenhouse which he himself might have entered and sold. I am, therefore, of opinion that the tenancy still continued notwithstanding the bill of sale of the 4th of April, and that that alone worked no forfeiture of the lease, and if the greenhouse had been sold at the auction there would have been nothing to prevent either Jackson or Hargrove or the plaintiff, if she had then purchased Hargrove's interest in the greenhouse, from removing it.

But it was said, on behalf of the defendant, that the facts shewed that, at least as early as the 14th of May, there had been a surrender of the lease by operation of law. This was contested at the trial, but I think it clear that it was so. On the argument before me it was agreed that I should find as a fact whether there was a surrender, and if I thought there was evidence of it to go to a jury. The evidence of it was that Hargrove having got the keys of the premises, presumably from Jackson, gave them up to the defendant, claiming no right to the premises; that Jackson claimed no right after the day on which Hargrove entered; and that from the 14th the defendant, the lessor, had full possession of the premises without any attempt on the part of the lessee to retake possession or demand the keys.

Then, granting that Hargrove had a right to enter and remove the conservatory on the 14th of May, the question remains whether the plaintiff, who only became the purchaser from Hargrove on the 7th of June, has any such right. The defendant contended that he had not, because the greenhouse being a fix-

ture, though removable by Jackson during his term, could not be removed afterwards. To this it was answered that though that would be so in the case of a term which expired by effluxion of time, it was not so where, as in the present case, the lease had been surrendered to the landlord by the tenant before the expiration of the term, and the case of *The London Loan and Discount Company v. Drake* (6), which was cited for the purpose, seems to me to establish that the tenant could not by surrendering the term deprive his own mortgagee, Hargrove, of his right to sever the fixture in question, at all events within a reasonable time of such surrender. The case of *Saint v. Pilley* (7) shews that the expiration of the lease by surrender does not necessarily prevent a purchaser of fixtures from removing them within a reasonable time of his learning of the surrender.

In the present case, however, the plaintiff only bought the greenhouse in question on the 7th of June, i. e., more than three weeks after the surrender of the term, and it does not appear that she then did more than purchase the greenhouse from Hargrove, as though it were already a severed chattel. It does not appear that any negotiation was going on between the defendant and Jackson, or Hargrove, or anybody else during the intermediate time, or that the defendant had any notice of the plaintiff's purchase until after the 7th of June.

Under these circumstances, having by consent of the parties power to decide whether the claim to remove was made within a reasonable time, I feel obliged to come to the conclusion that it was not, for I can see no reason at all why Hargrove, if he intended to remove the greenhouse, should not have done so immediately upon the surrender, which was called to his attention through his solicitors as early as the 14th of May. The reason he did not do so was probably because he thought it more convenient to wait until he had obtained a purchaser who would take the burthen

(6) 6 Com. B. Rep. N.S. 798; s. c. 28 Law J. Rep. C.P. 297.

(7) 44 Law J. Rep. Exch. 33; s. c. Law Rep. 10 Exch. 137.

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of removal together with the property; but I do not think he had a right as against the defendant to delay the matter for that purpose beyond a reasonable time, without her consent, of which I see no evidence; and on this ground I think the case is distinguished from both of those cited, and becomes one in which the greenhouse, being a fixture not removed within the time allowed by the law, is on the same footing as the rest of the premises, and is now the property of the defendant. I therefore give judgment for the defendant.

Judgment for the defendant.

Solicitors—W. W. Wynne, agent for H. Forshaw & Hawkins, Liverpool, for plaintiff; J. & R. Gole, agents for Evans & Lockett, Liverpool, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1877. { ANGUS AND COMPANY v. DALTON
April 26. { AND THE COMMISSIONERS OF
Dec. 11. { HER MAJESTY'S WORKS AND
PUBLIC BUILDINGS.

Prescriptive Easements—Right to Lateral Support for Buildings—Presumption of Grant when liable to be rebutted.

Any presumption arising from length of enjoyment, as respects the easement of lateral support to buildings, is one which is open to be rebutted.

Where it is established that no grant of such an easement was ever made, and none can be implied, the presumption from mere enjoyment fails; and where the easement claimed is such that the servient owner, whether he knows of the fact or not, has no practical means of resisting its acquisition, no presumption of a grant can arise.

One of two adjoining houses having been, twenty-seven years before the accident, altered internally by the plaintiffs so as to be made to rest chiefly on a pillar built on the edge of their land and contiguous to that on which the adjoining house of the defendants stood, fell down when excavations were made by the defendants on the

site of their house which they had pulled down, and by reason of the pillar being deprived of the lateral support previously afforded by the soil under the adjoining house of the defendants. In an action by the plaintiffs to recover damages for the loss caused by the fall of their house under the above circumstances,—

Held, by COCKBURN, L.C.J., and MELLOR, J. (dissentiente LUSH, J.), that the mere enjoyment of the lateral support for the twenty-seven years did not give to the plaintiffs a right to such support as against the adjoining owner, no grant having been made or assent given, and none being to be implied.

By LUSH, J.—That the house of the plaintiffs had acquired the status of an ancient building; and as mere absence of assent will not prevent a right to support being acquired, the defendants were responsible for the whole of the damage done, of which the excavation made was the sole cause.

This was an action brought by the plaintiffs, coachbuilders at Newcastle-on-Tyne, against the defendant Dalton, who was a builder and contractor, and the Commissioners of Works, who had employed Dalton to pull down a house and erect upon the site a new Probate Registry, for damages sustained by them by the destruction of their manufactory and warehouse, which, by reason of the excavations made on the adjoining land in carrying out the works of the defendants, fell down. Plaintiffs' premises were undoubtedly old buildings—one hundred years at least—and had been a dwelling-house, until in 1849 they were converted into a coach factory and warehouse, and continued to be so used, without further alteration, until they fell down in January, 1876. At that time the Commissioners of Works having lately acquired the adjoining premises, which were probably coeval with plaintiffs', were proceeding, by their contractor, Mr. Dalton, to pull them down. There was no party-wall between the premises, but the separating wall belonged entirely to the Commissioners' house; so that when the latter was pulled down, the side of the plaintiffs'

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factory was open and the interior exposed. None of the joists or beams of plaintiffs' premises had been built into the wall so removed, so that the stability of the coach factory was not affected by the exposure mentioned; but the floors were carried upon transverse beams resting in their own front and back walls at one end, and at the other in a trussed girder, carried by a chimney-stack, which was built like a pillar, from the ground to the roof, in the middle of the side adjoining the Commissioners' house. This chimney-stack, which was 6 feet 6 inches wide and 2 feet 3 inches thick, was not touched by the defendants in pulling down the adjoining house; but when they excavated to get out the old foundations and put in new ones, although they left a wall of earth round the pillar, they dug below it, and in consequence the pillar fell, and with it almost all the plaintiffs' building was drawn down into the hole made by the defendants. Plaintiffs had previously warned Dalton and the clerk of the works of the danger of this happening.

The premises which fell were used—the two lower floors as shew rooms or warehouse for carriages, and the second and attic floors as a painting and trimming shop and store room respectively, and had been similarly used for more than twenty years. The area of each floor was about 360 square feet. The report of Mr. Haswell, an architect, used at the trial, described the construction as follows:—"The joists of the upper floors are placed transversely to the building, with the ends resting on beams in the front and back walls, and in the middle of the building on a massive trussed girder, having a clear span of 33 feet 6 inches. The south end of this girder rested on the pillar of brickwork previously mentioned; hence it will clearly be seen that the floors, with their super-imposed weight, were carried by this centre pillar of brickwork to the extent of one-fourth of their total weight." "The total weight for all three floors being fifty-four tons, and twelve tons being allowed for the weight of the pillar itself, the foundation of the pillar would have to carry about twenty-five tons, and this

it had carried, without any signs of shrinking, since 1849. Previous to 1849, when it was a dwelling-house, there had been internal walls; when they were removed, the trussed beam was substituted to carry the floors and roof as above described.

The action came on for trial before Lush, J., at Newcastle at the Summer Assizes, 1876, when, after the evidence had been given, two points were raised on the part of the defendants—First, that Her Majesty's Commissioners of Works were not liable because they had employed a contractor to do the work, including the proper shoring up of the adjoining premises; and similarly that Dalton, the contractor, was not liable because he had employed a sub-contractor to do the excavating work, which actually caused the mischief, and his contract was to do all that Dalton was bound by his contract to do. Secondly, that the plaintiffs were not entitled to the support, by the adjoining land, of the pillar, carrying as it did the weight of the three floors; that they had not acquired a right to any more support than would be necessary for the pillar itself, because no right to support greater than that of which the adjacent owner had notice could be acquired against him by mere user.

The learned Judge held on the first point that he was concluded by *Bower v. Peate* (1), and on the second, that where a building has stood for twenty years it has acquired a right to the support of the adjacent soil, and such right is not dependent on the adjoining owner having notice of what is done or of what weight is put on the land, nor does it rest on any implied grant. A verdict was therefore directed for the plaintiffs for the amount in the statement of claim, subject to a reference as to the damages.

The plaintiffs set down the case on motion for judgment, and as there were demurrers standing for argument, it was directed that the two should be heard together.

The plaintiffs demurred to so much of

(1) 45 Law J. Rep. Q.B. 446; s. c. Law Rep. 1 Q.B. Div. 321.

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the statements of defence of Dalton and the Commissioners respectively, as alleged that the defendants were not liable for any damage, trespass or injury caused by the contractors they had respectively employed to do the work.

Little, G. Bruce and Ridley, for the plaintiffs, moved accordingly.—On the first point raised at the trial and by the demurrers it is unnecessary to argue here, as the Court is bound by the judgment in *Bower v. Peate* (1).

[COCKBURN, L.C.J.—That judgment seems to have been given on a misapprehension of the facts.]

On the second point it is submitted that if a building is in existence for twenty years, then, unless anything has been done clandestinely (as, e.g., undermining), the owner has obtained a right to the support for his building which it has so enjoyed for all time—*Holmes v. Powell* (2). What was done here was done openly; the change from a dwelling-house to a coach warehouse could be seen by the adjoining owner, and also the character of the alterations. The *onus* is on him to shew that he did not know. But here the facts shew that the defendants had full notice. To require a special notice to be given would involve the position that without notice every little alteration in a house would deprive the owner of right to support, and it would be impossible to say what the rights of adjoining owners at any moment were.

[COCKBURN, L.C.J.—How is a neighbour to protect himself against your increasing the weight upon his house and soil to any extent?]

The servient owner is charged with the obligation of taking care that an easement is not acquired against him. This is analogous to the case of window lights.

[MELLOR, J.—No; windows always challenge attention at once.]

It often is no hardship to support adjacent buildings. The advantage is mutual, enabling each owner to build up to the very edge of his land. But even if it be a hardship, the servient owner is as much bound to see that a new ease-

(2) 8 De Gex, M. & G. 572.

ment is not acquired as that one is not acquired in the first instance. Express notice cannot be necessary; but, whether he has it or not, he could, even then, only prevent the additional burden by digging away so much as would leave only enough to support the house in its unaltered state.

[MELLOR, J.—May it not be implied, from the nature of the original construction, that the dominant owner cannot acquire further right of support than that originally afforded?]

The right is said not to arise originally from an implied grant—*Smith v. Martin* (3)—so it is unnecessary to look at its origin. This right to support is not within the Prescription Act—*Bonomi v. Backhouse* (4)—and so not within the words “as of right.” Before the Prescription Act, in *Gray v. Bond* (5) a right to land nets on the bank of a river enjoyed publicly for twenty years was established against the defendant, who did not know of its being done, a former grant being presumed from the user. No special notice, therefore, was necessary. The nature of the user on which this right rests has not been altered by the Prescription Act. Public user is sufficient notice; and it was proved here that the building, as altered, was of proper construction and of a nature known to be suitable for a carriage warehouse. The servient owner can see its character.

[COCKBURN, L.C.J.—He cannot tell that the foundation of the pillar has not been strengthened.]

The dominant owner is not bound to tell him that; and, anyhow, does not lose the right to the support of the dwelling-house, and so falls within *Browne v. Robins* (6).

[COCKBURN, L.C.J.—The defendants say it was the additional weight beyond that of the dwelling-house which caused the fall, and the question whether

(3) 2 Wms. Saund. 400.

(4) 27 Law J. Rep. Q.B. 378; s. c. in Exch. Ch.; 28 Law J. Rep. Q.B. 380; s. c. in H.L. 34 Law J. Rep. Q.B. 181; s. c. 9 H.L. Cas. 503.

(5) 2 B. & B. 667.

(6) 4 Hurl. & N. 186; s. c. 28 Law J. Rep. Exch. 250.

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enough support was left for the house only was not put to the jury.]

Sir James Stephen, Hugh Shield, and A. E. Hardy, for the Commissioners of Works.—The right of support to land is an incident of property, not an easement, but the right of support to buildings is an easement. It is doubtful if such an easement can be acquired by the mere duration of the building, but if it can, the building must throughout the time have been in the state needing the support to the knowledge of the owner of the servient tenement—that is to say, the amount of the easement must be such as the owner of the servient tenement is aware of—*Wyatt v. Harrison* (7), the judgment of Lord Tenterden, at p. 875. The right to support of a building must have its origin in a grant—*Partridge v. Scott* (8), Alderson, B.'s, judgment, at p. 228; or, if in easement, it can only be acquired by user as of right with the knowledge of the person against whom it is to be acquired. The case of *Solomon v. The Vinters' Company* (9) suggests a doubt whether such a right can be acquired at all. The easement of light is peculiar, and its analogy is not a guide—*Gale on Easements*, 158; *Flight v. Thomas* (10). In *Humphries v. Brogden* (11), Lord Campbell's judgment has reference primarily to land only in its natural state; but where he cites *Hide v. Thornborough* (12) he points out how the doctrine, when applied to buildings upon land, is applicable only when acquiescence and knowledge on the part of the owner of the adjoining land exists. Parke, B., in the last case, lays stress on the knowledge of the defendant. Generally it is contended that no right can be acquired against a man where he can do nothing to prevent the act, and a grant is not to be presumed from user where it is not natural to do

anything to interrupt. Compare other cases, such as air to a windmill—*Webb v. Bird* (13). The easement here alleged was not such as was capable of interruption. It would be, as the Court there said, practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed. *Smith v. Thackerah* (14) shews that support to buildings is not a right *ex jure naturæ*. *Bonomi v. Backhouse* (4) and *Roubootham v. Wilson* (15) do not enter into the consideration of the difference between land and buildings; they only shew that support of land is an incident of property, and that the injury is done at the moment when the land subsides. *Browne v. Robins* (6), which has been cited, does not go far enough to include this case, because it was found there that some damage would have been caused to the land independently of the buildings.

Herschell and Wheeler, for the defendant Dalton.—This subject is discussed by Wood, V.C., in *Hunt v. Peake* (16), but there is no authority to be found for the proposition that an easement can be gained over another tenement, except where the owner of the servient tenement could have prevented that being done which is said to create the easement. This is expressly laid down by Willes, J., in *Webb v. Bird* (13).

[COCKBURN, L.C.J.—Every easement presumes acquiescence; there can hardly be said to be acquiescence where resistance is impossible.]

Certainly only general knowledge can be presumed, and if there are special circumstances which the building itself does not necessarily disclose, special notice must be given.

[COCKBURN, L.C.J.—We are thrown back on the old doctrine of a presumed grant.]

Yes, and one can only be presumed to grant when he knows what he is granting.

(13) 10 Com. B. Rep. N.S. 268; s. c. 30 Law J. Rep. C.P. 384; in Exch. Ch. 13 Com. B. Rep. N.S. 841; s. c. 31 Law J. Rep. C.P. 335.

(14) 35 Law J. Rep. C.P. 276.

(15) 8 H.L. Cas. 348; s. c. 30 Law J. Rep. Q.B. 49.

(16) 1 Johns. 705; s. c. 29 Law J. Rep. Chanc. 785.

(7) 3 B. & Ad. 871.

(8) 3 Mee. & W. 220; s. c. 7 Law J. Rep. Exch. 101.

(9) 4 Hurl. & N. 585; s. c. 28 Law J. Rep. Exch. 370.

(10) 8 Cl. & F. 231; s. c. 10 Law J. Rep. Exch. 529.

(11) 12 Q.B. Rep. 739; s. c. 20 Law J. Rep. Q.B. 10.

(12) 2 Car. & K. 250.

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G. Bruce, in reply.—It is not necessarily referable to a presumed grant, there may be an absolute right; there are dicta to this effect, though it has not been absolutely so decided, and a presumed grant is only a speculative reason for the existence of such rights or easements.

[COCKBURN, L.C.J.—The question of notice only arises if you establish the right.]

Cur. adv. vult.

The following judgments were delivered on December 11 :—

LUSH, J.—The plaintiffs are owners in fee of a coach factory at Newcastle-upon-Tyne. The defendant Dalton is a builder, who had been employed by the Commissioners of Works and Buildings, under a contract, to take down a house adjoining to the plaintiffs' factory, and to erect in its stead a building to be used as a Probate office.

The action is brought for excavating the soil of the adjoining property, on which the Probate office was to be built, to such a depth, as left the foundation of that part of the coach factory without sufficient lateral support, and thereby causing the factory to fall.

The two houses were apparently built at the same time, and were estimated to be upwards of a hundred years old. They were divided by a wall, which belonged to the house pulled down, and which wall had been taken down by the defendants without injury to the factory.

Up to the year 1849, being about twenty-seven years before the accident, both houses had been occupied as dwelling houses; but in that year the plaintiffs' predecessor converted his house into a coach factory, and to adapt it to this purpose he removed the internal walls, and erected on his own soil, close to and in contact with so much of the dividing wall, a large stack of brickwork, serving the twofold purpose of a chimney stack, and also of a support to the main girders, which had to be put in to sustain the floors. These girders were inserted into the stack on the one side, and into the plaintiffs' wall on the opposite side, and were strongly secured with braces and

struts, and they thus formed the main support of the upper stories of the factory. When the defendants removed the dividing wall they left this stack untouched and erected on the site of the dividing wall a temporary wooden gable, so as to protect the factory while the new building was in progress. There had been no cellarage in the adjoining house, and it was not disputed that if none had been made, the stack and the factory would not have been affected by the alterations.

The defendants, however, having removed the dividing wall and erected the temporary gable proceeded to dig to the depth of several feet below the level of the foundation of the plaintiffs' stack, leaving a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall. This pillar, however, large as it was, proved to be insufficient after exposure to the air; and before the foundation of the new building had been completed it gave way, and the stack sunk and fell, drawing after it the entire factory.

Under these circumstances it was contended on behalf of the defendants—1st, that the plaintiffs' factory was not entitled to the support of the adjacent soil; 2nd, that at all events the Commissioners of Works and Buildings were not responsible for the negligence of the contractor in not leaving sufficient support or not properly shoring up the chimney-stack.

These points were reserved at the trial which took place before me at Newcastle, at the Summer Assizes, 1876, and a verdict was entered for the plaintiffs, subject to the questions of law, and to a reference to an arbitrator to assess the damages in case the verdict should stand against both or either of the defendants.

We expressed our opinion during the argument that upon the subordinate question of the liability of the Commissioners for the acts of the contractor, we were bound by the case of *Bower v. Peate* (1), but we took time to consider our judgment upon the main question, namely, whether the plaintiffs had acquired a right to the support of the adjacent soil for their building, especially having regard to the fact that it had been altered from a dwelling-house

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to a factory, and that the adjacent soil had thereby, and by the use made of the altered fabric, been burdened with considerable additional weight beyond what it had to bear when the house was originally built.

It was not suggested, nor was there any ground for the supposition, that up to the moment of the fall the factory was not a perfectly sound and stable building, nor that any alteration had been made in it since its conversion from a dwelling-house in the year 1849. It had, therefore, stood for twenty-seven years in the condition in which it was immediately before the accident, having had during all that time the support of the adjacent natural soil.

The right to support from the adjacent soil and the right to lights, which are distinguished as negative easements, bear a close analogy to one another. They have often been treated as standing on the same footing, and the only distinction that can, as it appears to me, be suggested between them is, that the one is more onerous to the servient tenement than the other. For the one absolutely deprives the adjoining owner of a portion of his land for building purposes. He cannot raise any erection so near to the windows as to obstruct the light, whereas the claim to lateral support only prevents him from lessening that measure of support which the dominant tenement has enjoyed. So long as he prevents the latter from falling or sinking, which he may generally do by underpinning or other contrivance, he may use his own land as he pleases. It is to the degree and not the kind of support that the dominant owner looks, and it is that alone to which he has gained a right.

But as respects the acquisition of the right the two claims appear to me to be identical. The owner who builds to the extremity of his land may open windows overlooking his neighbour's land. He may also lay his foundations as much or as little below the surface of his soil as he pleases. The adjoining owner cannot object, or maintain any action against him, for no right of his is thereby invaded. His only remedy is to build up against

the windows, or take away the support which the house derives from his soil, before an adverse right has been gained—see *Cross v. Lewis* (17). What if, as was the case here, he has himself already built a house to the extremity of his own soil?

All the authorities agree that a building which has acquired the status of an ancient building is protected from invasion of its easements of light and support. Down to the time of James I it was the practice to prescribe for such easements as having existed from the time of legal memory—see *Bland v. Mosely* (18), and it was expressly held in *Bury v. Pope* (19) that a party could not maintain an action for a nuisance in stopping the lights of his house, unless he had gained a right in the lights by prescription. Theoretically, an ancient house at this period was a house which had existed from the time of Richard I, practically, it was a house which had been erected before the time of living memory, and the origin of which could not be proved. But it afterwards came to be settled law, that an uninterrupted possession of light, water or any other easement for twenty years, afforded a ground for presuming a right by grant, covenant or otherwise, according to the nature of the easements; and if there was nothing to rebut the presumption, a jury might and should be directed to act upon it—see 2 Saund. 184, note 2 by Serjeant Williams.

The statute, 21 James I. c. 16, which limited the time of making an entry on lands to twenty years, seems to have suggested the necessity of a corresponding period for the acquisition of these easements. The earliest recorded case, that I am aware of, was in 1761. In that year Wilmot, J., ruled that where a house had been built forty years, and had had light at the end of it, if the owner of the adjoining ground built against them, so as to obstruct them, an action lay; "and this," he said, "is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption, that there was originally some agreement between the parties."

(17) 2 B. & C. 686.

(18) Cited in *Aldred's Case*, 9 Co. 58a.

(19) 1 Leo. 168; s. c. Cro. Eliz. 118.

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And he added that twenty years was sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.

In 1769 the same learned Judge tried an action for stopping lights which had existed for sixty years. The defendant offered to shew that the lights did not exist prior to that period, a defence which would undoubtedly have destroyed a claim by prescription, and which, before the time of James I., would have been held good. But the learned Judge overruled it. "If a man," he said, "has been in possession of a house with lights belonging to it for fifty or sixty years, no man can stop up those lights. Possession for such a length of time amounted to a grant of the liberty of making them. It is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed, even by a writ of right, the highest writ in the law. If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd." (2 Wm. Saund. 175 a.)

In a case like the present, which came before Lord Ellenborough in 1803, that learned Judge directed the jury as follows: "Where a man has built at the extremity of his land, and has enjoyed his building above twenty years, by analogy to the rule as to lights, &c., he has acquired a right to support, or, as it were, of leaning to his neighbour's soil, so that his neighbour cannot dig so near as to remove that support; but it is otherwise of a house newly built."

This case is quoted in 1 Selw. N.P., 10th ed. p. 435, upon the authority of Lawrence, J.

No facts are stated, and it is probable that no rebutting evidence was offered, and that this may account for the strong way in which the proposition was put. But it shews that at all events, in the absence of any such evidence, Lord Ellenborough considered the right to be established by an uninterrupted enjoyment of twenty years.

In 1824 the right to lights which had been enjoyed for thirty-eight years came

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before the Court of Queen's Bench in *Cross v. Lewis* (17). In delivering judgment in favour of the rights, Bayley, J., says, "I do not say that twenty years' possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right, and ever since the decision of *Darwin v. Upton* (20) it has been held that in the absence of any evidence to rebut that presumption a jury should be directed to act upon it."

"It has been argued that in order to found such a presumption, it must be shewn that the first act was illegal. If so, the doctrine of presumption can never apply to windows; for a person building a house—even at the extremity of his own land—may lawfully open windows looking towards the adjoining property. If his neighbour objects to them he may put up an obstruction, but that is his only remedy; and if he allows them to remain unobstructed for twenty years, that is a sufficient presumption of an agreement not to obstruct them;" and Holroyd, J., who tried the case, says, "At the trial I considered the windows as ancient lights, and that the plaintiff had a right by law to enjoy them; and that it was not a question to be determined by a jury without some evidence to contradict the idea of their being ancient. . . . A man may on his own land erect a house with windows looking towards his neighbour's premises. At first they may be obstructed, but if no interruption is offered, he may at length prescribe for them as ancient windows, and claim to have them free from obstruction, as in *Bland v. Mosely*" (18).

It is not suggested in this judgment nor in any other judgment that I am aware of, what kind of evidence would be sufficient to rebut the presumption derived from twenty years' uninterrupted possession. But this judgment plainly teaches what would not be sufficient.

It would not be enough for the adjoining owner to say to the building owner, "I object to your opening windows overlooking my land." To make his objection effectual he must follow it up by actual obstruction. That, says Bayley, J., "is his only remedy;" and Holroyd,

(20) 2 Wm. Saund. 175 c.

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J., added, "at first they may be obstructed, but if no interruption is offered he may at length prescribe for them as ancient windows," evidently meaning by "interruption" actual physical obstruction. When we consider that at this period the Courts were familiar with the doctrine of adverse and non-adverse possession, which grew out of the statute of James 1st, it is not difficult to surmise what kind of evidence would be, in the minds of the Judges, proper evidence to rebut the presumption derived from actual uninterrupted enjoyment. The building owner would not ask his neighbour for his permission to enable him to build his own house, where and how he pleased on his own land. If he asked anything, it would be that his neighbour would forbear to exercise his right to obstruct the windows he intended to open, or to take away the adjacent soil upon which his house depended for support. It was not an unusual thing before the Prescription Act for the adjoining owner to grant what was called a "lease" of the lights overlooking his premises. Many such instances have come before the Court; and one such occurs in a case now pending in this Division in a rule for a new trial. I refer to the case of *Hunt v. The City of London Real Property Company* (21). Another mode of preserving the right of the adjoining owner was to exact periodical payment from the building owner as an acknowledgement that he held his lights upon sufferance. An instance is found in the remarkable case of *The Plasterers' Company v. The Parish Clerks' Company* (22), where it appeared that ten shillings a year had been paid ever since the Fire of London as an acknowledgement of the right of the adjoining owner to obstruct the lights when he pleased.

I conclude, therefore, that the mere absence of assent, or even the express desire of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment; and that nothing short of an agreement, either express or to be im-

plied from payment or other acknowledgement, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption. In other words, that it would be presumed, after the lapse of twenty years, that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance.

This was the state of the law as to this class of easements at the time the Prescription Act, 2 & 3 Will. 4. c. 71, passed. That Act, by the 3rd section, distinguishes lights from all other easements, and deals with them in a different manner. It converts twenty years' actual enjoyment into a right absolute and indefeasible, "unless it shall appear that the same was enjoyed by some consent made or given for that purpose by deed or writing."

Payment of rent or other acknowledgement therefore no longer keeps open the right of the adjoining owner to obstruct lights; and in the case of *The Plasterers' Company v. The Parish Clerks' Company* (22), just mentioned, it was held that, although the plaintiffs had paid the agreed acknowledgement for nearly 200 years, the right of the adjoining owner to build against them was taken away by the Act.

But the particular easement in question is not provided for by the Prescription Act. The 2nd section points to affirmative easements only; to such as are gained by an active assertion of right in some form or other, and which are capable of being opposed in their inception—see *Webb v. Bird* (13).

In erecting a building on his own land, the owner does no more than make a lawful use of his own property. He makes thereby no assertion of right against his neighbour, and the latter has no power to prevent and no right to complain of the erection.

As the writ of right has been abolished and the Limitation Act now in force (3 & 4 Will. 4. c. 27), which passed subsequently to the Prescription Act, abolishes also the distinction between adverse and non-adverse possession, the reasoning of

(21) 47 Law J. Rep. Q.R. 42.

(22) 6 Exch. Rep. 630; s.c. 20 Law J. Rep. Exch. 362.

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Wilmot, J., has a force beyond what it had when his judgments were given.

The law of lights having been settled by the Prescription Act, any argument drawn from the Limitation Act applies only to such an easement as the one in question which was left untouched by the Prescription Act. It seems to me to be the necessary consequence of the Limitation Act, that such an easement should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired and not a title to that which is essential to its existence; that the law which bars the owner from recovering the tenement itself, after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded in view of the necessary effect of the Limitation Act upon such an easement as this.

It is, however, unnecessary in this case to base my judgment on this ground. If the right to support still rests on the doctrine of presumption, no facts are shewn which, in my opinion, are admissible to rebut it. For nothing is shewn except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory, and this, for the reasons already given, cannot in my opinion be held to constitute rebutting evidence. If notice to the adjoining owner that an additional burden has been cast upon his land, be an ingredient, that is disposed of by the fact that the conversion of the dwelling-house into a factory, and the use of the premises as a factory during twenty-seven years, were things open and notorious.

There are here, then, all the elements which go to make up the ordinary presumption, unmixed with any rebutting element. If such a length of enjoyment under such circumstances does not create a right to support from the adjacent soil,

then no building, the date of whose origin can be proved, can claim it. For the Common Law does not present any alternative to the time of legal memory, except twenty years' enjoyment. This would be an alarming doctrine, especially at the present day, when a very small proportion of the owners of houses now standing could rest their title to support upon immemorial enjoyment.

Of the cases subsequent in date to those I have quoted, the first is *Wyatt v. Harrison* (7). This was an action similar to the present, but the declaration did not allege that the house was an ancient house, or that it had existed for twenty years. To so much of the declaration as charged the digging so near to the foundation as to cause the house to fall, the defendant demurred, and the Court gave judgment in his favour. "Whatever the law might be," said Lord Tenterden, "if the damage complained of were in respect of an ancient messuage, possessed by the plaintiff at the extremity of his own land, which circumstance might imply the consent of the adjoining proprietor at a former time, to the erection of a building in that situation, it is enough to say that in this case the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then according to the authorities the plaintiff is not entitled to recover."

The most that can be argued from this decision is, that the Court does not seem to be free from doubt whether, if the house had been alleged to be ancient, the plaintiff would have been entitled to recover.

The next case in order of time is *Dodd v. Holme* (23), a case exactly resembling the present. The house was in fact thirty-five years old. It was alleged in some counts to be an ancient house, in others to be more than twenty years old. The defence was that the plaintiffs' wall was in so rotten a state that it could not have been effectually shored up; that it had only a slight foundation, and was pressed by a great weight of rubbish on the plaintiffs' premises, and that even if undisturbed, it could not have stood six

(23) 1 Ad. & E. 493.

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months. Bolland, B., directed the jury as follows—"If I have a building on my own land which I leave in the same state, and my neighbour dig his land adjacent, so as to pull down my wall, he is liable to an action. If, however, I had loaded my wall so that it had more on it than it could well bear, he would not be liable." And he stated the question to be, whether the fall was occasioned by the defendants' negligence (not shoring up) in which case the verdict ought to be for the plaintiffs; or by its own infirmity, in which case they should find for the defendants. The jury found for the plaintiffs. A rule was obtained for a new trial on the ground of misdirection, but the Court, after argument, discharged it, thus affirming the right to support. *Partridge v. Scott* (8) followed in point of time *Dodd v. Holme* (23). The action was brought for excavating coal on land adjoining to the plaintiffs', and so letting down two houses, the one an ancient house, the other a new one. It appeared that the plaintiff had within twenty years excavated under the ancient house, so that the question as stated by the Court in their judgment was precisely the same as to both houses. "In this case," said Alderson, B., in delivering the considered judgment of the Court, "if the land on which the plaintiff's houses were built had not been previously excavated the defendants might without injury to the plaintiff have worked the coal to the extremity of their own land, without even leaving a rib of ten yards as they have done; and if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself without any fault on the part of the defendants, unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years, nor could the right to any easement have become absolute even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground

and was supported in part by the defendants' land." No such point as that arises in this case. *Bonomi v. Buckhouse* (4) involved the very point in contest here. There was a difference of opinion between the Exchequer Chamber and the Court of Queen's Bench upon the question, whether the Statute of Limitations ran from the time the excavation was made which ultimately caused the sinking, or only from the time the damage accrued to the ancient house. The Court of Queen's Bench held that the act of excavating was itself wrongful, and that the statute ran from that time. The Exchequer Chamber held that the plaintiff had no cause of action until actual damage done, and this decision was affirmed by the House of Lords. The damaged building was forty years old, and the judgment affirmed the right to support from both the adjacent and subjacent soil.

Hunt v. Peake (16) came before Vice-Chancellor Wood in 1860, after the decision of the Exchequer Chamber in *Bonomi v. Buckhouse* (4), but before the decision in that case in the House of Lords. It was a bill to restrain the defendants from working any mines under the plaintiff's houses, and from working mines adjacent thereto so as to cause damage or injury to the foundations of the houses. The Vice-Chancellor came to the conclusion that the soil would have fallen if there had been no building, and therefore found it unnecessary to determine the question raised in the present case. But he says in the course of his judgment—"Suppose a person has for twenty years remained in the enjoyment of a privilege—has an ancient house as it is called in the authorities—is he or is he not entitled in consequence of having had that house for twenty years supported as it was supported, to continue to enjoy the privilege against any operations of his neighbour in the adjoining soil. Upon that unquestionably I do find considerable discussion; and perhaps in the last authority that has been cited, namely, *Solomon v. The Vintners' Company* (9), not only was there considerable discussion, but some doubt was thrown upon it; and although it has been held in some previous authorities that the right does exist, I do not

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know that it has come clearly, pointedly and precisely in question in the former authorities. No doubt the dicta in *Bonomi v. Backhouse* (4) and *Humphries v. Brogden* (11) are clear to the effect that you may acquire, by a twenty years' acquiescence on the part of your neighbour, a right to the easement, or whatever it is termed, of having the house you have added to your own soil supported by your neighbour's soil. But that doctrine has been called in question in the present case and was called in question in the case of *Solomon v. The Vintners' Company* (9). That case, however, was not quite of the same character, being the case of a house which leaned upon another, and had come by accident to be supported in that way."

Further on the Vice-Chancellor says, however, "If I decided upon that point (the right of the house to support) all the dicta, for I doubt whether there is any precise decision upon the question, are favourable to the plaintiffs; but I have not thought fit to rest their rights upon this state of circumstances. It is the ground that needs support," &c. Neither the cases cited in 2 Saund. nor the case before Lord Ellenborough, nor *Cross v. Lewis* (17) were cited before the Vice-Chancellor, nor had, as I have said, the case of *Bonomi v. Backhouse* (4) been heard by the House of Lords. If that case is carefully considered it can hardly be said that it is not a decision involving this very point. The question put by the House to the Judges assumes the right of the plaintiffs' building to support both from the subjacent and adjacent soil. It is in these words—"A. B. is the owner of a house, C. D. is the owner of a mine under the house and under the surrounding land. C. D. works the mine, and in so doing leaves insufficient support to the house. The house is not damaged nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?"

It appears from the statement of facts in that case that, although the defendants had worked the coal under

the plaintiffs' house, those workings did not cause the subsidence, but the subsidence was caused by the working away of the pillars of coal under the adjacent land. Willes, J., in delivering the judgment of the Exchequer Chamber, thus states the facts upon which the judgment of that Court was founded; and which judgment the House of Lords affirmed—"The plaintiffs were owners of the reversion of an ancient house. The defendants for more than six years before the commencement of the action worked some coal mines 280 yards distance from the house. No actual damage accrued until within the last six years. The question is, is the Statute of Limitations an answer to the action?" (See 28 Law J. Rep. Q.B. 380.) The House of Lords evidently thought it immaterial whether the workings which caused the subsidence were under or around the house; and where the surface belongs to one owner, and the minerals beneath to another, in the absence of any grant, reservation or contract, the right to vertical support must stand on the same footing as the right to lateral support—see *Rogers v. Taylor* (24). Neither the adjacent soil nor the subsoil can, under these circumstances, be worked so as to cause the surface land to subside, nor can an artificial burden be placed on the land impose a servitude on the one or the other, until the erection has stood twenty years. I have intentionally passed by the case of *Solomon v. The Vintners' Company* (9), as well as that of *Peyton v. The Mayor of London* (25), because those cases appear to me to admit of other considerations than are involved in the present case. The plaintiffs here claim the support of the natural soil of the adjacent land. The plaintiffs in those cases claimed a continuance of artificial support; namely, the support of the adjoining building, and that without shewing whether the houses were originally built by the same owner, at the same time, so as to be dependent on each other, or which of the two was first built, or how the one came to lean upon the other; or whether some neighbouring sewer or other excavation caused both to

(24) 2 Hurl. & N. 828; s. c. 27 Law J. Rep. Exch. 173.

(25) 9 B. & C. 725.

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sink. The Lord Chief Baron observed in *Solomon v. The Vintners' Company* (9), that it seemed contrary to justice and reason, that a man by building a weak house adjoining to his neighbour's could, if that weak house at all got out of the perpendicular and leant upon the adjoining house, compel his neighbour either to pull down his own house within twenty years or to bring some action at law, the precise nature of which was not very clear, in order to prevent a right from being acquired by twenty years' enjoyment. In a subsequent case, where it appeared that the houses were built by the same owner at the same time, and so as to require mutual support, it was held that each retained a right to the support of the other—*Richards v. Rose* (26). *The Mayor of Birmingham v. Allen* (27), recently decided in the Court of Appeal, I mention only to shew that it has not been overlooked. That case decided that the right to support is confined to the *adjoining land*, and that where that land which, if it had been left in its natural state, would have afforded sufficient support to the plaintiff's house, had been excavated for coals by its owner, the owner of the house could not acquire a right as against land farther off, though next adjoining to the intervening land.

The case of *Humphries v. Brogden* (11) and other like cases, I also pass by, as they go no further than to establish the position, that the owner of surface land is entitled of common right to the support, lateral and vertical, which nature has provided for it.

For the reasons already given, and upon the authority of the cases to which I have adverted, I am of opinion that the factory in question had acquired the *status* of an ancient building, and that as the excavation made by the defendants was the sole cause of its falling, they are responsible for the whole of the damage done.

COCKBURN, L.C.J.—This is a case of very great importance as regards the law of easements. It is an action brought against the defendant Dalton, a

(26) 9 Exch. Rep. 218; s. c. 23 Law J. Rep. Exch. 3.

(27) June, 1877, 46 Law J. Rep. Chanc. 673.

builder, and the Commissioners of Works and Buildings, by whom Dalton was employed, for excavating under the soil of premises belonging to the commissioners, by means of which an adjoining coach-factory of the plaintiffs, to which they allege that they, as owners of the factory, had a right of lateral support from the soil adjacent, was caused to fall. The facts were as follows:—The plaintiffs are the owners in fee of a coach-factory at Newcastle-on-Tyne, erected by them some twenty-seven years before the event complained of; prior to that time the premises had been a dwelling-house, as had also been the adjoining premises, now purchased by the defendants, the commissioners, for the purpose of converting them into a probate office. While both houses still stood they appeared to be coeval in point of age, and there was reason to think that they had stood for about 100 years. Though immediately contiguous, there was no party wall between them. Each, as I understand the facts, rested on its own wall built to the extremity of the soil of the respective owner. In this state of things the plaintiffs at the time already stated, namely, twenty-seven years before the alleged cause of action, altered the character of the house belonging to them, and constructed a coach-factory in its place. They removed the support on which the fabric had previously rested, and substituted for it a stack of brickwork which they carried to the extremity of their soil, and which served at once as a chimney-stack and as a support to the main girders by which the upper stories of the factory were upheld. They did this without any grant from the owner of the adjoining premises of any right of lateral support, or any assent on his part to the use of such support, unless his assent is to be inferred from his taking no steps to resist the acquisition and enjoyment of such an easement.

The Commissioners of Works having purchased the adjoining house, with the intention, as I have said, of erecting a probate office on its site, employed the defendant Dalton to take down the house and prepare the ground for the erection of the intended office. In

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doing this, according to the plans for the new office, it became necessary to take down the wall adjoining the plaintiffs' premises and to excavate the ground to the extremity of the defendants' own soil. It was not contended on the trial that in doing this they were guilty of any negligence. They took such measures as appeared necessary to prevent any damage to the plaintiffs' premises. In excavating they left a thick pillar of clay, which might well have been deemed sufficient for the purpose, immediately round the plaintiffs' stack for the purpose of supporting it. But, on exposure to the air, the clay cracked and gave way, and the pillar, being by the excavation deprived of the lateral support which it had previously derived from the adjacent soil, gave way and fell, and falling, brought down the factory, which, as I have said, rested mainly upon it.

It is scarcely necessary to observe that any easement of lateral support, which may have attached to the plaintiffs' premises as the house before stood, was lost by the taking down of the old house and substituting a building of an entirely different construction as regards the wall or foundation on which it rested. No question arises therefore as to whether, if the house had been reconstructed as it stood before, the right to support would still have remained. The construction of the premises as altered was entirely different. As the house previously stood the weight, if supported by the defendants' adjacent soil, was supported by the entire range of that soil. In the new building the weight rested entirely on the chimney-stack, and was thus concentrated on one spot. It may well be that if the plaintiffs' former construction had remained, the defendants' soil, notwithstanding the excavation, would have sufficed to support the building. The nature of the easement thus became essentially different; and the easement now claimed must, therefore, depend upon the effect of the support having been afforded during the twenty-seven years.

The only question, therefore, is, whether by the enjoyment of the lateral support to their factory from the adjacent

soil, for the time stated, without more, the plaintiffs had acquired an easement which prevented the commissioners from dealing as they pleased with their own land for legitimate purposes. I am of opinion that they had not, and, consequently, that the defendants are not responsible for what has happened.

That the right to the lateral support of the adjacent soil for a building which has been superadded to the soil is an easement as distinguished from the proprietary right to such support for the soil itself in its natural condition is undoubted. Equally certain is it that, except where the positive law steps in, and in the absence of any legal origin gives to a fixed period of possession or enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant. Upon both these points the authorities are uniform and positive. It is no doubt equally true that, in the absence of proof of any grant, the existence of a lost grant may be presumed from length of enjoyment. And in no system of jurisprudence has this doctrine been carried to greater length than in our own. In the absence of any sufficient law regulating the period of prescription, Judges, to make up for this deficiency, were in the habit of directing juries to presume grants, in the past or possible existence of which no one believed,—a practice to be deprecated and, in spite of precedent, to be followed with great reserve, and certainly with no disposition to extend it.

Looking to the importance of the question here involved, and to the fact that the law as to lateral support, not having hitherto been brought before a Court in banc, has not been made the subject of authoritative decision, it may be useful to trace the growth of this doctrine as to presumption, and the extent to which it has been carried, and for this purpose to review the authorities on the law of prescriptive easements.

At the Common Law there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of

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man, or where, as the legal phrase was, "the memory of man ran not to the contrary." But by several statutes fixed periods were limited for the bringing of actions for the recovery of real estate.

Prior to the Statute of Merton, Bracton tells us that the limitation in a writ of right was from the time of Henry 1, that is to say, from the year 1100 or 135 years.

By the statute of Merton (20 Hen. 3) the limitation in a writ of right was to be from the time of Henry 2, a period of ninety years. Writs of mortd'ancestor and entry were not to pass the last return of King John from Ireland, a period of twenty-five years. Writs of novel disseisin were not to pass the first voyage of the King into Gascony, a period of fifteen years.

New periods of limitation were fixed by the Statute of Westminster, 3 Edw. 1. c. 39 (1275). By this statute the time for bringing a writ of right was limited to the time of King Richard 1, a period of eighty-eight years. Writs of mortd'ancestor, Cosinage, aiel, and of entry, were limited to the coronation of Henry 3, about fifty-eight years. The writ of novel disseisin was to remain limited as before, namely, to the passage of Henry 3 into Gascony.

It is plain that this statute had reference to *actions* for the recovery of real estate. Nevertheless the Judges, with that assumption of legislative authority which has at times characterised our judicature, proceeded to supply the rule as to prescription, established by the statute, to incorporeal hereditaments, and among others to easements.

As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But here again, the legislature not intervening, the Judges provided a remedy, by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory, that

is to say, from the time of Richard 1. This convenient rule having been established, the Judges seem not to have thought it worth while, when the statute of 31 Hen. 8. c. 2. was passed, by which, in a writ of right, the time was limited to sixty years, to apply, by an analogous use of that statute, the time of prescription established by it, to actions involving rights to incorporeal hereditaments.

In a case of *Bury v. Pope* (19), in an action for stopping lights, according to the report, "It was agreed by all the justices that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's land, and the house and the lights have continued by the space of thirty or forty years, yet the other may, upon his own land and soil, lawfully erect an house, or other things, against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land, and it was adjudged accordingly."

And as late as the 1st of Charles 2, it was held in a case of *Sury v. Pigot* (28), that to maintain an action for obstructing lights, the light must be prescribed for as having been enjoyed time out of mind.

But the statute of Jac. 1. c. 21, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change by the arbitrary adoption of that period by the Courts, as sufficient to found the presumption of the existence of a right from the time of legal memory. Here again the boldness of judicial decision stepped in to make up for defects in the law which the supineness of the Legislature left uncared for. But it is to be observed, and the observation is specially important to the present purpose, that, with all their desire to reduce the period of prescription within reasonable limits, the Courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at

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a time later than that of legal memory. Hence, if, in the course of a cause, it appeared that the disputed right had had a later origin, the presumption failed, and the claim of right was defeated.

The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming, after long user, a grant by deed which in the lapse of time had been lost. At first, to raise this presumption, it was required that the user should be carried back as far as living memory would go; but, after the statute of James, user for twenty years was—here again without any warrant of legislative authority and by the arbitrary ruling of the Judges—held to be sufficient to raise this presumption of a lost grant; and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction. Well might Sir W. D. Evans, while admitting the utility of this doctrine, say that its introduction was “a perversion of legal principles and an unwarrantable assumption of authority” (2 Evans, Pothier, 139).

Thus the law remained till the Act 2 & 3 Will. 4. c. 71. was passed with the view of putting an end to the scandal on the administration of justice which arose from thus forcing the consciences of juries. How far it has effected this purpose will be seen further on.

But this doctrine of presumption from user or enjoyment under the former law could not, according to the highest authorities, be carried, as regards the presumption of a lost grant, any more than that which had reference to the existence of an easement beyond time of legal memory, further than that of a presumption capable of being rebutted, and so destroyed. It is true that in an early case of *Lewis v. Price* (29), which was an action on the case for obstructing the plaintiff's lights where the house had been built forty years, Wilmot, J., told the jury that the action lay, saying that “this was founded on the same reason

as when lights have been immemorial; for this is long enough to induce a presumption that there was originally some agreement between the parties.” And he added that “twenty years was sufficient to give a man a title in ejectment on which he might recover the house itself; and he therefore saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.”

So in a subsequent case of *Dougal v. Wilson* (30), which was also an action for obstructing lights, on the defendant attempting to shew that the lights had not existed for more than twenty years, the same Judge said, “If a man has been in possession of a house with lights belonging to it, for fifty or sixty years, no man can stop up those lights. Possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right, the highest writ in the law. If my possession of the house cannot be disturbed, should I be disturbed in my lights? It would be absurd.” He adds, “and I should think a much shorter time than sixty years might be sufficient.”

From this language it would no doubt appear that the learned Judge considered that after such a length of possession as would be a bar to an action to recover an estate under the statute of Henry 8. or James 1, the presumption in favour of a grant in the case of an easement would become absolute. But this view of the law was corrected in the case of *Darwin v. Upton* (20), which came before the Court of King's Bench on a motion for a new trial, in an action which had been tried before Gould, J., in which it was alleged that the learned Judge had directed the jury that twenty-five years' possession was an absolute bar, incapable of being overturned by any contrary proof, whereas it was only a presumptive proof which might be explained away. Lord Mansfield, in giving judgment, explains the value and effect of presumptions of this nature, and places

(29) 2 Wm. Saund. 175 a.
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(30) 2 Wm. Saund. 175 a.
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the doctrine on its true footing. He says, "The enjoyment of lights with the defendant's acquiescence for twenty years is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar* like a statute of limitations; it is certainly a *presumptive bar*, which ought to go to a jury. Thus in the case of a bond, there is no statute of limitations that bars an action upon it, but there is a time when a jury may presume the debt to be discharged, as if no interest appear to have been paid for sixteen or twenty years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence, for so it was held in the case of *The Mayor of Kingston-upon-Hull v. Horner* (31). In a case before me at Maidstone, I held length of time, when unanswered and unexplained, to be a bar." Willes, J., said, "There was a case before me at York where I held uninterrupted possession of a pew for twenty years to be presumptive evidence merely, and that opinion was afterwards confirmed in the Court of Common Pleas." And Buller, J., says, "I incline very much to think that the Judge was misunderstood, for he could never call it an absolute bar. In the Wells Harbour Case this Court went fully into the doctrine, and the rule of law is clear, that length of time is presumptive evidence only. The Judge said, 'I think twenty years' uninterrupted possession of these windows is a sufficient *right* for the plaintiff's enjoyment of them.' Now that expression is open to a double construction. If the Judge meant it was an absolute bar, he was certainly wrong, if only as a presumptive bar, he was right." The learned editor adds that the next day Buller, J., said, that Ashurst, J., had waited on Gould, J., who said he never had an idea, but it was a question for a jury, and would have left it to the jury if the counsel for the defendant had asked it; that he compared it to the case of trover, where a demand and refusal are evidence

of, but not an actual conversion. Upon this the rule was discharged.

In the case of *The Mayor of Kingston-upon-Hull v. Horner* (31) just referred to, Lord Mansfield thus explains the law: "There is a great difference between *length of time* which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar: so in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence shewing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence, may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances."

In *Keymer v. Summer* (32), Yates, J., told the jury that thirty years' user of a right of way would afford a presumption of a right of way, but he put it no higher.

It is true that in two cases, the first that of *Balston v. Bensted* (33) at Nisi Prius, the other that of *Bealey v. Shaw* (34) in banc, Lord Ellenborough laid it down that "twenty years' exclusive enjoyment of water in any particular manner afforded a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament." But the decision in the latter case, which is expressly disapproved of by Lord Wensleydale in *Chasemore v. Richards* (35) turned on the particular facts; and the law as there laid down by the Chief Justice is not in accordance with the current of authorities, and is scarcely consistent with his own language in *Campbell v. Wilson* (36). In that

(32) Bull. N.P. 74.

(33) 1 Campb. 461.

(34) 6 East, 208.

(35) 7 H.L. Cas. 349; s. c. 29 Law J. Rep. Exch. 81.

(36) 3 East, 294.

(31) Cowp. 102.

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case a way had been used for twenty years, but must have originated within thirty-seven years, as at that time all ways had been extinguished under an award, except such as were therein set out, of which the way in question was not one, and there was some reason to think, on looking at the award, that the way in question had been used by mistake, but there was no evidence that this was so; and the Chief Justice at the trial left "in substance the question to the jury whether the enjoyment originated in a grant or in any other manner." A new trial having been applied for on the ground of misdirection, Lord Ellenborough says, "Though by possibility the parties might, in fact, have acted on the mistake of the award, yet on the evidence given nothing appears to shew that they referred their acts to the award, and therefore it comes to the common case of adverse enjoyment of a way for upwards of twenty years without anything to qualify that adverse enjoyment. On looking into the award, we might possibly suppose that the use of the way originated by mistake, but no evidence was given of any fact accompanying the enjoyment to shew that the parties acted upon such a mistake. There was, therefore, no reason why the jury should not make the presumption, as in other cases, that the defendant acted by right, and that was in substance the direction of the learned Judge." From this language the Chief Justice would appear to have treated the presumption arising from user as capable of being rebutted by the other circumstances of the case, if the evidence had warranted it. Grose, J., said, "I cannot say that upon this evidence the jury might not make the presumption which they have done; though, had I been one of them, I do not know that I should have dared to do so." And Lawrence, J., said, "No doubt, but that adverse enjoyment of a right of way for twenty years unexplained is evidence sufficient for the jury to found a presumption that it was a legal enjoyment," and such, in effect, was the opinion of the learned Judge in his direction to them. "If, in exercising the right of way from time to time, it had appeared that the

party had asserted his right to be grounded on the award, though it was exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time. The weak part of the plaintiffs' case is, that it does not appear by the evidence that the enjoyment of the way did arise from mistake. Then if there were an adverse possession for above twenty years, and not explained by any evidence, why might not the jury presume a grant?"

In *Cross v. Lewis* (17), which was an action for obstructing ancient lights, and in which the lights were proved to have existed for thirty-eight years, Bayley, J., when the case was before the Court of King's Bench, on a rule *nisi* to enter the verdict for the defendant, says: "I do not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin v. Upton* (20) it has been held that, in the absence of any evidence to rebut that presumption, a jury should be told to act upon it." Littledale, J., says, the facts were "sufficient to raise a presumption of a grant." Holroyd, J., who had tried the cause at *nisi prius*, says, "At the trial I considered the windows in question as ancient lights, and that the plaintiff had by law a right to enjoy them, and that it was not a question to be determined by the jury without some evidence to contradict the idea of their being ancient lights." "A man may, on his own land, erect a house, with windows looking towards his neighbours' premises. At first they might be obstructed; but, if no interruption is offered, he may at length prescribe for them as ancient windows." The learned Judge was here evidently confounding two distinct things, prescriptions which in theory required to be carried back to time of legal memory, but might be presumed, by enjoyment, to have had so long an existence, and an easement founded on the presumption of a lost grant, which was the matter before the Court; but he admits that if "evidence to con-

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tradict the idea of the window being ancient lights had been offered, it would have been matter for the jury."

In a still later case, that of *Livett v. Wilson* (37), in an action of trespass, the defendant pleaded in justification a right of way acquired by lost grant. On the trial it appeared that the premises occupied by the plaintiff and the defendant had formerly been in the hands of a single owner, who had conveyed part to a person under whom the defendant claimed; but the right of way asserted was not reserved in the conveyance. There was also some conflict of evidence as to the undisputed user of the way, but the weight of evidence on this point shewed the right had generally been contested. On this evidence the Judge left it to the jury to say whether there had been an uninterrupted user for more than twenty years by virtue of a deed, and that such deed had been lost, in which case they should find for the defendant; but if they thought no way had been granted by deed, they should find for the plaintiff. On an application for a new trial, Best, C.J., used this emphatic language: "I think that the direction of the learned Judge was perfectly right, and that he went far enough. I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorised to presume it originated in a deed; but even in such a case a Judge would not be justified in saying that they *must*, but they *may* presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly."

The case of *Doe dem. Fenwick v. Reed* (38) is not directly in point to the present, yet it is analogous to it, and it deserves attention on account of a dictum of Holroyd, J. It was an action of ejectment to recover property, into the possession of which the defendant's ancestor had been admitted as a creditor, after a judgment obtained against the then owner, more than half a century

before, till the debt should be satisfied, and his family had remained in possession ever since. Abbott, C.J., in giving judgment said, "I am clearly of opinion that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the rule may, perhaps, be different; and all the cases cited are of that description. Here the original possession is accounted for, and is consistent with the fact of there having been no conveyance. It may, indeed, have continued longer than is consistent with the original condition. But it was surely a question for a jury to say whether that continuance was to be attributed to a want of care and attention on the part of the Charlton family, or to the fact of there having been a conveyance of the estate. As the defendant's ancestors had originally a lawful possession, I think it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion that there had been a conveyance." And Holroyd, J., said, "Here the original enjoyment was consistent with the fact of there having been no conveyance, for it was in satisfaction of a debt. The true question was presented to the jury. In cases of rights of way, &c., the original enjoyment cannot be accounted for unless a grant has been made, and therefore it is that from long enjoyment such grants are presumed. But even in these cases evidence to rebut such a presumption would be admissible."

The text writers are quite in accordance with these dicta and decisions. "The presumption of right in such cases, says Mr. Starkie (39), is not conclusive; in other words, it is not an inference of mere law, to be made by the Courts, yet it is an inference which the Courts advise juries to make wherever the presumption stands unrebutted by contrary evidence." "This presumption," says Mr. Best, in his work on Evidence (40), only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted

(37) 3 Bing. 115; s. c. 3 Law J. Rep. (o.s.) 186.
(38) 5 B. & Ald. 232.

(39) 3 Stark. Ev. p. 911, 3rd. ed.
(40) Section 350.

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and unexplained." "The presumption of right," says the same learned author, referring to what had been said by Lord Ellenborough in *Balston v. Bensted* (33) and *Bealey v. Shaw* (34), (41), from twenty years' enjoyment of incorporeal hereditaments, is often spoken of as a conclusive presumption, an expression almost as inaccurate as calling the evidence a 'bar.' If the presumption be 'conclusive' it is a presumption *juris et de jure*, and not to be rebutted by evidence, whereas the clear meaning of the cases is that the jury ought to make the presumption and act definitively upon it, unless it is encountered by adverse proof." And in his work on presumptions the same learned writer in speaking of presumptions from user, writes: "This presumption only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted and unexplained," in support of which proposition he refers to *Livett v. Wilson* (37). Mr. Taylor in his valuable work on evidence (42), classes the presumptions arising from user and enjoyment among what he terms "disputable" presumptions. "These," he says, "as well as the former,"—that is, conclusive presumptions—"are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform, as to be conclusively presumed to exist in every case; yet it is so general, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode the law defines the nature and amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence." "The rules in this class of presumptions," says

(41) Section 379.

(42) Taylor on Evidence, 6th edit., Section 95.

Mr. Greenleaf (43), "as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good; yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised."

The true principle is, as it seems to me, correctly stated in Mr. Goddard's learned and able treatise on the law of *Easements* (44). "The whole theory of prescription depends upon the presumption of a grant having been made. If, therefore, it can be shewn that no grant could have been legally made, or that any easement lawfully created must have been subsequently extinguished by unity of seisin or otherwise, or if it can be shewn to be a very improbable thing that a grant ever was made, the presumption cannot arise, and the title by prescription fails."

An instance in which such a presumption failed, is to be found in the case of *Barker v. Richardson* (45). There lights had been enjoyed for more than twenty years over land which, during part of the time, had been glebe land. The defendant, a purchaser under the 55 Geo. 3. 147, had obstructed the lights. It was held that a grant could not be presumed, inasmuch as the rector being only tenant for life, was incompetent to grant such an easement.

The books are strikingly deficient in decisions on the subject of the easement of lateral support. I have been able to find two cases only prior to the passing of the 2 & 3 Will. 4. c. 71, in which the right has directly come in question. In some other cases which have occurred it has been coupled with the question of negligence, and the decisions have had reference to that question. The subject is treated of in *Palmer v. Fleshees* (46) (referred to in *Comyn's Digest*—action on the case for Nuisance, C.) The action, indeed, was for stopping up

(43) On Evidence, 9th edit., Section 34.

(44) Page 90.

(45) 4 B. & Ald. 579.

(46) *Siderfin*, 167.

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lights, the facts being that a man, having a piece of land, built a house on part of it, and sold the house, and then sold the rest of the land to the defendant, who, building thereon, obstructed the plaintiff's lights, and it was held that the action lay. In the course of the cause it was resolved by the Judges, first, that if a man being seized of land, leases forty feet to A. to build a house thereon, and forty feet to B. for a like purpose, and one of them builds a house, and then the other digs a cellar in his land, which causes the wall of the first and adjoining house to fall, no action will lie, for every one may deal with his own to his best advantage; but, semble, that it would be otherwise if the wall or house were an ancient one. Secondly, that if a man, having a piece of land, builds a house on part of it, and leases the house to one, and the other part of the land to another, neither the lessor, nor any one claiming under him, can stop up the lights; for otherwise it would be in the power of the lessor to frustrate his own grant. *Aliter*, if the land adjoining a house is the land of a stranger; for the latter may build on his own land, and the owner of the first house will be without remedy, unless such house were an ancient house, and the lights ancient lights. The case does not, however, say what length of time will constitute a house or lights "ancient," nor does it touch the subject of presumption.

No case in which the subject of support comes directly into question occurs till that of *Stansell v. Jollard* in 1803, which is shortly stated in *Selwyn's Nisi Prius* (47), from the MS. of Mr. Justice Lawrence. "In an action on the case," it is there said, "for digging so near to the gable end of the house of the plaintiff, let to a tenant, that it fell, Lord Ellenborough held that where, as in the case before the Court, a man had built to the extremity of his soil, and had enjoyed his building above twenty years, by analogy to the case of lights, &c., he had acquired a right to a support, or as it were of leaning to his neighbour's soil, so that his neighbour could

not dig so near as to remove the support; but that it was otherwise of a house newly built." From the language of this statement it would certainly appear that Lord Ellenborough treated the twenty years' enjoyment as conclusive. But the report is a very meagre and unsatisfactory one, depending entirely on the accuracy of Mr. Justice Lawrence's note. The decision appears to have occurred at *Nisi Prius*. The probability is, as there does not appear to have been anything to rebut the presumption arising from the twenty years' enjoyment, that the Judge told the jury they must act upon such a presumption as one obtaining in the case of lights and other easements. To have gone further would have been to go beyond the necessity of the case. I cannot help looking upon this case of *Stansell v. Jollard* (47) as one of very doubtful authority. It has since been questioned in the case of *Solomon v. The Vintners' Company* (9). In some later cases, as I before mentioned, the complaint of the withdrawal of support was founded, not on the right of support absolutely, but on the allegation of negligence in removing the adjoining building. Thus in *Massey v. Goyder* (48) the grievance complained of was the taking down an adjoining building, and digging the foundations of a new building, erected in its place, without giving due and proper notice to the plaintiff, the owner of an adjoining house, so as to give him the opportunity of taking precautionary measures, as also in respect of negligence in taking down the first building and in excavating. It was there held by Tindal, C.J., that, if the defendants had used reasonable and ordinary care in the doing of the work, having given due notice to the plaintiff, they would not be answerable in point of law for damage caused to the plaintiffs' premises. In *Brown v. Windsor* (49), which was an action for excavating under defendant's wall, on which the plaintiff's house, built twenty-seven years before, rested, the complaint was of negligence in the manner in which the work was carried on, besides which there was proof that the defendant had expressly authorised the

(47) Vol. 1, tenth edition, 435.

(48) 4 Car. & P. 161.

(49) 1 Cr. & J. 20.

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resting of the plaintiff's house on his wall. So in *Dodd v. Holme* (23) the question on which the decision turned was the allegation and proof of negligence. In *Peyton v. The Mayor of London* (25) the cause of action relied on was that the defendant by taking down his house adjoining that of the plaintiff, without shoring up, had injured the plaintiff's house. It was held that, as the plaintiff had not alleged or proved any right to have his house supported by the defendant's house, the defendant was not liable for what had happened. In *Walters v. Pfeil* (50) the complaint was of negligence in taking down the defendant's house whereby the plaintiff's house was injured. There was no question as to support from the adjacent soil. In none of these cases did the right to lateral support come into question; and though some of them have been cited in support of the plaintiffs' case, I cannot see that they have any bearing on the question before us.

I am very far from saying that when contiguous houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under circumstances from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where from other circumstances a grant can reasonably be implied, I agree that every presumption should be made, and every inference should be drawn in favour of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances there is no form of easement in which, as it seems to me, the

doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support. For this easement is obviously one of a very anomalous character. In every other form of easement, the party whose right as owner is prejudicially affected by the user, has the means of resisting it, if illegally exercised. In the case of the so-called "affirmative" easements he can bring his action or oppose physical obstruction to the exercise of the asserted right.

Even in the case of another negative easement, and which is said to approach the more nearly to this—that of light—the supposed analogy entirely fails. For, although no action can be brought against a neighbouring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question, the adjoining owner has no remedy or means of resistance, unless, indeed, he should excavate in his own immediately adjacent soil, while the neighbouring house is being built, or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house. Is he to endanger, and perhaps destroy, his own house, by excavating under it for the purpose of preventing his neighbour from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity of the owner's soil, a right of support is to be acquired, in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as

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to the first principles of justice and right.

For these reasons I cannot entertain a doubt that—at all events as the law stood before the passing of the Prescription Act, 2 & 3 Will. 4. c. 71—the presumption of a grant, if any, arising in this case from the support to the plaintiffs' premises having been had for the twenty-seven years, was open to be rebutted; and that when it was proved—or, what is the same thing, admitted—that when the plaintiffs' premises were rebuilt, the original easement, if any, being, as I have already pointed out, gone—the assent of the defendants' predecessors was not asked for, or obtained by grant, or in any other way, to any support being derived from their soil, the presumption was at an end.

We have then to consider whether any alteration in the law, as applicable to this case, has been introduced by the statute just referred to. First, does the statute apply to the presumption of a lost grant at all? Secondly, if it does, does it apply to the easement under consideration? Thirdly, if it does, is the right of the party interested to rebut the presumption by proving that no grant ever existed taken away?

Now, it is first to be observed that the Act professes to deal with the matter of prescription alone. It is entitled "An Act for Shortening the Time of Prescription in Certain Cases." And what is here meant by "prescription," if it admitted of any doubt, is immediately made apparent by the preamble, which is in these words: "Whereas the expression 'time immemorial, or time, whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice, for remedy thereof be it enacted, &c." Then come the remedial enactments of this strange and perplexing statute. What was wanted was a fixed period of prescription, such as is to be found in the

French and Italian codes, in which for easements at once continued and apparent, a prescriptive period of thirty years is fixed; in all others the right can only be founded on positive proof of title, unless arising from the disposition of a common owner (see articles 688–707 of the French code, and articles 629–630 of the Italian code). Thus fictitious presumptions, with us the arbitrary creation of the Courts, and repugnant at once to common sense and to the consciences of juries, are altogether got rid of.

But while this period of presumption is fixed by the statute at the longer periods of sixty years, in the case of rights of common, and other profits *à prendre*, and of forty years in the case of easements, unless in either case it appeared that the enjoyment had been had under some deed or writing, with regard to any intermediate period, it was enacted that after an enjoyment for twenty years without interruption by any person claiming right, no claim shall be defeated by shewing only that the enjoyment commenced earlier than the twenty years. To both enactments is, however, appended the important provision that "such claim may be defeated in any other way by which the same is now liable to be defeated."

By this roundabout, and it must be admitted somewhat clumsy contrivance, so far as prescriptive rights were concerned, the presumption arising from twenty years' user or enjoyment was rendered a *presumptio juris et de jure* and conclusive. But as regards the presumption of a lost deed in rights arising from supposed grant, although the statute may have introduced easements created by grant for the purpose of making such rights indefeasible by prescription at the end of forty years, it is difficult to see how the presumption arising from an enjoyment for twenty years can be in any way affected by the Act. For such a presumption was never liable to be rebutted by evidence of a still earlier user, which is the inconvenience which the statute professes to remedy. On the contrary, the effect of such proof could obviously only be to strengthen the presumption. The Act does not go to the length of

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saying that the twenty years' user in the case of easements shall have any greater effect than it had before. It is only to the exceptional easement of light that it has given the character of indefeasibility at the expiration of the twenty years of uninterrupted enjoyment—a special enactment which would have been wholly unnecessary if the effect of the general enactment had been to make all easements indefeasible at the end of twenty years. The only conclusion, therefore, at which I can arrive is that, as regards the effect of twenty years' user or enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the Act.

But secondly, is the easement we are dealing with within the Act? The Act requires that the user or enjoyment shall have been under "a claim of right" and "uninterrupted." A man builds a house on his own land. He may lay the foundations so deep as not to need the support of his neighbour's soil; or he may not do so, and the support may be needed; but in the latter case the neighbour may not be aware of it, and there is nothing to convey to him the knowledge that the support is in fact had; nor, if he knew it, has he any means practically of preventing it. Is this an enjoyment "of right" within the 1st and 2nd sections of the Act, according to the meaning put upon the term by this Court in *Tickle v. Brown* (51)?

Again, the enjoyment is required to be uninterrupted. Now, interruption may arise either from a disuser by the one party, or from physical obstruction opposed by the other. I take the statute to have contemplated interruption as arising from either cause. Can it have been intended to include a form of easement to which no interruption could be opposed by the party whose rights are to be prejudicially affected? But the answer to the third question may render the foregoing one unimportant. Does the statute take away the right of the party denying the grant to rebut the presumption arising from user? I answer most assuredly not. For it says expressly that "the claim may be de-

feated in any other way by which the same is now" (that is, by the then existing law) "liable to be defeated." Now, nothing can, I think, be more certain, for the reasons I have before given, and from the authorities I have cited, than that the presumption of a lost grant from twenty years' user was under the previous law capable of being rebutted, and so the claim defeated by proof that no grant had ever existed.

I find nothing in the decisions which have taken place since the statute which shakes my confidence in the view I expressed. The mining cases, such as *Humphries v. Brogden* (11), *Harris v. Ryding* (52), *Rogers v. Taylor* (24), *Rowbotham v. Wilson* (15), *Bonomi v. Backhouse* (4), are not at all in point. The right of support there claimed was not of lateral but of vertical support, and was not in the nature of an easement, but of a proprietary right—the right of the owner of the surface land to have the support of the strata below as of absolute right, independently of user or of right acquired by enjoyment. This distinction was expressly pointed out by Lord Wensleydale when the case of *Bonomi v. Backhouse* (4) was before the House of Lords. He says:—"I think it is perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment."

The case of *Brown v. Robins* (6) comes nearer to the present, but, nevertheless, is plainly distinguishable. It was an action for excavating beneath land adjoining the plaintiff's house, and so causing the fall of the house, which had been built on land previously excavated beneath the surface, and which the defendant knew to have been so excavated. The plaintiff was held entitled to recover—to my mind a very questionable decision—but only on the express finding of the jury that the land would equally have sunk if no building had been superadded to its weight.

(51) 4 Ad. & E. 369.

(52) 5 Mee. & W. 60.

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The case of *Partridge v. Scott* (8) is still nearer to the present; and the language of the Court with reference to the easement claimed, which was one of support, is deserving of observation with reference to the case before us. The plaintiff had built a house on land which had been previously excavated by mining below. Four years after the house was built the defendants, in working a mine immediately adjoining, removed the minerals which afforded lateral support to the plaintiff's house without leaving sufficient to uphold it, but the removal of the minerals would not have had that effect if the house had not been built on excavated soil. It was held that no right of support could be claimed under such circumstances, except by way of easement, which, of course, could not have been acquired under twenty years; the language of the Court leaving it doubtful whether, in their opinion, if the support had been had for the twenty years, a right thereto would have been acquired. In delivering the judgment, Baron Alderson says:—"He (the plaintiff) has, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants, unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground and was supported in part by the defendant's land. If the law stood as it did before Lord Tenterden's Act (2 & 3 Will. 4. c. 71. s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that Act the lapse of time,

under these peculiar circumstances, would probably make no difference. For the proper construction of that Act requires that the easement should have been enjoyed for twenty years under a *claim of right*. Here neither party was acquainted with the fact that the easement was actually used at all, for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right, and that Lord Tenterden's Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point."

The case of *Rogers v. Taylor* (24) is still nearer to the present. The plaintiff, having built two cottages on waste belonging to the Crown, in the year 1824, obtained a grant of the surface from the Crown, exclusive of the minerals. In 1853, the defendant, who, as tenant of the owner of the mines, was working a quarry underneath the house, cut away the supports of the roof of the quarry under the house, which caused the house to fall. The Judge at the trial left it to the jury, from the enjoyment of the support for upwards of twenty years, if they thought the enjoyment had been uninterrupted—which was a question in the cause—to presume a grant from the owner of the quarry, and this direction was held by the Court of Exchequer to be right. But in this direction, which was given in deference to previous decisions, and which I now think went to the extreme verge of the law—for no one could have believed in the reality of such a grant—the effect of the enjoyment was only put as matter of presumption. There is nothing to lead to the inference that, had there been rebutting evidence, it ought not to have been submitted to the jury.

The only case which would appear to be adverse to this view is that of *Hide v. Thornborough* (12), in which Parke, B., at Nisi Prius, held that where the house of the plaintiff had been supported by the adjoining land of the defendant for twenty years to the knowledge of the defendant, the house of the plaintiff had acquired a right to such support, so as to give the plaintiff a right to

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damages for injury to his house by its withdrawal. But it is to be observed that this was a decision at *Nisi Prius*, and which does not appear to have undergone much consideration, and, what is more important, there was no evidence to shew the origin of the user or to rebut the presumption arising from the continuance of the support, and so to negative, as is the case here, the presumption of a grant.

The same learned Judge, in *Gayford v. Nicholls* (53), uses language which might imply an opinion that twenty years' enjoyment would give an absolute right to support. There the plaintiff's buildings had been injured by excavations made in the defendant's soil; but the buildings were modern, and it was held that the plaintiffs could not recover. Parke, B., in delivering judgment, says:—"This is not a case in which the plaintiff has the right of the support of the defendant's soil, either by virtue of a twenty years' occupation or by reason of a presumed grant, or by a presumed reservation where both houses were originally in the possession of the same owner; for unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbour who causes the damage by the proper exercise of his own right." But this was *obiter dictum* and not necessary to the decision.

The case of *Arkwright v. Gell* (54) is an authority on this question, as well as on the question of presumption. It was an action for diverting from certain cotton-mills water flowing down a mineral sough, and of which the mills had for many years had the benefit. The stream was an artificial, not a natural, one. In giving the judgment of the Court the Lord Chief Baron says, and his language is well worthy of attention:—"What is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse at common law, and independently of the effect of user under the recent statute—

(53) 9 Exch. Rep. 712; s. c. 23 Law J. Rep. Exch. 205.

(54) 5 Mees. & W. 203.

2 & 3 Will. 4. c. 71? He would only have a right to use it for any purpose to which it was applicable, so long as it continued there. An user for twenty years or a longer time would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines by the ordinary mode of getting the minerals below the level drained by that sough, and to keep the mines flooded up to that level in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burden themselves with such a servitude, so destructive to their interests? And what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by an act of his, except by at once making a sough at a lower level, and thus taking away the water entirely—a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity, as a matter of right." The learned Judge next proceeds to consider the case with reference to Lord Tenterden's Act:—"It remains to be considered whether the statute 2 & 3 Will. 4. c. 71 gives to Mr. Arkwright and those who claim under him any such right, and we are clearly of opinion that it does not. The whole purview of the Act shews that it applies only to such rights as would before the Act have been acquired by the presumption of a grant from long user. The Act expressly requires enjoyment for different periods 'without interruption,' and, therefore, necessarily imports such an user as could be interrupted by some one 'capable of resisting the claim,' and it also required it to be 'of right.' But the use of the

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water in this case could not be the subject of an action at the suit of the proprietor of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode; and as against them it was 'not of right;'—they had no interest to prevent it; and until it became necessary to drain the lower part of the field; indeed, at all times, it was wholly immaterial to them what became of the water so long as their mines were freed from it." This reasoning, as it seems to me, implies that the presumption arising from user may be negatived by the surrounding circumstances; more especially where the user could not be interrupted by the party against whom the easement is claimed.

In the case before us the neighbouring owner could not bring an action; he could not interrupt the user by anything he could do or could reasonably be expected to do.

As regards the matter of presumption, *Chasemore v. Richards* (35), in the House of Lords, is very much to the present purpose. It was an action for intercepting by the formation of a reservoir on the defendant's own land, and the use of mechanical appliances, currents of water, which before ran underground and percolating through the soil, fed the stream of the river Wandle, on which the plaintiff had an ancient mill worked by the stream, the supply of water to the mill being thereby diminished. In delivering the opinion of the Judges, which was adopted by the House of Lords, Wightman, J., says:—"In such a case as the present, is any right derived from the use of the water of the river Wandle, for upwards of twenty years, for working the plaintiffs' mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated from some grant from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating water, depending upon the quantity of rain falling, or the natural moisture of the soil? and in the absence of any

visible means of knowing to what extent, if at all, the enjoyment of the plaintiffs' mill would be affected by any water percolating in and out of defendant's or any other land? The presumption of a grant arises only where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of the water?"

So here, I ask, how could the adjoining owner prevent the plaintiffs' building from pressing laterally on his soil? Lord Wensleydale afterwards says (55):—"I do not think that the principle on which prescription rests can be applied. It has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards. '*Qui non prohibet quod prohibere potest, assentire videtur.*' But how here could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land to cut off the supplies of water in order to indicate his dissent. It is going very far to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user if it does not belong of natural right to the plaintiff. For the same reason I dispute the correctness of Lord Ellenborough's opinion in the case of the spring in *Balston v. Bensted* (33), where there had been twenty years' enjoyment of it in a particular mode."

The principle thus asserted is directly applicable to the present case. How could the defendants' predecessor have prevented the plaintiffs' house from being built on their own land?

In *Webb v. Bird* (13) it was held by the Court of Common Pleas (the judgment of which Court was afterwards affirmed on appeal) that an easement which was incapable of interruption was not within Lord Tenterden's Act. The action was brought for obstructing the passage of air to the plaintiffs'

(55) *Ibid.* p. 385.

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windmill. That, of course, is not this case; but the grounds on which the case was held not to be within Lord Tenterden's Act are directly to the present purpose. "I do not think," says Erle, C.J., "the passage of air over the land of another was or could have been contemplated by the Legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right was disputed. It is clear to my mind that that was the intention of the Legislature, because the section provides that the claim shall not be defeated 'where there has been actual enjoyment for the period mentioned without interruption.' I am at a loss to conceive what would be an interruption of such a right as is here claimed. In the case of a way, the exercise of enjoyment of the right may be interrupted by the erection of a gate or other impediment. So of the analogous right to water. So a claim to lights may be obstructed or interrupted by the erection of a hoarding or other screen by the owner of the servient tenement." And on the appeal in the Exchequer Chamber (13), Wightman, J., in giving the judgment of the Court, said it had "to be considered whether, independently of the statute, the right claimed may be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a certain term of years. We think, in accordance with the judgment of the Court of Common Pleas and the judgment of the House of Lords in *Chesmore v. Richards* (35), that the presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the supposed grant." After referring to what had been said by Lord Wensleydale in *Chesmore v. Richards* (35), the learned Judge continues:—"In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty as pointed out in the judgment below, that

we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right, by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it."

In the case of *Solomon v. The Vintners' Company* (9), the facts were peculiar. Three contiguous houses, standing on a declivity, had for thirty years been out of the perpendicular, the first leaning on the second, the second on the third. The lowest house having been taken down, its removal caused injury to the highest. An action having been brought, it was held that the action would not lie, partly because, there being an intermediate house, no right of lateral support could accrue; partly because—and it is on this point that Baron Bramwell rests his judgment—as an adjacent owner can never know whether the neighbouring building requires the support of his soil, or may have sufficient support on its own foundations, the enjoyment cannot be said to be open, and therefore cannot be adverse. The Lord Chief Baron in his judgment casts doubt on the authority of *Stansell v. Jollard* (47) and *Hide v. Thornborough* (12), cases on which I have already commented.

The same question as arises in the present case was raised before Vice-Chancellor Wood in that of *Hunt v. Peake* (16), and the authorities were gone into; but it became unnecessary to decide it, as the learned Vice-Chancellor was of opinion, as matter of fact, that the land would equally have fallen had no building been erected on it.

The last authority which I shall cite, but which appears to me conclusive to shew that, notwithstanding Lord Tenterden's Act, a presumption arising from user can be rebutted by shewing that no grant could ever have existed, is the case of *Mill v. The Commissioners of the New Forest* (56). The claimant—an allottee of waste land under an Inclosure Act—in an enquiry held under the 17 & 18 Vict. c. 49, an Act for the settlement of

(56) 18 Com. B. Rep. 60; s. c. 25 Law J. Rep. C.P. 212.

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claims upon and over the New Forest, claimed a right of common in the waste lands in right of such allotment, and proved an enjoyment for thirty years exercised as of right and without interruption, which it was contended gave an absolute right under the first section of the Act. But it was held that the origin of the enjoyment might be shewn, and that as by reason of the statutes 9 & 10 Will. 3. c. 36, and 1 Anne, stat. 1. c. 7, the right could have had no origin in a grant from the Crown, the claim could not be sustained. After expressing a doubt whether Lord Tenterden's Act could operate so as to repeal the Act of Will. 3, Jervis, C.J., says:—"It is, however, unnecessary to give any opinion upon that matter, because I am of opinion that, assuming that Lord Tenterden's Act does apply, still the claim cannot be supported. It is not sought to be defeated or destroyed by shewing *only* that the right profit or benefit was first taken or enjoyed at any time prior to the period of thirty years, but by shewing that it had never had any legal existence." And Cresswell, J., said:—"I am entirely of the same opinion. It seems to be imagined by Mr. Smith that because you cannot defeat a claim which may be lawfully made at the Common Law by custom, prescription or grant, to any right of common or other profit *à prendre*, by shewing *only* that such right or profit was first taken or enjoyed at any time prior to the period of thirty years, therefore you cannot defeat it at all. I do not find that stated in Lord Tenterden's Act. There is no attempt in this case to defeat the claim by shewing only its origin, but by shewing that it never could have had a legal origin." And Willes, J., said:—"I am of the same opinion. What was done here was in fact this—it was shewn that the enjoyment commenced in 1810, so that it could not give rise to the right claimed, and that it was impossible that any legal grant of the right could have existed." This case, it is true, was decided on the first section of the Act, but the reasoning is just as applicable to a case arising on the second.

It is scarcely necessary to point out that the rule established by *Pickard v.*

Sears (57) and *Freeman v. Cooke* (58), can have no application in a case where not only no assent was in fact given, but as no assent was necessary, none can be implied; in addition to which any opposition on the part of the adjoining owner would have been useless. Nor can the doctrine as to implied grants apply, as at the time of the plaintiff's factory being built, the premises belonged to different and independent owners.

For the foregoing reasons I am of opinion that any presumption arising from length of enjoyment, as respects the easement of lateral support to houses or other buildings, is one which both at Common Law, and since the Act of 2 & 3 Will. 4. c. 71, is open to be rebutted; and that if the fact that no grant was ever made is established, and from the circumstances none can be implied, the presumption fails. It is beyond all question in this case that no grant was ever made, nor assent ever given. It is equally certain that there are no circumstances from which any grant or agreement to make a grant, or assent in any form can be implied.

I am, therefore, of opinion that judgment must be given for the defendants.

MELLOR, J.—I have not thought it necessary to prepare a separate judgment in this case, as I have had the opportunity of reading the judgment of the Lord Chief Justice and that of my brother Lush. I admit that the case is not free from grave difficulties, but I am satisfied that the conclusion at which the Lord Chief Justice has arrived is the only one which is consonant with the principles of our law as well as those of ordinary justice.

I therefore agree entirely with the judgment of my Lord, and with the conclusion he has formed.

Judgment for the defendants.

Solicitors—Shum & Crossman, agents for Stanton & Atkinson, Newcastle-upon-Tyne, for plaintiffs; Prior, Bigg, Church & Adams, agents for Thos. Dalton, Leeds, for defendant Dalton; Hare & Fell, for other defendants.

(57) 6 A. & E. 469.

(58) 18 Law J. Rep. Exch. 114; s. c. 2 Ex. 654.

1877. }
Dec. 11, 21. } WOOD v. MURTON.

Recovery of Land—Mortgage with Power of Sale after Notice—Payment of Mortgage Debt by Bill during Currency of Notice—Revival of Notice on Dishonour of Bill.

Mortgage of the equity of redemption of premises as security for payment of a sum of money, with the condition that, if default should be made for seven days after notice requiring payment, the mortgagee might sell. The mortgagee subsequently gave due notice, and on the sixth day after took a bill at three months for the amount from the mortgagor, who died the following day. The bill was dishonoured, and thereupon the mortgagee, without giving any further notice, sold the premises to the plaintiff, who brought ejectment against the defendant, the mortgagor's widow:—Held, that the power of sale having been well exercised, the defendant was not entitled to redeem, but must give up possession to the plaintiff. That the giving of the bill operated as a suspension of the remedy by sale, and of the running of the notice, and that both revived when the bill was dishonoured; no further notice was therefore necessary.

This was an action tried before Lush, J., at Newcastle-on-Tyne, at the Summer Assizes, 1877, when judgment was reserved. The case was argued before the learned Judge during the Michaelmas sittings, by

Cave and Hindmarsh, for the plaintiff; and

Herschell, for the defendant.

The learned Judge then took time to consider, and on the 21st of December delivered the following judgment, in which the facts fully appear:—

LUSH, J.—This is an action of ejectment to recover possession of a leasehold cottage in Newcastle-upon-Tyne. The defendant is the widow and executor of Edward Murton, who, in June, 1872, purchased the cottage of one Smithson and mortgaged it to a building society. Not having sufficient to pay off the purchase-money he mortgaged the equity of

redemption to Smithson, the vendor, subject to the mortgage to the building society; and by that mortgage it was declared and agreed that if default should be made in payment of the said sum of 59*l.* 3*s.* 6*d.*, or the interest thereon, within two calendar months from the date of the mortgage, and also for the space of seven days next after notice in writing, requiring payment thereof, should have been given to Murton, it should be lawful for Smithson to sell and absolutely dispose of the said premises, either by public auction or private contract at the expiration of such notice.

The money not having been paid within the two months, Smithson, after this period and on the 2nd of October, 1872, gave notice, in writing, requiring payment at the expiration of seven days.

On the sixth day after the notice the parties met, and the amount of 59*l.* 3*s.* 6*d.* was by agreement reduced, after a settlement of accounts, to 43*l.* 4*s.* 6*d.*, and a bill of exchange given by Murton to Smithson for payment of that sum at three months after date, and the following memorandum indorsed on the mortgage:—"Memorandum. The before-mentioned sum of 59*l.* 9*s.* 6*d.* has been reduced by payment to the sum of 43*l.* 4*s.* 6*d.* Dated this 8th of October, 1873."

Murton died on the following day. The bill not having been paid, Smithson in August, 1873, without any fresh seven days' notice, put up the premises by auction under the power of sale, and sold to one Shipley. Shipley, however, in order to give the defendant an opportunity to redeem, relinquished his contract, and this arrangement seems to have been assented to by Smithson. Having waited nearly three years longer, he, in August, 1876, put the premises up to sale again by auction. The defendant attended and objected to the sale on the ground that no mortgage had been given. The auctioneer told her that if she would pay the mortgage debt the sale would be stopped. She did not pay, and the premises were knocked down to one Waugh, who subsequently transferred his contract to the plaintiff, and in November the purchase-

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money was paid, and an assignment of the premises executed by Smithson to plaintiff. The plaintiff afterwards paid off the mortgage to the building society, and took a statutory assignment of their interest.

Possession was afterwards demanded and this action brought.

The question argued before me was, whether the power of sale was duly exercised, and that resolves itself into this question, whether the giving the bill in October, 1872, for the reduced amount operated as a waiver, or only as a suspension of the notice to pay in seven days, the giving of which is by the mortgage made a condition of the power to sell. No evidence was given of what took place at the settlement and giving the bill, and I have to say what is the fair inference to be drawn from the bare facts stated. The defendant does not offer or ask for leave to redeem, but Mr. Cave, on the part of the plaintiff, agreed that if she was entitled to redeem, she should not be prejudiced by not having claimed it in her defence.

I am of opinion that she is not entitled to redeem, because the power of sale was well exercised. The bill suspended the remedy by action for the mortgage debt, and *prima facie* it suspended also the running of the notice. Both revived when the bill was dishonoured, and the plaintiff was then remitted to the position in which he stood when the bill was given. I cannot infer an agreement that if the bill was not paid the plaintiff should begin again and give a fresh notice, which would be to place him in a worse position than when he consented to give time. The conduct of the plaintiff at the second auction, when she objected to the sale, not because no notice was given, but on the allegation that there was no mortgage, would, if she had known of the stipulation as to notice, have perhaps concluded her from afterwards objecting to the want of it, but she probably had no knowledge of the contents of the mortgage, and I therefore lay no stress upon her not objecting on this ground.

It follows that my judgment must be for the plaintiff for possession, and mesne profits at the agreed rate of 6s. per week

from the 8th of November, 1876, and costs.

Any balance remaining of the purchase-money in Smithson's hands of course belongs to the defendant.

Judgment for the plaintiff.

Solicitors—R. W. Busby, agent for James Radford, Newcastle-on-Tyne, for plaintiff; Satchell & Chapple, agents for Allan & Davies, Newcastle-on-Tyne, for defendant.

[IN THE EXCHEQUER DIVISION.]

1877. } THE ATTORNEY-GENERAL
Dec. 6. } v. MOORE.

Borough Fund—Municipal Corporations Act—Fines made "payable to Her Majesty" by subsequent Act.

[For the report of the above case, see 47 Law J. Rep. M.C. 33.]

[IN THE QUEEN'S BENCH DIVISION.]

1877. }
Dec. 10. } *Ex parte CURTIS.*

Licensing Act, 1872 (35 & 36 Vict. c. 94), sections 12 and 52—Appeal against Conviction, Condition of—Notice to "Court of Summary Jurisdiction"—Service on Clerk to Justices.

[For the report of the above case, see 47 Law J. Rep. M.C. 35.]

[IN THE QUEEN'S BENCH DIVISION.]

1877. {
Dec. 19. { THE COMPANY OF PROPRIETORS
OF THE REGENT'S CANAL (*appellants*) v. THE ASSESSMENT
COMMITTEE OF THE PARISH OF
ST. PANCRAZ (*respondents*).

Poor Rate—Canal—"Lands of a Like Quality"—Mode of Assessment under 52 Geo. 3. c. 195. s. 101.

[For the report of the above case, see 47 Law J. Rep. M.C. 37.]

[IN THE HOUSE OF LORDS.]

1877. }
 April 30. } THE RIVER WEIR COMMISSIONERS
 May 8. } (appellants) v. ADAMSON AND
 July 27. } OTHERS (respondents).

Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74—Damage to Pier by Derelict Vessel—Owner's Liability—Act of God—Construction of Statute.

Section 74 of the Harbours, Docks and Piers Act, 1847, enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done shall also be liable to make good the same Provided always that nothing herein contained shall extend to impose any liability" upon the owner when the vessel is at the time when the damage is caused in charge of a compulsory pilot.

A vessel was driven aground by a violent storm, and after the master and crew had been obliged to abandon her, was forced by the wind and waves against a pier, whereby serious damage was occasioned:—

Held by the majority of their Lordships (affirming the decision of the Court of Appeal), that the owners of the ship were not liable under the above section.

The exemption from obligation to make good losses or injuries caused by the "act of God" applies to liabilities created by section 74 no less than to those existing before the passing of the Act.

This was an appeal against a decision of the Court of Appeal reversing a decision of the Court of Queen's Bench.

[The case is reported in the Court of Queen's Bench, 42 Law J. Rep. M.C. 33; s. c. Law Rep. 8 Q.B. 10, and in the Court of Appeal 46 Law J. Rep. Q.B. 83; s. c. Law Rep. 1 Q.B. Div. 546.]

The appellants were the Commissioners appointed under the Harbours, Dock and Piers Act, 1847 (10 Vict. c. 27), for

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constructing and maintaining a pier at the mouth of the river Weir.

The respondents were the owners of the steamship Natalian, which, on the 17th of December, was caught by a violent storm while on a voyage from London to Newcastle. While endeavouring to enter Sunderland harbour she was driven aground near the appellants' pier, and the master and crew were compelled to save their lives by abandoning the ship. As the tide rose the abandoned ship floated, and was driven by the storm against the appellants' pier, causing injury to the amount of 2,825l. 13s.

This action was brought by the appellants to recover damages for the injury from the respondents as owners of the vessel. Allegations of negligence were mutually made by both parties, but withdrawn at the trial.

The case was tried before Quain, J., at the Durham Summer Assizes, 1873, when a verdict was entered for the plaintiffs, the appellants, with leave to move to enter a nonsuit or a verdict for the defendants.

The Court of Queen's Bench refused the rule, but this decision was reversed by the Court of Appeal. This appeal was brought to the House of Lords.

Mr. O. Russell and Mr. Shield (Mr. Herschell with them), for the appellants. —The questions in this case are, first, whether or not, upon the construction of section 74 of the Harbours, Docks and Piers Act, 1847 (1), when the injury done

(1) 10 Vict. c. 27. s. 74—"The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damages done by the same; provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

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by a ship to a pier is attributable to the act of God, the owner of the ship is liable to pay damages for such injury? and secondly, whether or not the circumstances of this case amounted to a loss of the ship by the act of God? Section 74 casts all liability on the shipowner whatever may be the cause of the injury. The object of the statute is to protect the undertakers of piers without any restriction. Nothing is said as to limiting the liability of the owner to cases where the float of timber or ship causing the injury is under the control of himself or his servants. Even in the cases of timber stolen from its rightful owner, or of a ship abandoned without sufficient cause by its master, the owner might have a remedy over, but would be liable to the undertakers for the injury to their pier. In the cases of *The Merle* (2), *Dennis v. Tovell* (3), *Eglinton v. Norman* (4), the owners of the ships were held liable. No such general proposition has ever been laid down as that statutes imposing liability for injury must be read as excepting the "act of God." The maxim, "*Actus Dei nemini facit injuriam*" only applies to cases of contract or common law liability, as is shewn by the authorities collected under that heading in *Broom's Legal Maxims*, 3rd ed. p. 211. It was clearly the intention of the Legislature to extend the common law liability. The provision specially exempting the owner where the ship is compulsorily in charge of a pilot indicates that the liability was intended to attach to the owner in all other cases. In the case of *The Queen v. Leigh* (5) a landowner was held liable by prescription to make good damage caused to a sea-wall by an extraordinary tempest amounting to "act of God." The liability must *a fortiori* attach when imposed by statute distinctly and without exception.

Secondly, the injury in this case was not caused by the "act of God." It was directly attributable to the master and crew having brought near to the

pier a ship which, if not kept under control, would probably cause mischief; as they did not keep it under control the owner is liable, and it makes no difference whether or not there was negligence—*Rylands v. Fletcher* (6). It cannot be meant that the fact that no one was on board at the time of the collision can have been intended by the Legislature to exempt the owner from liability; if so, the statute would encourage precipitate abandonment of ships in distress.

The Attorney-General and Mr. Greenhow, for the respondents.—The object of the statute was by stringent obligations to make shipowners and their masters careful, and thus to protect piers from injury. But how can a statute protect from the "act of God," or, in other words, from inevitable accident? In *Nichols v. Marsland* (7) the principle was laid down that damage by the act of God is to be excepted out of liabilities imposed by law. And statutes are to be read as if they excepted the act of God, unless they expressly provide the contrary. There is no reason for holding that the rule of excepting the act of God should apply only to common law liability and not to liability imposed by statute. A statute can speak for itself, and if the Legislature had intended the ordinary common law rule of exception not to apply, such intention would have been expressed. It is more important that the exception should be held to apply to cases of statutory liability than to cases of contract, inasmuch as the former is universally applicable, whereas a contracting party can protect himself by the terms of his contract—*Paradine v. Jane* (8), *Brewster v. Kitchell* (9), *Bailey v. De Crespigny* (10). It cannot have been intended to make the shipowner responsible for the act of God, which he can do nothing to avert: *lex non cogit ad impossibilia*. If damage

(6) 37 Law J. Rep. Exch. 161; s. c. Law Rep. 3 E. & I. App. 338.

(7) 46 Law J. Rep. Exch. 174; s. c. Law Rep. 2 Exch. Div. 1.

(8) Aleyn 27.

(9) 1 Salk. 198.

(10) 38 Law J. Rep. Q.B. 98; s. c. Law Rep. 4 Q.B. 180.

(2) Marit. Cas. 402.

(3) 42 Law J. Rep. M.C. 33; s. c. Law Rep. 8 Q.B. 10.

(4) 46 Law J. Rep. Exch. 557.

(5) 10 Ad. & E. 398.

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caused by the act of God is not excepted, the owner of timber, or of a ship, driven against a pier, would in such a case have no remedy over, as he would in case of timber wrongfully taken, or of a ship coming into collision through the master's negligence. In no other case is there liability for loss at sea, unless negligence is proved, whether the action is brought at common law or in the Admiralty Court.

Mr. Shield replied.

Cur. adv. vult.

THEIR LORDSHIPS delivered judgment on the 17th of December, 1877, as follows:—

THE LORD CHANCELLOR.—The steamship *Natalian* was attempting, under stress of water, to enter the Sunderland Docks, belonging to the appellants. While she was still in the open sea, about forty or fifty yards from the pier, she struck the ground, canted with her head to the south, and drifted bodily ashore. The crew were rescued from the ship by the rocket apparatus. The tide was low at the time, and as the tide rose the flood and the storm drifted the ship against the pier, and caused damage to the amount of 2,825*l.* 13*s.* The respondents are the owners of the ship, and the question is whether they are liable to pay this damage to the appellants. The Court of Queen's Bench have held that the owners are liable. The Court of Appeal have been unanimously of opinion that they are not.

The question depends upon the true meaning of the Harbours, Docks and Piers Clauses Act, which enacts that the owner of every vessel or float of timber shall be answerable to the undertakers (that is in this case to the appellants) for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, with certain further provisions which I need not at present mention. The Court of Appeal have been of opinion, and I think rightly, that the injury was not in this case occasioned by the voluntary act or the negligence of the respondents, or indeed of any person

on board of or connected with the ship; that it could not have been prevented by any human instrumentality; but that it was occasioned by a *vis major*—namely, by the act of God in the violence of the tempest. Founding himself on this, the Master of the Rolls states that it is a familiar maxim of law that, where there is a duty imposed or liability incurred, as a general rule there is no such duty required to be performed, and no such liability required to be made good, where the event happens through the act of God or the Queen's enemies, and that the Court may well come to the conclusion that the act of God and the Queen's enemies were not meant to be comprised within the first words of the section. The Lord Chief Baron states that no man can be answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God. Lord Justice Mellish states that the act of God does not impose any liability on anybody. Mr. Justice Denman states that in every Act of Parliament words are not to be construed to impose a liability for an act done if the act is substantially caused by a superior power, such as the law calls the act of God.

In my opinion these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is the duty of a carrier to deliver safely the goods entrusted to his care; but, if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God.

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There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do — namely, to be liable for the damages. If, therefore, by the section to which I have referred it is meant that the owner of every vessel shall, irrespective of whether anything has happened which would at common law give a right of action against anyone, pay to the undertakers the damage done by a ship to the pier, I should be unable to see any reason why the payment should not be made in the manner required by the statute. I cannot, however, look upon this section of the statute as intended to create a right to recover damages in cases where before the Act there was not a right to recover damages from some one. The section and those which follow it are in an Act which collects together the common and ordinary clauses which it was the habit of Parliament to insert in private bills authorising the construction of piers and docks. There was no special legislation intended on this head for any particular place or any particular state of circumstances; and it would be difficult to suppose that, by means of ordinary and routine clauses inserted in private or local Acts, the Legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, could intend to create new rights and liabilities to damages unknown to the common law. By the common law, if a pier were injured by a ship sailing against it, the owner might be liable if he was on board and directing the navigation of the ship, or if the ship was navigated by persons for whose negligence he was liable. But the owner would not be liable merely because he was the owner, or without shewing that those navigating the vessel were his servants.

In my opinion it was to meet this state of the law that this section was introduced. It proceeds, as it seems to me, on the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person — that is to say, damage

occasioned by negligence or wilful misconduct, and not by the act of God. The section relieves the undertakers from the investigation, always a difficult one for them to pursue, whether the fault has been the fault of the owner, or of the charterer, or of the persons in charge. It takes the owner as the person who is always discoverable by means of the register, and it declares that he shall be the person answerable—that is to say, the person who is to answer, or is to be sued, for the damage done. It does not absolve the master or crew if there has been wilful fault or negligence on their part. They in that case may be sued as well as the owner; but if the owner is thus in the first instance made to pay the damage, where there has been wilful or negligent conduct on the part of the master or crew, the owner may recover over against the master or crew; and if the damage has occurred by reason of the act or omission of any other person—if, for example, some one who had hired the ship sent her to sea insufficiently manned, and the accident occurred in consequence, the owner might apparently recover from the hirer by reason of this act or omission. The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before. This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but everything is left as it would be at common law. If a pilot was in charge of a ship, and the owner was at the same time the master navigating the ship, and did an act which caused damage, he would be liable at common law, and the Act leaves him so; but in the same case if, while the pilot was in charge and the owner navigating the ship, the ship became unmanageable by tempest, the owner would not be liable. I therefore think, although I do not concur in the reasoning of the learned Judges of the

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Court of Appeal, that their conclusion was right, and that the appeal ought to be dismissed with costs.

LORD HATHERLEY.—I must candidly say that this case has given me much anxiety, and I have felt very great doubt and difficulty as to the proper interpretation to be given to this clause, which is, as it appears to me, somewhat inartistically framed. I cannot concur in the views expressed in the Court below by some of the learned Judges, on the one hand, that the damage which was done in this case having been caused by what is commonly said to be an accident, but is called in the language technically used in the Law Courts “the act of God”—namely, a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however construed, from the consequences of that mischief. Neither can I think, on the other hand, that, as has been held by others of the learned Judges in the Court below, the clause in question refers only to cases where a vessel is in charge of somebody. I do not think, in the first place, that the grammatical construction of the clause will admit of that solution of our difficulties.

When we look at the whole construction of the clause, it appears to me that it speaks, in the first place, of damage done by a vessel, without regard to anyone being on board or not; then it speaks, in the second place, of damage done by any person employed about the vessel; and then it says that the master or person in charge of a vessel is to be liable if damage is done through his wilful act or negligence. And then the excepted case occurs of the pilot, because he had been compulsorily and against any power of resistance of the owner placed on board and in charge.

Now we have to see whether or not damage arising from the “act of God”—that is to say, in this particular case, a tempest—should be held to be excepted. There might be other cases which would be similar to this of a tempest; the vessel might have been driven on the pier in some other way, or have been injured and become unmanageable by lightning, or

the like. However it occurred, if the pier was damaged by the vessel in the way which was called by the learned Judges in the Court below “the act of God,” is there anything in the Act of Parliament to say that the owner of the vessel shall not be responsible for the damage, but that there shall be an exception in respect of damage so caused? One can easily conceive that the Legislature might think it desirable that those who provide this great accommodation for the navigation of the country—those who provide harbours of refuge and the like, which are greatly wanted in many parts of the coasts of the United Kingdom, should be indemnified against the possible damage which may accrue to their docks or other works, which they construct in discharge of the duties in question, and in the exercise of those powers which they have for making docks and other works. Those promoters might say—“We offer protection to the public at all times, only protect us from having our works damaged, in consideration of the benevolent hospitality which we so afford.”

There is nothing, as it appears to me, utterly unreasonable in such a proposition carried out. It is quite true, that many cases put by the learned Judges in the Court below are cases in which it would seem to be a very rigid enactment indeed, that damage to a very large and extensive amount, exceeding the value of the vessel itself, should be compensated by the persons whose vessel has done this damage being made answerable to make it good to the full amount of the damage done, which might even go to the destruction of the principal works, and might therefore result in the ruin of those persons whose vessel had been so forced against them. But, on the other hand, if there was any intention at all of giving a relief of this kind, which must be sought, of course, in the words of the Act, then, I apprehend, that the exception of a storm or tempest would be a very singular one, because it is a probable case to happen. There are, no doubt, many other ways in which damage might be done; but it is amongst the very probable causes that a storm or tempest should be the thing which would occasion the damage through the medium

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of the ship, which directly produced that damage. I do not think, therefore, that I can say, at all satisfactorily to my own mind, that, provided that the Act is clear and specific in its clauses, the party who caused the damage could be exempted, because the damage was the result of a tempest, and not of what is ordinarily called his fault. Neither, as I have already said, by the grammatical construction of the clause, do I think that the clause is only to be applied in cases where some master or other person is in charge of the vessel.

Possibly the expression of Mellish, L.J., may come nearer to the mind of the Legislature. His notion of the general intent of the clause is this—that it points to something in which man is concerned. I think that is his expression. That is to say, in which human agency intervenes; and it was on that ground that he coincided with the views taken by the other learned Judges. His idea of the whole intent and purpose of the clause was, not that the “act of God” was wholly to excuse the person liable under the enactment, if that liability once existed; but that the clause pointed to some act of man which was to take place, and not to a mere casualty occasioned by the tossing and driving about of the vessel from the effect of a storm upon the sea.

Finding that I cannot concur in the reasons given in the Court below, of course one has to consider the construction of the clause. I think that, taking the view which was taken by the appellants in this case, the clause has been framed with probably extraordinary pressure and severity against the persons by whose vessels this damage would be created. No one can possibly deny that; and that severity seems to have induced some of the Judges before whom the case has come, to think that it is impossible to attribute such an intention to the Legislature. Now I am afraid that it does sometimes occur, that an act of the Legislature cannot be carried out without very great inconvenience and hardship; but that is not because the Legislature intended it, but because the possibility of its occurrence had been forgotten. I think that such a circumstance may have

occurred here, and produced the enactment that we have before us.

However, it is the opinion, I believe, of the majority of your Lordships, that, on the whole case being considered, this is not a case that we can regard as struck at by this clause. Whether the ground to be assigned for that is the view which has been expressed by the Lord Chancellor, or whether any view may be adopted by any of your Lordships, similar to that taken in the Court below, leading to the conclusion that the damage which here occurred is not brought within the meaning or purview of this Act, I shall not pause to enquire. There being this difference of opinion, I shall not do what I might probably under other circumstances have thought it my duty to do in this case. I am unwilling to do anything further than say that I cannot concur in the opinion expressed by my noble and learned friend on the woolsack, otherwise than with extreme doubt and hesitation.

LORD O'HAGAN.—I need scarcely say that this is a difficult and embarrassing case. The various views which have been adopted by able Judges make this very plain, and I do not think that any conclusion at which we can arrive will be completely satisfactory.

The difficulty arises from the form of the short clause we are required to interpret. Your Lordships, exercising your appellate jurisdiction, act as a Court of construction. You do not legislate, but you ascertain the purpose of the Legislature; and if you can discover what that purpose was, you are bound to enforce it, although you may not approve the motives from which it springs, or the object which it aims to accomplish. Our daily experience demonstrates that the task of construction so understood, is not an easy one. It sometimes involves the necessity of harmonising apparently inconsistent clauses, and making homogeneous provisions cast together haphazard by various minds, differently constituted, and looking to different and special objects, without regard to the harmony of the whole. Undoubtedly, if the first division of the 74th section of the Harbours, Docks and Piers Clauses Act, 1847, stood alone, it would seem to cast

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upon the owner under all possible circumstances liability to the undertakers for any damage done by his vessel. That was the view reluctantly adopted by the Court of Queen's Bench, which we are asked to affirm in opposition to the judgment of the Court of Appeal; and if your Lordships, on a full consideration of the whole clause, are satisfied that that was the view intended to be carried out, you have no alternative but to act upon it. No speculation as to the inconvenience or even the injustice which it may accomplish, no consideration of the admitted innocence of the owner of the vessel, or of the inevitable nature of the accident which wrought the injury, would justify a refusal to interpret the statute according to the design of the makers of it; and if you clearly see that they meant the liability to be unqualified and universal, you are not at liberty, on such grounds, to defeat that design and say that the appellants shall not have the benefit of it. If the law as it stands is oppressive or inequitable, the Legislature which devised it can alone reform it; and certainly, in my judgment, should your Lordships feel yourselves obliged to reverse the ruling of the Court of Appeal, such a reform will be needful, and should be promptly made, for the results of such a reversal seem very serious. It would involve the obligation of the owner to make good damage done by his ship, although, as in this case, he be free from blame, for any imaginable injury by himself, or his servants, or in any other way. If necessarily abandoned on the high seas a thousand miles away, she drifts ashore, after long wandering, and does an injury; or, if taken out of his hands absolutely by a pirate or an enemy, she is brought in his absence, and against his will, to attack the coast of England; or if, as was put by the Judges of the Appeal Court, the undertakers themselves shall have got hold of the vessel, and employed it so as to injure their own pier; in all these cases, and in others easily to be conceived, he would be responsible for results to which he had not contributed.

Now, no doubt, it is possible that the Legislature may have contemplated for the protection of harbours, docks and piers, an enactment fraught with conse-

quences of this description; but before we attribute to it so strange a purpose, we are bound, I think, to see whether the phraseology it has used, taken together, does not enable us to reconcile its action with common sense and common justice; and to say that although it has spoken obscurely, it has not made unavoidable such a very startling construction of its words. The case before us is not perhaps quite so shocking as those which have been supposed to test the effects of this piece of legislation. But certainly it does seem hard that the respondents, having had their ship so injured by the winds and waves on the high seas that the crew abandoned her to save their lives, and she was derelict, and was forced by the storm against the pier, should not only have lost her value (10,000*l.*) save in so far as she was insured, but, in addition, nearly 3,000*l.* for mischief done—admittedly without fault of theirs, and by the “act of God.” We must take care that a hard case shall not make bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant without coercive necessity.

Now, I have come to the conclusion, though not without serious hesitation and misgiving, that there is no such necessity, and that the statute, well considered, is not applicable in the peculiar circumstances before us. I do not propose that your Lordships should act on any very large application of the old maxim, “*Qui hæret in literâ hæret in cortice*,” or refuse, from any assumption of error in policy on the part of the Legislature, to give effect to the literal meaning of the Act. But when we pass from the first clause of the section, and find it dealing with “the master or person having the charge of a vessel,” I think it is indicated that “such vessel” may be taken to limit the description of “every vessel” in the preceding phrase, and to confine the liability of the owner to vessels “in charge” of a master or somebody else. I do not see how we are to give effect to the word “such” otherwise than by qualifying the generality of the preceding language, and holding with Mellish, L.J., that the section points to something done by the act

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of man, or to the act of the person in charge.

The terms of the statute appear to me fairly to bear this interpretation, and if they do it is manifestly more in accordance with reason and probability than that which is opposed to it. In any view the provision is hard upon the owner, and puts him in a worse position than he would have held at common law. But there is something comparatively tolerable in the notion that he shall be responsible if an accident occurs when his captain or some one else employed by him, acting for him and under his control, has at least the chance of avoiding it. When this chance is gone, because the *employés* cease to be in charge, and his ship becomes an ungoverned log, irresistibly borne against a pier without the possibility of check or guidance, the hard measure of liability for an act which is not his nor his agents, should not be imputed to him if there is fair ground for thinking that the section did not contemplate such a state of circumstances. In the one case it may be just that the owner should answer, if the injury arises from the actual or presumed default of his servants, and it may be politic to make him careful in the selection of them from an apprehension of the consequences of such an actual or presumed default. In the other, his utter and necessary powerlessness to avert the mischief should make us slow to say that he was meant to answer for it.

Then as to the proviso, it appears to be reasonably applicable on the one construction and not on the other. If it was meant that the owner should be universally liable whether or no any control remained with him or with his crew, how can we account for the exception as to the presence of the pilot? The injury is the same, the instrument of the injury is the same, and why, if the liability is to arise without any regard to circumstances in all other cases, although every possibility of control or default is absent, why should the pilot's compulsory employment exonerate the owner? On the other hand, if the true construction makes him only liable when a master or some other person freely chosen by him-

self, and on his own responsibility, is in charge, we can see good reason for the exoneration as soon as the pilot, whose retainer is not optional, as in the case of his own people, assumes the care of a ship, and so disables him from meddling with her directly or indirectly. In the one case there is some control remaining with him; in the other there is none. The law displaces the person he had chosen to guide his vessel, and he is made irresponsible. Why should he not be so when the stress of the storm has the same effect, and forces his captain and his crew to abandon the trust he had committed to them? The proviso appears to me persuasively to sustain the argument of the respondents.

It has been said that unless the appellants prevail the statute must have failed of its object, which was manifestly the greater protection of the pier owners, because it gives them nothing which they had not at common law. I think that this is a great fallacy. At common law there were serious questions continually arising, which, on either construction of the statute, can arise no more. Often it was doubtful on whom liabilities were charged, or by what evidence the charge of it could be made successfully. We can well conceive that the undertakers might have found difficulty in properly selecting a defendant amid the varying circumstances which affect the direction and management of merchant vessels, and the proof establishing a responsibility must often have been hard to find and inadequate to satisfy a jury. I do not know the exact history of the legislation, but in this state of things the undertakers may perhaps have reasonably complained, that having performed great public service in forming a harbour, a dock or a pier, they found themselves unable to recover for injuries confessedly done to works accomplished with much expense and labour, and of the utmost importance to the commerce of the country. And the Legislature may have fairly said that greater protection was due to them than they derived from the law, which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore

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uncalled for and unknown. Accordingly they made the owner a person easily and always to be found, "answerable" as owner, and they dispensed with the proof of negligence or any other proof, save of the injury by the vessel, in all cases contemplated by the Act. This was a great change, and a great addition to any security which the undertakers enjoyed at common law, and it was so whether we give the clauses the universal force for which the appellants contend, or the more restricted application which, with the Court of Appeal, I think your Lordships should attribute to them. And in addition, a further material advantage, unknown to the antecedent law, is afforded to the undertakers, who are empowered to detain the vessel or float of timber until sufficient security has been given for the amount of damage done by the same. These most important provisions supply the *raison d'être* for the legislation, whatever be the issue of the controversy as to the extent of its action, and I think it is vain to allege that we cannot suggest for it a sufficient motive without straining its effect to work confessed injustice.

I do not stay to consider the argument that this construction, approved by the Court of Appeal, should be rejected because a float of timber is not usually "in charge" of anyone as a vessel is, and that Parliament cannot therefore be supposed to have restricted its view to cases in which the instrument of injury is derelict. The first answer is that floats may be, and are often, "in charge," not perhaps of such a "master" as governs a vessel, but of other persons such as the statute takes care to mention. And next, the statute deals with the vessel and the float of timber, *quoad* the "charge" of them, precisely in the same way, and the observations I have made as to the first will, if they have force, be equally applicable to the second.

My reasoning has not been precisely that of the Court of Appeal, and I have not based it altogether upon the legal doctrine as to the "act of God." That doctrine is founded on the view, which commends itself alike to equity and rea-

son, that liability should not be imposed, unless in special circumstances, or where public interests imperatively require it, for consequences which are not wrought by human will or act, and for which no human being is morally responsible. There are exceptions to its application, as when a man voluntarily contracts, with full opportunity of anticipating possible results, to do that from doing which he is disabled by inevitable accident; or when, as is said, the repairing of sea-walls is imperative by prescription, and is made impossible by such accident; and in various other cases. And I am not at all prepared to say that the Legislature has not full power, if it be so minded, to declare that a proceeding it forbids, or a proceeding it commands, shall not be justified, in the commission of the one, or the omission of the other, because the result was caused by the "act of God." A law so providing we should be bound to enforce, and if in the case before us the statute was universally applicable, as the appellants contend, the unhappy shipowner must have submitted to its hard infliction. As I have said, I think that it is not so applicable, and that in these circumstances it does not apply, and it seems proper to suggest that we should not, upon any phraseology of a doubtful character, or without the clearest and most unequivocal expression of legislative intention, or if we may anywise reasonably interpret that intention in another sense, assume that a maxim so ancient, so well established and so accordant with the common sense of mankind, has been set at nought by the statute before us.

In the view I have presented to your Lordships the only case cited as touching the present has no application to it. There the vessel was not derelict, and the owner may properly have been held liable. Here, on the other hand, in the words of Pollock, B., "out on the high seas she met with certain risks and injuries which compelled the crew to leave her, and she became derelict." And in my judgment she should be dealt with as if she had been abandoned at the Antipodes and had been ploughing the ocean

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without a crew for years before she was driven against the pier at Sunderland.

On the whole, I think that the judgment of the Court of Appeal should be affirmed, and this appeal dismissed.

LORD BLACKBURN.—I have had very great doubt and hesitation in this case, and have, while considering it, changed the opinion I at first held.

The question raised depends upon the true construction of three sections of the Harbours, Docks and Piers Clauses Act, 1847, 10 Vict. c. 27, namely the 74th, 75th, and 76th sections. These are part of a set of clauses gathered together under one head, namely, "Protection of the Harbour, Dock and Pier, and the vessels lying therein, from fire or other injury." I do not think any other clause in the Act throws light on the construction of those sections, nor do I think that the construction put upon those sections will have any legitimate bearing on the construction of sections in other parts of the Act, though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment. It is of great importance that those principles should be ascertained, and I shall therefore state as precisely as I can what I understand from the decided cases to be the principles on which the Courts of law act in construing instruments in writing, and a statute is an instrument in writing.

In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used. I do not know that I can make my meaning plainer than by referring to the old rules of pleading as to innuendoes in cases of defamation. Those rules, though

highly technical, were very logical. No innuendo could enlarge the sense of the words beyond that which they *prima facie* bore unless it was supported by an inducement or preliminary averment of facts, and an averment that the libel was published or the words spoken of and concerning those facts, and of and concerning the plaintiff as connected with the facts. If these preliminary averments were proved, words which *prima facie* bore a very innocent meaning might convey a very injurious one, and it was for the Court to say whether, when used of and concerning the inducement, they bore the meaning imputed by the innuendo. See the notes to *Craft v. Boite* (11). The Legislature has rendered it no longer necessary to set out in the record the facts and the *colloquium* necessary to support an innuendo; they are now only matter of proof at the trial, but the principle remains.

In construing written instruments I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs, and, therefore, evidence is admissible to shew all that he knew, and the Court has to say what is the intention indicated by the words when used with reference to those extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of another testator's affairs and family.

In the case of a contract the two parties are speaking of certain things only, and, therefore, the admissible evidence is limited to those circumstances of and concerning which they use those words.—See *Graves v. Legg* (12). In neither case does the Court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention indicated by the words used under such circumstances really is.

And this, as applied to the construc-

(11) 1 Wms. Saund. 246.

(12) 23 Law J. Rep. Exch. 228; *n. c.* 9 Exch. Rep. 642.

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tion of statutes, is no new doctrine. As long ago as *Heydon's Case* (13) Lord Coke says that it was resolved, "That for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered—First, what was the common law before the Act? Secondly, what was the mischief and defect for which the common law did not provide? Thirdly, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And fourthly, the true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy." But it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court to be injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call "the golden rule" is right—namely, that we are to take the whole statute together and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification and to justify the Court in putting on them some other signification which, though less proper, is one which the Court thinks the words will bear. In *Allgood v. Blake* (14), in the judgment of the Exchequer Chamber, which I had the honour to deliver, as to the construction of a will it is said:—"The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces so absurd a result or inconvenience so great, as to justify the Court in putting on them

another signification which to that mind seems a not improper signification of the words, whilst to another mind the effect produced may appear not so inconsistent, absurd or inconvenient as to justify putting any other signification on the words than their proper one; and the proposed signification may appear a violent construction. We apprehend that no precise line can be drawn, but that the Court must in each case apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will." *Mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills; and I think it is correct.

In local and personal Acts there was found to be great inconvenience from the clauses being framed according to the views of the promoter's counsel, and, consequently, being very differently worded; and to remedy this a practice arose of obliging the promoters to submit their bills to the revision of the Chairman of Committees, who required them to make their clauses in the form he had approved of, unless some good reason was shewn for deviating from it. These forms of clauses were well known, and the research which my noble and learned friend opposite (Lord Gordon) has made shews that in the Harbour Acts, passed in 1846, the common form of the clause used was in the words of what is now section 74 of the Harbours, Docks and Piers Clauses Act, 1847, but, except in one instance, without a proviso similar to that at the end of it. That shews, what the frame of the section would have led one to guess, that the proviso was an after-thought, added to the enactment after it had been adopted. The preamble of the Harbours, Docks and Piers Clauses Act declares that it is passed for the purpose of comprising in one Act the clauses usually contained in Harbour and Pier Acts for the purpose of avoiding prolixity and producing uniformity; and the clause in question is one of a series for the "protection of the

(13) 3 Rep. 7.

(14) 42 Law J. Rep. Exch. 101; s. c. Law Rep. 8 Exch. 160.

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harbour, docks and pier and the vessels lying therein from fire or other injury."

The first inquiry for your Lordships is, are we justified in putting a different construction on the words of an Act passed at the instance of particular promoters from that which would be put on similar words in a general Act? To some extent I think we are. If in a local and personal Act we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters, and which the Committee would not, if they did their duty, have allowed to be introduced into such an Act, I think the Judges would be justified in putting almost any construction on the words that would prevent them from having that effect. But I do not think it impossible that the Legislature can have intended in such an Act to create a new liability to damages unknown at common law. The creation of such a liability would be in direct furtherance of the declared object of the enactment—the protection of the piers from injury. And in every construction of the enactment in question which I have heard suggested the Legislature does impose on the owners a liability for damages occasioned by persons for whom they would not be liable at common law. At present I cannot see my way to limiting the words of this Act more than in a general Act, but I think that neither in a general Act nor in a special Act could the Legislature have meant to shift the burden of a misfortune befalling the owner of a pier from the owner of a pier, who at common law would bear it, to the owner of a ship wholly free from blame, and involved without fault of his in a common misfortune. It may have been said, but it can hardly have been intended to be said.

The common law is, I think, as follows:—Property adjoining a spot in which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour, or a navigable river, or the sea, which is liable to be injured by

a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some person is liable to make it good; and he does not establish this against a person merely by shewing that he is owner of the carriage or ship which did the mischief, for that owner incurs no liability merely as owner, but he does establish such a liability against any person who either wilfully did the damage or neglected that duty which the law casts upon those in charge of a carriage on land and a ship or a float of timber on water to take reasonable care and use reasonable skill to prevent it from doing injury; and that this neglect caused the damage; and if he can prove that the person who has been guilty of this negligence stood in the relation of servant to another, and that the negligence was in the course of his employment, he establishes a liability against the master also. In the great majority of cases the servant actually guilty of the negligence is poor and unable to make good the damage if it is considerable, and the master is at least comparatively rich, and consequently it is generally better to fix the master with liability; but there is also concurrent liability in the servant, who is not discharged from liability because his master also is liable. And in a very large number of cases the owner of the carriage, or ship or float of timber is, or at least is supposed to be, the master of those who were negligent, and consequently the action is most frequently brought against the owner, and is very often successful. But the plaintiff succeeds not because the defendant is owner of the carriage, or ship or float of timber, but because those who were guilty of the negligence were his servants.

I have stated the law with particularity, because I think it important to have it clearly before us. What I have said is really a statement of the law as laid down by Parke, B., in delivering the judgment of the Exchequer in *Quarman v. Burnett* (15), where the plaintiff was nonsuited because the defendants, though

(15) 6 Mees. & W. 499; s. c. 9 Law J. Rep. Exch. 308.

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owners of the carriage and actually seated in it at the time of the accident were not the mistresses of the coachman whose negligence caused the accident. I have already said that in the ordinary course of things those employed about a ship are the servants of the owners, and in *Hibbs v. Ross* (16) the majority of the Court of Queen's Bench thought this was so much the case that proof of ownership in the defendant was *prima facie* that they were his servants, calling on him to prove an exceptional state of things in which they were not his servants. A case very likely to occur in a harbour in which this would be disproved would be where the ship was put in the hands of a shipwright to be repaired, and the shipwright's servants, in moving her into a graving dock, negligently did mischief. The owner would not there be liable at common law. Where the owner of a ship is compelled to take a pilot on board, that pilot is not the servant of the owner, and he is not liable for the negligence of that pilot; but the captain and crew remain his servants, and he is liable for their negligence though a pilot is on board. Where no one is to blame—as where the damage is occasioned by inevitable accident—the loss, at common law, was borne by the owner of the property injured. And lastly, the person injured has at common law no lien on the ship, but only a right of action against the person to blame, and also, if he was a servant, against his employer.

Reading the words of the enactment and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks and piers more protection than they had. It seems to have occurred to those who framed the statute that in most cases where an accident occurs it is from the fault of those who were managing the ship, and in most cases those are the servants of the owners, but that these were matters which in every case must be proved, and that consequently there was a great

deal of litigation incurred before the owner, though he really was liable, could be fixed; and with a view to meet this the remedy proposed was that the owner, who was generally really liable—though it was difficult and expensive to prove it—should be liable, without proof, either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened; and this is expressed by saying that the owner "shall be answerable for any damage done by the vessel or by any person employed about the same" to the harbour. It seems to have been suggested that where a compulsory pilot was on board the mischief might very well be by his fault, and the presumption on which they acted—that mischief was generally due to the fault of the owner's servants—did not arise. This case, therefore, was by the proviso taken out of the enactment of the common law. As to the possible case of the mischief being occasioned by the servants of a shipwright or some other substantial person, it seems to have been thought enough to give the owner the remedy over provided by section 76. As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier without fault of either seems not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words.

On reading the words of the enactment I am brought to the conclusion that such was the scheme of legislation adopted by Parliament—the mischief being the expense of litigation, the remedy that the owners should be liable without proof of how the accident occurred. And if it had been confined to cases in which the damages were under

(16) 36 Law J. Rep. Q.B. 193; s.c. Law Rep. 1 Q.B. 534.

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50*l.* and might be recovered before two justices under section 75, I think it would be a scheme of legislation against which no very serious objection could be raised. *Dennis v. Tovell* (3) was a case under 50*l.* raised in the County Court, and brought by appeal before the Court of Queen's Bench. Without bestowing so much consideration on the case as I have now done, I joined in the judgment of the Court, which I have for a long time thought right, and now dissent from with great trouble and hesitation. It is impossible, however, to put any limit on the amount. The shipowner, if liable at all under this statute, is personally liable to his last farthing for the whole damage, however great and however small may be the value of the ship. In the present case the amount is 2,825*l.*, and if the statute transfers the liability for so large a sum from the plaintiffs to the defendants, who have done nothing wrong, there is no doubt it is a hard case on the defendants. There is a legal proverb that hard cases make bad law, but I think there is truth in the retort that it is a bad law which makes hard cases. And I think that before deciding that the construction of the statute is such as to make this hardship we ought to be sure that such is the construction, more especially when the hardship affects not only one individual, but a whole class.

I have therefore examined the reasons given by the various Judges in the Court of Appeal, with a wish to find that some of them would in my mind justify the conclusion to which they have come in favour of the defendants. And I have tried to find some ground which had escaped their notice in which I could advise your Lordships to uphold that decision, but for a long time without success. It is quite true that where a duty is imposed by law, if the performance of the duty is rendered impossible by the "act of God or the King's enemies," the non-performance of the duty is excused. *Paradine v. Jane* (8), which is the case generally cited for that position, is one in which the point did not arise. That case was one in which it was attempted to argue that the duty imposed by the contract to pay rent was subject to a condition

that the tenant was not evicted by the "act of God," or other *vis major*, and the really important part of the decision is, that where a contract is made which does not either expressly or implicitly except the "act of God," the Courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that in construing a statute where the Legislature might have expressed, but did not express, such an exception, the Court should introduce it. And there is no case cited, and, as far as I can find, no case exists in which such a doctrine is laid down. In *Latless v. Holmes* (17), where an Act, which received the Royal assent in May, by fiction of law related back to the first day of the session in October, it was held to apply to a transaction occurring between October and May. This was contrary to two legal maxims—that a fiction of law should never be used to work injustice, and that the law compels no one to do an impossibility; but the words of the enactment were too plain, and the Court was obliged not only to work great hardship, but, in the particular case, great injustice. And in the present case, if the object of the statute be, as Pollock, B., says, and as I think it is, with a view to avoid expense and delay, that the owners of the docks are not to be put to the proof of negligence, or to the proof of how the injury was occasioned; that object would be to some extent less effectually carried out by importing such an exception, which is certainly not expressed in terms.

Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the Court in putting any meaning on the words, which they will bear in order to avoid it. Both Mellish, L.J., and, as I understand him, the Lord Chancellor, have thought that the words may be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man, damages for which some one is answerable at common law. I have already said that the question whether words can bear a secondary sense different from the usual one, is one

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on which different minds differ. In the present case I feel no doubt, that the hardship is great enough to justify putting a considerable strain on the words to avoid it; for I feel certain that if the enactment has the effect of shifting the burthen of a misfortune to the piers from the owners of the property, who at common law would have borne it, to the owners of the ship, who are free from all blame, it is an unforeseen consequence of the words used, which words, if the consequence had been foreseen, would not have been used in the enactment.

I cannot see anything in the language of the Act to justify what was the opinion of some of the Judges of Appeal, and is, I think, adopted by Lord O'Hagan, that it is confined to cases in which some one is in charge of the ship, even if that exception could save the defendants, which I do not think it would. The defendants were by their servants in possession of the ship when it drove on the bank. It did not strike the pier till the rising tide floated it in, but it was all one transaction; and when it struck it was still a ship, and the defendants were still its owners. It is not necessary to enquire when and under what circumstances that which was once a ship becomes a mere congeries of planks, to which the statute would not apply, further than to say this ship cannot be treated as having become such, nor was it in my opinion in any sense a derelict.

After much hesitation and doubt, I am not prepared to say that this judgment should be reversed. I am not prepared to say that the words "damage done by the ship," as used in this enactment, necessarily include all expenses occasioned by misfortune in which the ship was involved in common with the piers. Mellish, L.J., seems to have thought that these words might bear the more restricted sense of *injuria cum damno*. The declared object of the enactment is the protection of the piers, &c., from "injury," which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from "loss." If they can bear that sense we ought so to construe them; and though I have had and have

great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and consequently I agree that the appeal should be dismissed with costs.

LORD GORDON.—The opinion which I have formed in this case differs from that at which the majority of your Lordships and the Lords Justices of Appeal have arrived. I incline to the opinion of the Court of Queen's Bench. Having regard to the great weight due to the opinions which have been expressed by your Lordships, and also to the great weight due to the opinions of the Lords Justices of Appeal, both in their collective and in their individual capacity, I feel great distrust in my own opinion. But I have considered the case with great anxiety, not only in consequence of the views entertained by your Lordships, but also in consequence of the case involving the construction to be put upon a section of an Act of Parliament—a matter which it is of importance should not be subject to conflicting views, founded upon supposed expediency; and I feel that it is my duty to explain more fully than I should otherwise do the grounds upon which I venture to dissent from the opinions which have been expressed by your Lordships, although I am aware that my doing so will have no practical effect upon the decision of this case.

The question relates to the application of the provisions of an Act passed for consolidating certain provisions usually contained in special Acts authorising the making and improving of harbours, docks and piers. It is a British statute, applicable to Scotland as well as England, and its provisions are of much importance. The question in this appeal arises out of the leading enactment of the 74th section, which [His Lordship then read the section and continued]. The enactment is general and express, that the owner of every vessel causing damage to harbours, &c., shall be answerable for such damage, except in the single case, where the vessel is in charge of a pilot; and the question which your Lordships have to consider is, whether the words of the section are to be read and applied

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in their ordinary common sense meaning, or whether there is to be imported into the statute another exception than the express exception it contains, relieving the owner of a ship which at the time the damage occurred was in charge of a duly licensed pilot, an exception, namely, from liability in cases where the damage was caused by the vessel through the "act of God," or, as it is sometimes expressed, *vis major*.

It may be mentioned that this section was the subject of consideration in the case of *Dennis v. Tovell* (3). That case, having involved a sum under 50*l.*, was decided in the County Court, but was taken on appeal before the Court of Queen's Bench, who dismissed the appeal. That previous decision of the Queen's Bench prevented that Court from reconsidering the section in the present case, and leave was granted by the Court to appeal to the Lords Justices, which led to their Lordships' judgment—the subject of the present appeal to your Lordships' House.

The exemption from liability on the part of the owner when his vessel is under the charge of a licensed pilot may, it appears to me, be regarded as strengthening the express words of the leading enactment of the 74th section, in accordance with the maxim, *exceptio probat regulam*. The first consideration to be attended to in reading the clause judicially is whether the words are express, intelligible, grammatical and unambiguous. I submit for your Lordships' judgment that they have all these characteristics. In my humble opinion the word "answerable" is merely an equivalent for "liable;" and I observe that their Lordships in the Court of Appeal deal with the expression as having that meaning, and no argument was addressed to your Lordships from the bar, on the part of the respondents, to shew that the word was capable of any other construction. I think the section in question itself shews that the words are synonymous. For while it enacts that the owner shall be "answerable," it likewise enacts that the owner or person in charge shall, "also in cases of negligence, be liable;" and then it provides

that "nothing herein contained shall extend to impose any liability for any such damage upon the owner" where the vessel shall be in charge of a pilot.

The next matter for consideration is, what are the duty and province of a Court of law, when ascertaining what effect is to be given to the section, which in my opinion is of the express and unambiguous character already stated; and in expressing an opinion upon this question, your Lordships are at present officiating, not in your legislative character, but as the Supreme Court of Appeal, in a judicial capacity. Blackstone, the highest constitutional and legal authority with reference to the law of England, when treating of statute law states (vol. i. p. 89):—"Where the common law and statute differ, the common law gives place to the statute;" and again (p. 91), "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control; and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable, the Judges are at liberty to reject it, for that were to set the judicial power above that of the Legislature, which would be subversive of all government."

In the case of *Birks v. Allison* (18) Byles, J., stated that the general rule for the construction of Acts of Parliament is, that the words are to be read in that popular, natural and ordinary sense giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such a large sense. Jervis, C.J., in the case of *Abley v. Dale* (19), stated:—"If the precise words used are plain and unambigu-

(18) 13 Com. B. Rep. N.S. 23; s. c. 32 Law J. Rep. C.P. 51.

(19) 11 Com. B. Rep. 391; s. c. 21 Law J. Rep. C.P. 104.

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ous, in our judgment we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the function of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." Cresswell, J., in the case of *Biffin v. York* (20), states:—"It is a good rule in the construction of Acts of Parliament that the Judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words." In a recent case before your Lordships' House, *Hutton v. Harper* (21), where the construction of a statute incidentally arose, Lord O'Hagan said, "The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates unmistakably the purpose of the Legislature. When the words are obscure, and the purpose therefore more or less doubtful, it may help to a right understanding of them."

The Lords Justices of Appeal, without stating that the leading enactment of section 74 is not express, or is even ambiguous, gave effect to the present respondent's contention, that the statute must be read as if it contained an express provision that the liability for damage should not attach to the owner where the damage had been caused by what is called the "act of God," which, in the present case, means stress of weather. Their Lordships proceeded upon the ground that such an exception applies to all cases where a duty is imposed, unless expressly included, and they held that the same rule was applicable to Acts of Parliament, and, further, that it could not have been the intention of the Legislature, with reference to the statute in question, to impose what their Lordships

regard as an unjust liability upon owners guilty of no fault or negligence. But no authority has been referred to, either by their Lordships or in argument from the bar, warranting the introduction of such a qualification; and, after a careful search, I have been unable to find any either in the law of England or of Scotland. It has been argued by the respondents that the introduction of such an extension of the owner's liability must be qualified by the implied condition freeing them from such liability where the damage was occasioned by the "act of God," in order to give what is called a "reasonable construction" to the statute itself. With regard to the supposed intention of the Legislature to express the terms of the Act, subject to the implied condition, I may observe that Mellish, L.J., said, "I think, taking the language of the section, it was clearly the intention of the Legislature to extend the liability of the owners of vessels in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law, because, if that is not the intention, it is not easy to see the object of the section at all." This is very high authority for presuming, in so far as it may be relevant or competent to do so, what was the intention of the Legislature in passing the Act, although I submit that, where the terms of an Act are clear and unambiguous in the language of the enacting clause, these terms cannot be controlled by any supposed intention which may be presumed to have influenced the Legislature, or by consideration of the injustice of the result of the express terms used in the enacting clause.

In the *Sussex Peerage Case* (22) the Committee for Privileges of this House desired the opinion of the Judges, which was given and was unanimous. The opinion was delivered by Tindal, C.J.; in the course of it he said, "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and

(20) 6 Sc. (N.S.) 235; s. c. 12 Law J. Rep. C.P. 162.

(21) Law Rep. 1 App. Cas. 464.
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(22) 11 Cl. & F. 143.

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unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver." The opinion delivered by the Lord Chief Justice was approved of by the Lord Chancellor (Lyndhurst), and by Lords Brougham, Cottenham, Denman and Campbell. And in the case of *Fordyce v. Bridges* (23), in this House, with reference to the construction of the Apportionment Act, the provisions of which it was argued were quite inapplicable to the law of Scotland, Lord Brougham stated: "We must construe this statute by what appears to have been the intention of the Legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute."

I think, in accordance with these authorities, that in such a case as the present, where the words are clear and distinct, we must judge of the intention of the Legislature from the words of the Act itself. But, if it were relevant or competent to speculate as to what truly may have been the intention of the Legislature in passing the 74th section, apart from the words of the statute, it appears to me, with great deference, that it may have been, amongst others, to give that amount of protection to the owners of piers, &c., which the words of the section clearly imply, and so relieve them from the often difficult questions of evidence as to whether the damage was caused by the fault or negligence of owners of vessels, or their servants, in which cases there would be no doubt of their liability apart from the words of the statute.

It seems to me to be not unimportant, in considering the intention, to consider the course of legislation with reference to the Acts for the construction of piers and harbours, prior to the passing of the Consolidating Act, with which your Lordships are now dealing. That Act was passed, as the preamble states, because it was expedient to comprise in one Act

sundry provisions usually contained in Acts of Parliament authorising the construction or improvement of harbours, docks and piers, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for insuring greater uniformity in the provisions themselves.

In accordance with a suggestion made in the course of the argument, I have looked into the private Acts which were passed for the construction of piers and harbours during the session immediately preceding that in which the consolidating Act was passed, and I find that there were twelve Acts passed in that session, each of which contained a clause, imposing liability for injury done to harbour works in the same general terms as those of section 74 of the consolidating Act; and I presume, from the apparently stereotyped form of the clauses in these Acts, that the Acts passed in previous sessions had contained clauses to the like effect. I observe that the Weir Commissioners obtained a special Act in that session, and it contains the clause to which I have referred, making an exception when a pilot is on board. The provision for imposing liability for damage to pier and harbour works, must, therefore, I think, have been familiar to the Legislature, and that appears to me to strengthen the presumption that the Legislature did intend by the clause your Lordships are considering to impose the liability in the general terms it has done. And as the Act affected so great interests as the piers and harbours of the United Kingdom, it is to be presumed that its terms would be thoroughly canvassed and carefully considered in its passage through Parliament, especially with the view of preventing any limitation in the case of future piers and harbours of rights which had been conferred on owners of piers by previous legislation.

The risk of causing damage to piers or harbours is, I apprehend, a risk which it would be competent to owners of vessels to insure against, although it might require an alteration of the existing form of policy, by an express provision against

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the risk of such damage. The supposed injustice of the section thus resolves itself into a question of payment of money to cover the premium to secure against the risk of such damage.

Applying the authorities to which I have referred to the present case, I am humbly of the opinion, which I entertain with very great hesitation after the opinions which have been expressed by your Lordships, that the statute ought not to be construed as if it contained an exemption from liability for damage where it occurs by the "act of God." The words appear to me to be express and unambiguous, and being so, I think they should be read according to their ordinary construction.

*Judgment appealed against affirmed;
and appeal dismissed with costs.*

Solicitors—J. W. Hickin, agent for Ralph Simey, Sunderland, for appellants; Johnson & Weatheralls, agents for E. H. Haswell, Sunderland, for respondents.

[IN THE COURT OF APPEAL.]

(*Appeals from the Common Pleas, Exchequer and Queen's Bench Divisions.*)

1877.	{	LONGMAN v. EAST.
Dec. 6, 12,		PONTIFEX AND ANOTHER v.
		SEVERN.
19, 20.		MELLIN v. MONICO AND ANOTHER.

Practice—Reference under the Judicature Acts—Official Referee—Reference for Trial—Reference for Report—General Report—Special Report—Entering Judgment—Form of Order of Reference—Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 57, 58—Rules of the Supreme Court—Order XXXVI. rules 2, 5, 30—Order XL. rules 2, 3, 5.

The Court or a Judge has no power under the Judicature Act, 1873, ss. 56 & 57, to refer the whole action for trial to an official or special referee. Under section 57 the Court may, by consent, refer any question or issue of fact in an action to an

official or special referee for trial, but their power of compulsory reference for trial under that section is confined to questions or issues in an action requiring prolonged examination of documents or local investigation, or questions of account, and any other matters so involved with such issues as to be incapable of being tried separately.

A referee under the Judicature Acts to whom the issues in an action are referred for trial has no power to order judgment to be entered. His findings should be separate on each of the issues submitted to him; but, semble, that he may by consent of the parties find generally for the plaintiff or for the defendant.

The old forms of orders of reference under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), are inapplicable to references under the Judicature Acts.

Where a reference had been ordered to an official referee, and the order of reference was drawn up in the form known as the "Long Order," under the Common Law Procedure Act, 1854, and the parties with knowledge of the terms of the order appeared before the referee, who gave his award,—Held, that the referee must be taken to have sat as arbitrator by consent, and that his award was binding on the parties, neither of whom could obtain a new trial.

The "Rules of the Supreme Court" have not enlarged, and, per BRAMWELL, L.J., could not enlarge, the powers of reference to official or special referees conferred by the statute.

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This was an action in the Common Pleas Division to recover damages for the destruction of a fishing weir on the river Test. The defence was substantially a denial of the plaintiff's right to the weir, and a counter-claim for its wrongful erection, whereby the defendant's fishery was injured.

The defendant took out a summons to refer the questions in the action to a referee, on the ground that there were involved in it matters requiring prolonged local investigation.

The application was opposed by the plaintiff, and Denman, J., made an order in the following terms:—"I do order

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that this action be referred to an official referee, pursuant to the Judicature Acts, 1873 and 1875 (1), unless the parties agree on a special referee within a fortnight."

Against this order the plaintiff appealed, on the ground that the Court or a Judge had no jurisdiction under the Judicature Acts to make the order.

The Common Pleas Division (consisting of Grove, J., Denman, J., and Lindley, J.), rescinded the order.

(1) By the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 56, "Subject to any rules of Court, and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice, or before the Court of Appeal, may be referred by the Court, or by any Divisional Court or Judge before whom such cause or matter may be pending for enquiry and report, to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may, if so adopted, be enforced as a judgment by the Court. The High Court, or the Court of Appeal, may also in any such cause or matter as aforesaid, in which it may think it expedient to do so, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such special referees or assessors shall be determined by the Court."

By s. 57, "In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested, who are under no disability, consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury or conducted by the Court through its other ordinary officers, the Court or a Judge may, at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising therein to be tried either before an official referee to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties, and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct."

The defendants appealed from this decision to the Court of Appeal, asking in the alternative that the order of reference should be amended.

Channell (on Dec. 6), for the defendants.—There are two kinds of reference contemplated by the Judicature Acts. Under section 56 a reference of questions for report; under section 57 a reference of issues for trial. Under the latter section, where questions of a certain class arise, there may be a compulsory reference for trial, not of "any such questions," but of "any question or issue of fact in the cause." If any question may be referred, it follows that all may be; and if all the questions in the action may be referred for trial, that is the same as a reference of the whole action for trial. The referee can try the action, and decide incidentally any matters of law arising in it. It is like a trial by Judge and jury, and the decision is subject to review in the same way. This is shewn by section 58, which gives the findings of the referee the same force as the verdict of a jury. The intention of the Act is shewn and carried out by the general rules. Order XXXVI. r. 2, provides for the trial of an action by a referee; and rule 3 enables the plaintiff to give notice of trial before a referee if he chooses, saving the defendant's right to have the action tried by a Judge and jury. Rule 5 also assumes that there may be notice of trial of an action by a referee under section 57. The referee has the same jurisdiction as a Court of assize before which a trial has been ordered under Order XXIX., or by the Chancery Division under Order XXIXA. Again rules 30, 32 and 34 of Order XXXVI. speak of a "trial" before a referee, and Order XL. rules 2, 3 and 5 shew that a referee has power to order judgment to be entered. The cases already decided contain nothing opposed to this view—*Cruikshank v. The Floating Swimming Baths Company* (2); *Lloyd v. Lewis* (3).

(2) 45 Law J. Rep. C.P. 684; s. c. Law Rep. 1 C.P. Div. 260.

(3) 46 Law J. Rep. Exch. 81; s. c. Law Rep. 2 Exch. Div. 7.

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If the order of reference is wrong, we ask for an amended order in such terms as the Court shall think fit.

H. T. Cole and Pitt Lewis, for the plaintiffs.—There is no power under the Judicature Acts to refer a cause compulsorily. If a cause can be tried by an official referee (which seems probable, as notice of such trial may be given under Order XXXVI. rule 3), it can only be by consent, and is subject to the right of the defendant to have the action tried before a Judge and jury. That right is absolute—*Sugg v. Silber* (4)—and we have that right in the present case.

[Brett, L.J., referred to the case of *Carlyle v. Bush*, reported in the *Solicitors' Journal*, vol. 21, p. 650.]

Channell in reply.—The case of *Carlyle v. Bush* was a trial with assessors, and is irrelevant. The only case in point is *Pontifex v. Severn*, now under appeal. The judgment of the Exchequer Division in that case is in my favour. It was decided against the plaintiffs on the technical point of entering judgment, but it was allowed that the referee could try and decide the cause.

(The Court reserved judgment till after the hearing of the appeals in *Pontifex v. Severn* and *Mellin v. Monico*.)

PONTIFEX AND ANOTHER v. SEVERN.

Statement of claim (in an action in the Exchequer Division), alleging that the plaintiffs made for the defendant a refrigerator in accordance with certain instructions, and claiming as a reasonable charge 125*l.*, less 15*l.* paid by way of deposit.

Statement of defence, that the refrigerator was badly made and worthless; and that the plaintiffs did not make or offer to deliver it within a reasonable time, and were never willing to deliver it except for an unreasonable price; and counterclaim, that the refrigerator which the plaintiffs undertook to make was a refrigerator of a new kind, for which the defendant had obtained letters patent, and was required for ex-

hibiting to brewers and others with a view to procuring purchasers, and that by the defaults of the plaintiffs the defendant had been prevented from so exhibiting it, and from procuring purchasers, by reason whereof the defendant claimed 200*l.* damages.

Reply joining issue upon the defence, and denying the allegations in the counterclaim; joinder of issue by the defendant upon this denial.

The action coming on for trial at the London sittings on June 22, 1877, before Pollock, B., and a jury, the learned Judge said that the action could not in his opinion be conveniently tried before a jury, and that he should send it before an official referee, unless the parties could agree to try before some other referee, and he thereupon adjourned the case. No agreement for referring the action was come to, and on June 27, to which day the case had been adjourned, Cleasby, B., at the London sittings, made, by way of carrying out the intention of Pollock, B., the following order:—

“At a sitting held at the Guildhall on June 27, 1877, before the Honourable Baron Cleasby, it is ordered that this action be referred to one of the official referees.”

The case came before Dowdeswell, O.R., as official referee in rotation. He made the following report:—

“I hereby beg to report to the Court that the plaintiffs are entitled to recover against the defendant the sum of 90*l.*, and that the defendant is not entitled to recover against the plaintiffs in respect of his counterclaim, and I direct judgment to be entered for the plaintiffs in the action for the said sum of 90*l.*, with costs.”

The plaintiffs signed judgment thereon.

A motion was made (on Nov. 21, 1877), on behalf of the defendant, to set aside the judgment and the report, on the several grounds that the official referee ought to have reported specifically upon the facts at issue under the pleadings; that he ought, upon the evidence, to have reported in favour of the defendant; that he had no power to order judgment

(4) 45 Law J. Rep. Q.B. 460; s. c. Law Rep. 1 Q.B. Div. 362.

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to be entered, and that judgment was improperly signed. The notice of motion gave notice also to set aside or amend, if necessary, the order of reference, on the ground that such reference could only extend, and was only intended to extend, to a reference for report upon the facts involved in the pleadings; but this part of the notice of motion was barely mentioned in the Exchequer Division, although the judgment in the Court of Appeal was, as will be seen, a judgment in accordance with it.

O. Gould, for the defendant.—The Judicature Act, 1873, section 57, does not enable the Court or a Judge, by a compulsory order, to refer an action itself, but only to refer facts in an action, the words being “any question or issue of fact arising” in any cause or matter; and, although the power may extend to mixed questions of law and fact, the referee must report specially. Section 58 says that the report of any referee upon any question of fact on any trial by him shall be “equivalent to the verdict of a jury.” It has already been decided that an official referee must report specially—*Mayor of Birmingham v. Allen* (5).

G. R. Kennedy, for the plaintiffs.—Where the action itself is referred, as in this case, the official referee has power to order judgment. Section 58 of the Judicature Act, 1873, enacts that referees shall have such authority as, subject to rules of Court, shall be prescribed by the Court or Judge ordering the reference or trial. Order XL. rule 2, implies that a referee may order judgment to be entered, inasmuch as it says, “where at the trial of an action a referee has ordered that any judgment be entered.”

[CLEASBY, B.—That may allude to cases where by the order of reference the Court or Judge has given power to the referee to order judgment to be entered.]

Cruikshank v. The Floating Swimming Baths Company (2) and *Lloyd v. Lewis* (3) shew that the decision of the official re-

ferree in this case is final, and that even independently of his direction as to entering judgment there was no necessity to apply to the Court or a Judge before entering judgment.

Gould, in reply.—The fair effect of sections 57 and 58 of the Judicature Act, 1873, is that the official referee is merely to report. The cases cited are distinguishable. The reference in *Cruikshank v. The Floating Swimming Baths Company* (2) was to a Master; and the Court expressly say that upon a reference under section 57 of the Judicature Act, 1873, a report is necessary. If there can be a reference under the Judicature Acts and the Common Law Procedure Acts taken together, such a reference cannot be to an official referee.

KELLY, C.B.—It appears to me that the decision of the official referee is right, and therefore that, subject to the observance of proper forms, the plaintiff is entitled to judgment. But, as to the entering of judgment, I think the official referee had no power to direct judgment to be entered. The Judicature Act, 1873, contains, in section 58, an express provision that the decision of a referee upon a reference under the Act shall be “equivalent to the verdict of a jury,” thus saying that it shall be equivalent to a verdict, not that it shall be equivalent to a judgment. I abstain from expressing any opinion as to what might be the case if the order of reference contained an express power to order the entering of judgment. The case of *Cruikshank v. The Floating Swimming Baths Company* (2) has been referred to on behalf of the plaintiffs, and that case is an authority for saying that the old law and practice with regard to references to arbitration are not abolished by the Judicature Acts, and that, consequently, where a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be required to report, and his decision is final; but there the reference was to a Master, and the case does not apply to a reference to an official referee. I think that we must so far amend the report of the official referee as to strike out the direction for entering judgment;

(5) Law Journal (Notes of Cases) 1877, p. 165; s. c. Law Rep. (Weekly Notes, 1877) 190.

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and if, on the facts of the case, we saw reason to disturb the conclusions of the report we might remit the case; but we see no such reason, and the report ought therefore I think to be only so far disturbed.

CLEASBY, B.—I am of the same opinion. As to the entering of judgment, I think that the official referee had no power to order the entering of judgment, and that judgment could not be entered independently of his order. The foundation of the proceedings which have taken place here is clear. The reference was a compulsory reference to an official referee. What can be clearer than that that is a reference under the Judicature Acts? The reference is therefore governed by sections 57 and 58 of the Judicature Act, 1873. It is clear to my mind that these sections give no power to the referee to order the entering of judgment, and that they give no power to a party to the action to sign judgment. As to the cases which have been cited for the plaintiffs, I should not venture to differ from them, but they do not apply, and the dicta contained in them are also inapplicable. In *Cruikshank v. The Floating Swimming Baths Company* (2) the reference was to a Master, and unless the Common Law Procedure Acts were repealed the reference was affected by them. Further it is there expressly said that since the Judicature Acts there are two classes of reference—one a reference for decision under the old practice, together with the new, the other a reference for report under the new practice. As to *Lloyd v. Lewis* (3) it is still more clearly distinguishable. Brett, L.J., there said: "There was here a trial at *nisi prius*, and a verdict was taken for the plaintiff subject to a reference under the old form." What application has that to a reference to an official referee?

Judgment set aside and report varied by striking out the direction to enter judgment but no farther.

Against the above decision the defendant appealed. The plaintiff gave notice in the nature of a cross appeal.

Gould (on Dec. 12), for the defendant.—The objection to the report of the referee in this case is, that upon such a report, the Court can only order judgment to be entered; whereas the official referee ought only to find the facts with regard to the issues submitted to him, and then the Court must hear the action on any point of law arising on the findings. If the referee may find generally for the plaintiff or the defendant, the entering judgment becomes a mere ministerial act, and the application to the Court for it would be superfluous. The order of reference is *ultra vires*, and should be set aside. He cited *Mackintosh v. The Great Western Railway Company* (6), *The Mayor of Birmingham v. Allen* (5), *Sheffield v. The Managers of The Metropolitan Asylum District* (7).

G. R. Kennedy, for the plaintiffs.—There are two sorts of reference—one for report under section 56, and another for trial under section 57. This is a reference for trial. Substantially there is only one issue in the action, and that is how much shall the defendants pay to the plaintiffs? and that question is completely in the referee's power to decide. As to the power of the referee to enter judgment it is nowhere given by the Act, but must be implied from Order XV. rules 2, 3, 4 and 5. He cited *Carlyle v. Bush* (8), *Stubbs v. Boyle* (9), *Lloyd v. Lewis* (3).

Our. adv. vult.

MELLIN v. MONICO AND ANOTHER.

This action was brought in the Queen's Bench Division against the defendant (a "building owner," under the Metropolitan Improvement Acts), for breach of a contract of indemnity, and for damage done by keeping hoardings up too long, and by improper building, and for encroachment. The defence consisted of a denial

(6) 16 Jur. 1012.

(7) Law Times, 10th of November, 1877, p. 25.

(8) Solicitors' Journal, vol. 21, p. 219.

(9) Solicitors' Journal, vol. 21, p. 659.

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of the acts complained of, and a payment of money into Court.

On June 4th a summons was taken out on the part of the plaintiff to shew cause why the "action should not be referred for trial to an official referee." And on the 5th of June an order was made that the action should be referred accordingly. An order of reference was then drawn up following what is known as the "long form" of order of reference under the Common Law Procedure Act, 1854, and the order was indorsed "Judicature Act, 1873, s. 57."

Notice of trial was given for July 26. The official referee sat for five days, and at the end of the fifth day called attention to the terms of the order, saying that he doubted whether he had power as official referee to decide the action on such terms, but that he would do so as arbitrator if the parties wished it.

No objection being taken, the reference was concluded, and an award made, in which the first issue was found for the plaintiff, and damages assessed thereon, and the other issues for the defendant.

The plaintiff then applied to the Court for an order that the referee should give his reasons, and on obtaining these he obtained leave to move to enter judgment on the findings for the plaintiff.

The defendant thereupon moved the Court to set aside such leave, and the rule previously obtained that the referee should give his reasons; on the ground that the Court, not being informed to the contrary, had granted the latter rule on the understanding that the reference was made under section 57 of the Judicature Act, and not under the old procedure.

The Divisional Court made their order in the terms of the defendant's notice of motion, and against this decision the plaintiff appealed asking alternatively that the order should be varied by sending back the matter to the referee for a new trial under Order XXXVI. rule 34.

Castle (on Dec. 19), for the plaintiff.—The decision of the Court below proceeds on the assumption that the referee in the present case sat as a private arbitrator. But that can only be if the referee has

acted in excess of the powers given him by the Judicature Acts. If he acted within those powers he acted as referee. It is clear that the questions in this cause were all questions which could properly be referred under section 57 of the Act of 1873. That section enables the Court or a Judge to refer questions for trial "on such terms as may be thought proper." The order of reference embodies these terms, and though it is in the old form it is none the less a reference under the Judicature Act, 1873, section 57. The fact that the action is referred and not a particular issue or issues, makes no difference. See Order XXXVI. rules 2, 3 and 30.

Watkin Williams and Lush, for the defendant.—There is no power under the Judicature Act to refer an action in this way. The order was drawn up by the plaintiff and assented to by both parties. The official referee undertook to try the action as arbitrator, pointing out to the plaintiff that the order of reference was in excess of the powers conferred by the Judicature Act. The plaintiff elected to proceed, and the parties, under the circumstances, must be taken to have consented to an arbitration. The finding of the referee is therefore the award of an arbitrator and cannot be set aside. They cited *Dinn v. Blake* (10), and *Holland v. Judd* (11).

Judgment was delivered in all three cases together on the 20th of December:—

BRAMWELL, L.J.—I am of opinion that in the case of *Mellin v. Monico* the appeal should be dismissed. I have no doubt the parties thought they were referring the case under the Judicature Act. Whether they intended it to be under the 56th or 57th section is somewhat doubtful to my mind. To judge from their application in the Queen's Bench Division I should think they meant the 56th, but here they intended to proceed under the 57th. It is one of

(10) 44 Law J. Rep. C.P. 276; s. c. Law Rep. 10 C.P. 388.

(11) 3 Com. B. Rep. N.S. 826.

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those cases where, for want of due consideration, a mistake has occurred which would have been obviated if the order had been more fully examined.

The order refers the action to the official referee. Now I am of opinion confidently, because it is not my own opinion only, nor the opinion of the Judges forming this Court only, that the Judge had no power to refer the action. Under section 56 all that can be done is this: Any question arising in any cause or matter may be referred by the Court or a Judge, for enquiry and report, to any official or special referee, and the report of any such official or special referee may be adopted wholly or partially, and if adopted may be enforced by the Court. What the official referee has to do is not to dispose of the action, nor to settle the matters in question, but to report on certain specific questions, as for instance, if one party says a wall is twenty feet high and the other that it is twenty-five feet high, the referee is to determine the fact. In effect what he has to do under section 56 is to find the materials for the Court to act upon, and not to determine the action, both facts and law.

Then take section 57. All that can be done under that section is this: In cases where the parties do not consent to a reference, the Court or Judge can refer issues of such a character as is mentioned in the earlier part of the section. When there is need of "any prolonged investigation of documents or accounts or any local or scientific investigation which cannot conveniently be made before a jury or conducted by the Court through its other ordinary officers," then the Court or Judge may "order any question or issue of fact or question of account arising therein to be tried" by the official or special referee.

When there is a consent of the parties the Court or Judge can do no more, except that they can order any question whatever to be tried in the same way as in the case of compulsory reference, and are not limited to the special kinds of issues before described. But there is no power to refer *actions*, but only questions or issues of fact in actions, and in cases where there is no consent, only issues of

the character particularly enumerated unless indeed there is something so mixed up and entangled with those issues that it cannot be severed and tried separately. Although such references are to be "on such terms as may be thought proper," those words do not authorise the Court or a Judge to refer another subject matter to the referee, or anything which could not otherwise have been referred, but merely means that such terms may be enforced as are thought proper with regard to the subject matter which may be, and is, referred.

If so, the order in this case could not properly be drawn up under section 57. The official referee would have a right to say, "I will not take this case. No Court has any right to refer actions to me compulsorily. All the Court can do is to refer certain issues for trial." But the learned referee did what, knowing him, we should have expected. As the parties wished it, he undertook the reference, and now that he has given his award Mr. Castle claims a new trial. I think his observation was a just one, that all through the new Judicature Acts the principle is to be found that in all cases there is to be a right of appeal, and a new trial is to be granted when there has been a mistake; and he asks, "Then why not here?" That is a cogent argument. And if the form of the order had been something of this kind—"It is ordered by consent that the following issues (or all the issues of fact) shall be referred to the official referee for trial," then he would have had a perfect right to move for a new trial. But that is not the form of the order. It does not appear to be an order of reference under section 57, and if it is so in any sense it is under section 57 *plus* something else. But I think that it is not, and that the form of the reference contemplates a reference to the referee as arbitrator to settle the whole question in dispute—it is not necessary to say whether under the terms of the Common Law Procedure Act or not. It is said that this is not a reference by consent. But would it have been possible for either side to have modified the order? Mr. Castle says he does not want it

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modified, and it does not lie in his mouth to say otherwise, for it was for his side to draw up the order, and they might have gone to the Judge and objected to the form of it. But I doubt whether he could have been heard, for the order is, no doubt, to refer the action. The same considerations shew that the defendant was bound by the order, and therefore both the plaintiff and defendant have become parties to an order of reference not under section 57, and those considerations which would arise under the section do not exist here.

But there is another ground for my decision. This is an appeal from the Queen's Bench Division, but the application to the Queen's Bench Division was different from the application here.

They were asked that the Court should act on the referee's report, and give judgment for the plaintiff. That application was refused, and Mr. Castle does not ask us to reverse that decision, but to send the case back to the referee; he is not coming here on appeal, but making a new application, and therefore, also, I think this appeal ought to be dismissed.

In the case of *Pontifex v. Severn* it might seem at first sight that the same remarks would apply, but I do not think that is so, for that was a purely compulsory reference, not made at the instigation of either of the parties, and therefore the Court could have had no authority except under section 57. Now I do not wish to find fault with the learned Judge who made the order, but there is no doubt that he referred the whole action, whereas he had no authority to do so. The officer of the Court drew up the order of reference, and if Baron Pollock had seen it, he would have said, "It is not the action, but certain issues that are to be referred." The officer drew up the common *Nisi Prius* order referring the action. Now if Mr. Gould had known this, he would have been very much in the same position; but he did not know till after the award that the whole action had been referred, and he has a right to say there has been an excess of jurisdiction. Indeed, I am not sure such an order would not be completely *ultra vires* of the Judge, without a subse-

quent consent of the parties. It has never been urged on the part of the plaintiff that anything has been done by the defendant to make the order valid if it was not so originally. I am therefore of opinion that Mr. Gould's appeal should be allowed, and the cross-appeal dismissed.

In the other case Mr. Channell says that the Divisional Court proceeded on a ground which he did not anticipate, and asks for an amended order of reference. For my own part I do not think that the case presented by Mr. Channell, as opposed by that presented by Mr. Cole, is of such weight and cogency that we ought to order a modification of the order of reference. We think, therefore, that in that case the appeal must be dismissed.

BRETT, L.J.—I think it right in this case that I should shew my view of the construction of the Judicature Acts with regard to references, and for that purpose I think it advisable to consider what kinds of references existed before those Acts had their effect on the law.

Before the Judicature Acts there were several ways of remitting matters in dispute from the Courts which might be called references. There was arbitration by consent; there was compulsory reference to an arbitrator to decide both the law and the facts, if the case was under the terms of the Common Law Procedure Act; these references were ordered at chambers or at *Nisi Prius*, as to matters of account; there were also references to the Master to report on matters of discipline; and there were references to chambers in Chancery.

None of these references were touched, or were intended to be touched, by the Judicature Acts. They all exist with all their incidents. There may be a common law reference with consent, or the Judge at *Nisi Prius* may order a compulsory reference to the Master, or to an arbitrator agreed upon, or the Judge may order the reference of the cause to arbitration as such. The Divisional Courts at common law may refer questions of discipline and other similar matters to the report of the Master, and the Chan-

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cery Division may still order references to chambers.

But it was thought that farther powers ought to be given to all Divisions, so the new enactment was passed. To the Chancery Division it gave a new tribunal, for, instead of sending a case for report to chambers, they can send it for report to the official referee. He was a new official with defined duties and rights. Nothing but a new tribunal was given to the Chancery Divisions, but to the Common Law Divisions a new power as well as a new tribunal was given. The Acts gave them the powers of Chancery as to referring questions in a suit. Whereas before they could only refer matters of discipline to a Master for report, they could now refer questions in a cause for report as in a Chancery reference to chambers. That seems to me to be the whole effect of section 56. Section 57 gives powers both to the Chancery and Common Law Divisions which they never had before. It gives them power to send certain questions and issues in causes to the official or a special referee, not for report but for trial. What is the true meaning of section 57? It gives powers to the Courts under two different states of circumstances—in one case power to send more questions to the referee for trial than in the other. It deals with references by consent and compulsory, and the words are, "In any cause or matter in which all parties interested consent thereto, and also without such consent, in any cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot conveniently be made before a jury or conducted by the Court through its other ordinary officers"—words which shew that the section applies to the Chancery Divisions—"then the Court may order"—not the whole cause to be referred, but—"any question or issue of fact, or any question of account arising therein, to be tried either by an official or a special referee."

Therefore, it seems to me, that where there is consent, they may send, not the whole cause, but any question of fact, to the official referee to try; but where the reference is compulsory, only such

questions as are within the terms of the section, that is, questions of account, and where scientific or local examination is necessary; again, not every question of account or every scientific or local examination, but only such of them as cannot be conveniently tried by a jury, &c. If the case is brought within these definitions, then the Court or a Judge may "order any issue or question of fact, or question of account arising therein, to be tried" by the referee. In the first case, where the reference is by consent, all issues of fact may be so tried. But even then no questions of law can be left to the referee, any more than the parties could call upon a Judge to act as arbitrator in a cause. But if the reference is by consent, all questions of fact may be referred; and, if there are no issues of law in such a case I am inclined to think the parties may relieve the referee from the duty of reporting specially, or making special findings, and may consent to his reporting the general effect of his findings on the facts. So that he may find generally for the plaintiff or for the defendant. But that being so, it is clear that he cannot enter judgment for either side. That must be the act of the Court. If all parties do consent that the referee shall find or report not on each issue but generally, it follows that there must be an appeal of a certain sort—that given by section 58. If the reference to the official referee is compulsory, it seems to me he is only entitled to try those particular issues, and to report the result of each (but not to report the evidence). Other issues may remain to be tried in some other manner. When they are tried the matter must be brought before the Court, and the Court must give judgment as they think right on the issues or findings.

There is then an appeal from the referee as to the questions submitted to him. What is the kind of appeal? It is to be found in the end of section 58:—"The report of any referee upon any question of fact, on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury." Now, I should say, that in cases where the official referee has to report, the Court may

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differ from him as to any inferential finding of facts, just as they may from the finding of a Master on a matter of discipline.

But with regard to findings of fact, either on a compulsory or a voluntary reference under section 57 the rule is the same as with regard to appeals from a Judge without a jury, or from the findings of a jury, *i.e.*, the Court accepts the finding, unless, according to the ordinary rules with regard to the findings of a jury, or of a Judge, they see fit to set it aside. Thus the finding is open to appeal, on the ground that wrong evidence was admitted; on the ground that the referee considered the facts in a wrong way, so as to amount to the same thing as misdirection; or the Court may set aside the finding because it is against the weight of evidence, as in the case of the verdict of a jury.

If, under such circumstances, a new trial is granted, the issues must be sent back to the same or another referee, to be tried again.

This is the construction of the statute regarded by itself; but it is said its effect is altered by the rules. But I do not think that, either on the construction or on our historical recollection of the drawing up of these rules, it was either intended or expected that anything should be brought under the jurisdiction of the referee, which was not brought under it by the statute. When we remember that the rules and orders were drawn up before the Act of 1875 was passed, and that they were drawn and made when they were no part of a statute, I do not think it can have been intended that they should go beyond the statute. They were for the purpose of carrying it out, and not extending it. It is true they are now part of the subsequent statute, but they are to be read into the former one, and when found in that statute are to be considered as relating to forms and procedure, and not substance, and you must construe them as not inconsistent with, and not extending the provisions of the statute as to jurisdiction.

Order XXXVI. rule 2, is appealed to as shewing that the official referee may try actions. But that section may be

read, and I think ought to be read, merely as an enumeration of the various ways in which an action may be disposed of under the Judicature Acts. "Trial," as applied to the official referee, means such a trial as the law allows him to try; and the word "action" is not necessarily to be read as the whole action, but where the jurisdiction is only as to part it must be taken to mean so much of the action as may legally be so tried. Then we are referred to the 5th rule. But I do not think that rule has any application. It is this:—"In any case where neither the plaintiff nor the defendant has given notice, under the preceding rules, that he desires to have the issues of fact tried before a Judge and jury" (*i.e.*, all such issues as he has a right to have so tried), or, in any case, within section 57 of the Act (*i.e.*, where there has been a compulsory reference), if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a Judge, &c.;" that is to say, where he wishes *the whole* action to be tried in some other way. It does not follow that the Court is enabled by the rule to grant an order inconsistent with the statute. Then there is the 30th rule:—"Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of a Court or Judge, hold the trial at, or adjourn it to any place which he may deem most convenient, &c." That rule should be construed in the same way as rule 2. It is dealing merely with the place where and the time within which the trial is to be held, and it means such trial as may properly be ordered to be held before a referee.

There is nothing in the rules which was intended to alter, or necessarily in effect alters the legislation contained in the statute of 1873. The construction of the statute being as I have shewn, the only kinds of reference to an official referee, over which he has jurisdiction, are those I have stated, and no others. He cannot be called on compulsorily to be an umpire. If the parties agree that he shall so act, it is in his power to accept or refuse the position. If he accepts it he is

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not acting as the official referee, but as an arbitrator.

That being the case, I think that in Mr. Channell's case (*Longman v. East*) the order referring the action to the official referee was made with the intention that he was to decide the question as arbitrator. The Court had no power to make such an order, and therefore when the Divisional Court set aside the order they did what was right. But Mr. Channell says the facts of that case bring it within the provisions of section 57, and he asks us now to send certain issues to be tried by the referee. And that raises another question, which I have omitted, namely, whether section 57 is to be construed in the same way as the Common Law Procedure Act, so that if one part of the cause of action comes within the words limiting the kind of question which may be compulsorily referred, the Court may refer the whole cause.

I do not think that is the 'right construction of the statute. The Court cannot, because one part of the action comes within the statute, order all the questions to be referred, unless they are so mixed up and entangled with the questions which are proper to be referred that the Court may fairly say there ought to be only one trial.

Therefore the request of Mr. Channell that we should send all the questions in this action to be referred because some are fit subjects for a reference is one which we cannot, and we are satisfied that the Court ought not to grant.

Then comes the question, whether the facts of the case have brought it within the terms of the section? Now it may have been shewn that there were some matters in the cause which might properly have been tried by local examination. But the defendant must not only shew that, but also that it is not a case which can be conveniently tried before a jury. I do not think the case has been brought within that category, indeed I think it could very well be tried by a Judge and jury, and therefore we ought not to make the order.

In Mr. Gould's case (*Pontifex v. Severn*) it seems to me the order was one which the Court had no jurisdiction to

make without consent; and as there was no acquiescence on the part of the defendant, his objection was a good one and his appeal should be allowed.

In Mr. Castle's case (*Mellin v. Monico*) the plaintiff is wrong in two points of view. In the first place, after he had seen the order of reference, which was drawn up in a manner inconsistent with section 57, he made no objection, but acted upon the order, and therefore he must be taken to have assented to a reference not under the Judicature Acts, but a reference to the arbitration of the referee in the ordinary way under the Common Law Procedure Act. If this were not so, he would have an appeal such as I have described; he could have moved for a new trial, if they had the materials, on the ground of misdirection, or that the verdict was against the weight of evidence. But he did not attempt this, and I do not think he had the materials; but he wished us to deal with the case as if it had been a reference for report under s. 56. He therefore asked for a wrong remedy in the Court below, and I do not think he is entitled to change the form of his demand on appeal.

COTTON, L.J.—I will first give my opinion with regard to sections 56 and 57 of the Act. Those two sections deal with different matters. Section 56 clearly deals with cases in which a report is to be made by the referee, which the Court may adopt wholly or in part, and which, if adopted, they may enforce as a judgment of the Court. That is really dealing with certain matters which often used to occur in the Court of Chancery, not in cases where certain issues were sent to be tried as before a jury, but in cases where a question arose as to which witnesses differed upon some fact, or a question as to what would be the proper remedy, or what was the state of the property. In such cases it was not unusual to refer it to an expert to report to the Court, that the Court might have its conscience informed. These are the references with which section 56 deals, not to try an issue, but to make a report, which the Court may adopt wholly or in part if they think fit.

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Section 57 is entirely different. It is to enable certain issues of fact, arising in any cause or matter in the High Court, to be tried by another tribunal. That clearly is acting on the Chancery practice, where sometimes on the original hearing of the cause nothing was done but a reference to Chambers, or according to the old practice, to the Master to make certain enquiries; as, for instance, whether any part of a testator's estate is being employed in partnership, so as to entitle the representatives to a share in the profits, what mines have been opened before the estate came into possession, and whether the deceased opened any in his lifetime. I put these things merely as examples of the sort of enquiry which was sometimes referred to the Master, or to Chambers and sometimes to a Judge and jury.

Under section 57, by consent in all cases, and by compulsion where certain kinds of questions arise, the Court has power not to refer the cause, but to have issues of fact tried otherwise than before the Court.

There is nothing in the section about sending the cause for trial, but the power is confined to questions of fact and matters of account. My own opinion is, however, that we cannot confine the operation of the section to those issues which involve long examination of documents and accounts, or any scientific or local investigation, but that there may be certain other issues so connected with those involving such examination and investigation, that it would be barely possible to deal with those other issues without sending them for trial to the same tribunal. But the Court would be wrong, even if possibly they have jurisdiction, to refer all the issues in a cause, because there is one issue involved which they can refer.

No one reading the words of the section would say that the Court has power to refer a cause, but simply a question or issue of fact which is to be tried not before a Judge and jury, but by a referee who is to give his finding on the facts, just as if it were the verdict of a jury. It is true that the reference is to be made on such terms as may be thought proper.

But that does not justify the Court in sending any other issues or matters to be so tried. It must mean on such terms as are proper with regard to the matters which the Court has authority to refer. To say that those words give the Court power to substitute the referee for itself as judge of any point of law would be to alter the section entirely. Such a construction of the section would not be reasonable, and would not be correct.

There is some difficulty arising from the orders. If they could enlarge the jurisdiction given by the Act, I think it should be done in clear and specific terms. Some of them, no doubt, seem to assume that there can be a trial of a cause before a referee. But to assume the jurisdiction is not to give it, and the Act is clear on the point, that issues of law cannot be referred, but only issues of fact. And the ambiguous language of the rules cannot be taken as enlarging the jurisdiction of the referee, or enabling him to do anything that he could not do under the Act.

To apply these principles to the three cases before the Court. In the case of *Mellin v. Monico* I concur with my Lord and my brother Brett. Here was an order not justified by the Act. But the plaintiff drew up the order, and accepted it in this form, and though he might have appealed against it he went on and took his chance of success. When he has done that it is too late for him to come here and ask us to deal with the case as if it were a simple reference to the referee under the statute.

As to the case of *Longman v. East*, in that case the defendant appeals against a rescission by the Divisional Court of an order to refer the whole action. He now modifies his application and asks for a reference of the action, or for such an order as he can get under section 57. He seeks for a transfer of all the issues to the referee for trial, but he will be content with the issues of fact. But I do not think all the issues were fit matters for a reference; many of them were fitter for a jury. The defendant has failed to make out that they could not conveniently be so tried, and if we are to exercise our discretion, we think a Judge and jury is the proper tribunal.

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As to the other case (*Pontifex v. Severn*), on the cross appeal, I may say that it would have been clearly wrong to make an order giving the official referee power to enter judgment. As to the appeal against the refusal to refer the action, as we have already said, there is no jurisdiction in the Court to refer actions but only certain issues, so that there may be findings of issues which the Court may either adopt or send back for a new trial.

BRAMWELL, L.J.—I may as well remark that the forms of order in use seem to be all wrong.

BRETT, L.J.—They certainly are wrong. They need not go into detail, but they ought to point out clearly whether the referee is to report under section 56, or to try issues under section 57, and whether he is to try all or only some of the issues; and if not all, which he is to try.

Longman v. East—Judgment affirmed.

Pontifex v. Severn—Judgment reversed.

Mellin v. Monico—Judgment affirmed.

Solicitors—Garrard, James & Wolfe, agents for Smith, Andover, for Longman; Allen & Son, for East; Learoyd, Learoyd & Peace, for Pontifex; Dobinson, Geare & Son, for Severn; G. F. & M. Rooper, for Monico; S. S. Seal, for Mellin.

[IN THE COMMON PLEAS DIVISION.]

1877. { SMITH (appellant) v. WALTON
Nov. 30. { (respondent).

Master and Servant—Truck Act—1 & 2 Will. 4. c. 37—Wages—Deduction for Damage—Payment in Goods.

[For the report of the above case, see 47 Law J. Rep. M.C. 45.]

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878. { BAKER v. THE MAYOR, ALDER-
Jan. 16. { MEN AND BURGESSES OF THE
BOROUGH OF PORTSMOUTH,
ACTING AS URBAN SANITARY
AUTHORITY.*

Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 34—Validity of Bye-Laws—Power to Pull Down—Buildings Erected in Contravention of Bye-Law, as to Deposit of Plans—“Construction of Streets.”

By sect. 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), Local Boards have power to make bye-laws with respect to—First, the level, width and construction of new streets; second, the structure of the walls of new buildings; third, the sufficiency of space about buildings; fourth, the drainage, &c., of buildings. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter or pull down buildings:—Held, that the power to pull down buildings for which the local boards might make provision was not confined to cases of contravention of bye-laws relating to structure, but might be extended to cases of contravention of bye-laws relating to the giving of notices, the deposit of plans, &c.

The word “streets” in sub-section 1 of section 34 includes not only the roadway but also the buildings at the side of the roadway.

Statement of claim, averring—

1. That the plaintiff is a builder, and the lessee and occupier of certain land situate in the borough of Portsmouth.

2. That in or about the month of July, 1875, plans were duly deposited with the defendants, in pursuance of a bye-law made by the defendants, as the Urban Sanitary Authority of Portsmouth, for the construction of a street or road over the said land, and that such plans were duly

* Coram Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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submitted to and approved by the defendants.

3. That in or about the month of August, 1875, the plaintiff began to build sixteen houses on the said land, being eight on either side of the said street or road, and continued to build them until the month of November, 1875, when eight of the said houses were roofed in, and the others were chamber-floor high with joists on. That the plaintiff had not before commencing the said houses deposited plans thereof, though he believed that his surveyor had done so. That the defendants allowed the plaintiff to proceed with the erection of the said houses, without complaint or interference, down to the month of November, 1875, and the said houses were in all respects constructed in accordance with the bye-laws of the defendants relating to the construction of buildings.

4. That, on the 22nd day of November, 1875, the defendants charged the plaintiff before the magistrates of the said borough with having built the said houses without having first deposited the plans for the same, in accordance with the bye-laws of the defendants. The plaintiff pleaded guilty, and was ordered to pay and paid a fine of 1*l.* and costs.

5. That, on the 9th day of December, the defendants sent workmen and pulled down twelve of the said houses, and totally demolished the same, and in doing so used so much violence that the materials thereof were rendered almost valueless for building or any other purpose.

The statement of defence was as follows:—

1. The defendants deny the allegations of paragraph 3 of the statement of claim, except so far as the plaintiff therein admits that he had not before commencing the said houses deposited plans thereof.

2. Bye-laws have been duly made by the defendants as the Urban Sanitary Authority of the borough of Portsmouth, under the statutes in such case made and provided (1).

(1) By section 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98):—

"Every local board may make bye-laws with respect to the following matters, that is to say—

3. By the 3rd of the said bye-laws it is provided that no building shall be erected by the side of any new street, or proposed new street, or to which any new street will form the only carriage approach until such street has been constructed to the approval of the Urban Sanitary Authority.

4. By the 32nd bye-law, it is provided that every person who shall intend to erect any new building shall give twenty-one days' notice to the Urban Sanitary Authority of such intention, to be delivered to the local surveyor or left at his office, and shall, at the same time, leave or cause to be left at the said office, for the use of the Urban Sanitary Authority, detail plans or sections, and a block plan of such intended new building and its appurtenances, and a description of the materials of which the building is proposed to be constructed, of the intended mode of drainage and means of water supply.

5. Bye-law 37 is as follows:—"The Urban Sanitary Authority shall, by re-

"1. With respect to the level, width and construction of new streets, and the provisions for the sewerage thereof.

"2. With respect to the structure of the walls of new buildings for securing stability and the prevention of fires.

"3. With respect to the sufficiency of the space about buildings to receive a free circulation of air, and with respect to the ventilation of buildings.

"4. With respect to the drainage of buildings, to water-closets, privies, ash-pits and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

"And they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter or pull down any work begun in contravention of such bye-laws, provided always that no such bye-law shall affect any building erected before the date of the constitution of the district."

This section is repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), but is substantially re-enacted by section 157 of that Act. Before the Act of 1858 the powers of local boards were regulated by the Public Health Act, 1848 (11 & 12 Vict. c. 63).

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solution or order, approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices thereof; but if the owner or person intending to lay out any new street or construct any new building fail to give the notices herein required, or if any owner or person shall construct, or cause to be constructed, any works or buildings, or do any act, or omit to do any act, or comply with any requirement of the Urban Sanitary Authority contrary to the provisions of any or either of the hereinbefore contained bye-laws, he shall be liable, for each offence, to a penalty not exceeding 5*l.*, and he shall pay a further sum, not exceeding 40*s.*, for each and every day during which such works or buildings shall continue or remain contrary to the said provisions, and the Urban Sanitary Authority may, if they shall think fit, at any time after the expiration of forty-eight hours from the time of the service of a notice in writing, addressed to such owner or person, signed by the local surveyor, or the clerk to the Urban Sanitary Authority, expressing their intention so to do, in default of such owner or person shewing good cause to the contrary in the meantime, cause any work begun or done in contravention of any or either of such bye-laws to be removed, altered or pulled down, as the case may require; and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the 'Public Health Act, 1848,' and any such notice shall be served, either personally or by leaving the same with some person, either at the usual or last-known abode or place of business of such owner or person, or at or upon the works or buildings referred to therein."

6. The plaintiff erected the houses mentioned in paragraph 3 of the statement of claim, in contravention of bye-laws 3 and 32. The said street was a new street, and the said houses were erected before the street had been constructed according to the approval of the defendants, as such Urban Sanitary Au-

thority as aforesaid. The plaintiff did not first give to the defendants, as such Urban Sanitary Authority, for their use any detailed plans or sections, or any block plans of the said houses, or any description of the materials of which the said houses were proposed to be constructed, or of the intended mode of drainage or means of water supply.

7. The defendants afterwards, upon receiving a report from their local surveyor, gave the plaintiff notice, in pursuance of bye-law 37, that the defendants would, after the expiration of forty-eight hours from the service of the said notice, in default of the plaintiff shewing good cause to the contrary, cause the said houses to be pulled down, as being erected by the plaintiff in contravention of the said bye-laws.

8. The plaintiff did not, within the said forty-eight hours, or before the removal of the said houses as hereinafter mentioned, shew good cause why the said houses should not be pulled down, and the defendants accordingly, in pursuance of bye-law 37 and of their said notice, and after the expiration of the said forty-eight hours, viz., on the 9th day of December, 1875, caused the said houses to be pulled down as they lawfully might. The defendants deny that in so doing any unnecessary violence was used, or that the materials were rendered almost valueless, as alleged in the 5th paragraph of the statement of claim.

The plaintiff joined issue; and demurred, on the ground that the defendants had no power to make bye-laws authorising them to pull down buildings, except in cases where such buildings were erected in contravention of some bye-laws relating to mode of construction.

The issues of fact were tried before the argument of the demurrer, and in answer to questions left to them by the learned Judge (Blackburn, J.), the jury found that the ground on which the houses were built was, at the time when the buildings were begun, in such a state as to make it improper to build dwellings on it without previous precautions; and

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that there had been a neglect of duty on the part of the defendants in pulling down the houses in such a way as to do unnecessary damage. Under the latter head they assessed the damages at 18*l.*, and they assessed the damages in respect of the pulling down, if unlawful, at 500*l.* It was left to the Divisional Court to enter judgment on these findings and on the demurrer; and the defendants obtained a rule for a new trial, on the ground that the verdict for 18*l.* was against the weight of evidence.

All the questions came on for argument before the Exchequer Division on the 29th of May, 1877, when judgment was given for the defendants on the demurrer and the findings, and a new trial was ordered with respect to the verdict for 18*l.*, unless the plaintiff should be willing to let the verdict stand without costs.

The plaintiff now appealed against the judgment on the demurrer.

Kingdon and Petheram, for the plaintiff.—Bye-law 3 is *ultra vires*. The board has power to make bye-laws as to the construction of streets, and another power to make bye-laws as to the construction of houses. These two powers are separate and cannot be combined as in bye-law 3. The word "street" does not include "houses." Bye-law 32 does not apply to such a case as the present. Nothing justifies the extreme measure of pulling down except grave structural defects. If bye-law 32 is good at all, it is valid under the last part of section 34 of the Act. Under that section the local board is empowered to make bye-laws as to the construction of buildings; and to secure the performance of those bye-laws they may make other bye-laws authorising the removal of buildings. But that power does not extend to securing by the same power the observance of other bye-laws not relating to the actual construction of the buildings, but merely to certain rules of practice. Bye-law 37 is therefore *ultra vires*, and does not justify the defendants' act. This is the view taken by Martin, B., in *Hattersley v. Burr* (2). See also

Brown v. The Local Board of Holyhead (3), *Young v. Edwards* (4) and *Hall v. Nizon* (5), where Lush, J., says, "As to the power of pulling down buildings, that could not be used to enforce the giving of notice and the deposit of plans."

Arthur Charles and A. L. Smith, for the defendants.—The deposit of plans is not a mere matter of practice, but a most important sanitary regulation, for the site of a building is at least as important as the structure. Suppose a house built upon a festering mass of filth. It might be perfectly constructed, but yet it might be right to pull it down. All depends on the meaning of section 34 of the Act of 1858. It is in substitution for the enactment of section 53 of the Act of 1848. That section expressly gave local boards power to pull down houses built without due notice. It is repealed, and section 34 gives instead a general power to make bye-laws with reference to the matters mentioned in the four sub-sections. Bye-laws 3 and 32 are within those sub-sections. Bye-law 3 has regard to the construction of streets under s. 34, sub-sect. 1. "Streets" does not mean merely "roadways," but the roadways and whatever stands by the side. This is its usual meaning in Acts of Parliament. See the interpretation clause of the Act of 1848 (11 & 12 Vict. c. 63. s. 2), also the Metropolis Local Management Act, 18 & 19 Vict. c. 120. s. 250. These Acts are *in pari materia*. See also *Pound v. The Plumstead Board of Works* (6). If the plaintiff's contention is right, the power which the local board had of controlling buildings between the years 1848 and 1858 is now gone. But this view is not necessary, unless it is necessary to limit the word "street" to roadway. If bye-law 3 is good so is 32, for it is equally under the sub-sections of section 34. At all events it comes under the powers to make provisions for the observance of

(3) 1 Hurl. & C. 601; s. c. 32 Law J. Rep. Exch. 25.

(4) 33 Law J. Rep. M.C. 227.

(5) 44 Law J. Rep. M.C. 51; s. c. Law Rep. 10 Q.B. 152.

(6) 41 Law J. Rep. M.C. 51; s. c. Law Rep. 7 Q.B. 183.

(2) 4 Hurl. & C. 523, at p. 527.

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bye-laws, given by the latter part of the section. Such provisions when made become part of the bye-laws.

Kingdon replied.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. No doubt it gives great power to local boards, but this power was probably given to them in order that they might have great strength, and on the faith that they would not so use that strength that it should degenerate into tyranny. We therefore must construe these Acts of Parliament with regard to the consideration that it was intended that the boards should have a large discretion.

I think that the first sub-section, with regard to the construction of new streets, includes the construction of buildings; that the phrase "new streets" means the roadway and whatever is at the side of it, and I base this view not on authority but on the construction of the Act.

The first and governing reason is that otherwise there would be no power to regulate new buildings in new streets. In the next place, the use of the word "construction" is not a common way of speaking of a mere roadway or carriage-way. You generally talk of laying a roadway; and there is also the word "building" which has been applied to roads in America, and which has been adopted in this country with the usual avidity with which incorrect expressions are seized upon when they come from that quarter. Then there are the general words at the end of sub-section 4, and it is enacted that they may further provide for the observance of the same by enacting therein such provisions as they think necessary "as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings," and so forth.

Therefore I think that sub-section 1 refers to buildings as well as roadway. That being so, we have a right to say that the expression, "until such street has been constructed" in the 3rd bye-law does not refer to houses, for until the roadway is approved as a street no building at the side is to be erected. I

see no objection to the imposition of such a limit of time as that. We must use our practical knowledge of the matter; we know that people will not be half a century making a street, and it is reasonable as a matter of fact for the board to say, "Until we see how the street is laid out we will have no buildings at the side." There is another reason that the board should make the restriction. Till the street is laid out and properly sewered, it might be very inconvenient and wrong, from a sanitary point of view, to have the houses built. Therefore Mr. Petheram's argument does not apply, and I think the board, so far as the regulation as to time is concerned, has power to do as they have done, for the building has been done in contravention of the bye-laws. Then there is another argument. The board have supplemented the bye-laws which they have passed for the purpose of accomplishing the provisions of the four sub-sections of section 34, by certain other bye-laws intended to enforce the observance of the former ones. They have no power, it is said, to inflict the penalty of pulling down houses built in contravention of the auxiliary bye-laws, but only those which are in contravention of the primary ones. This is a very ingenious and subtle argument, but I doubt its application. For in the contemplation of the law these are all one bye-law, by which, among other things, arrangement is made for the deposit of plans, and for the pulling down houses built in contravention of the bye-law. The bye-law says you shall not build till you have deposited the plans. If the plans are not deposited, there is a contravention of the bye-law, and the houses may be pulled down. I am, therefore, of opinion that this judgment should be affirmed.

BRETT, L.J.—I am of the same opinion. The defendants justify what they have done by alleging a contravention of two of their bye-laws, Nos. 3 and 32—either both or one of them,—and that by reason of such contravention, by another bye-law they are entitled to pull down these buildings. It is obvious that if either of these bye-laws is good, and if there has been a

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contravention of a good bye-law, even if the act complained of has been done under a bye-law merely intended to enforce that good bye-law, it is justifiable. We have therefore to see whether either No. 2 or No. 32 is good, and then whether the other is also good.

The first question is what is the construction of the Act of Parliament. I have come to the conclusion that the right construction of the word "street" in sub-section 1 of section 34 is that it includes the buildings at the side as well as the roadway itself. We must consider both the words of the section and the state of the law. The law at the time of the passing of the Act was contained in enactments which were repealed by this section. They dealt with houses. There were specific statutory provisions with regard to them, instead of which the present Act gave the boards power to make bye-laws. It was not intended to take away from the local authorities the powers they possessed with reference to the construction of houses, but to give them a further power. Their power having been a specific one given by statute, the present Act gave them power to make bye-laws, not necessarily all the same, but varying in respect to different places. The Legislature cannot have meant to exclude from their jurisdiction houses over which they formerly had power. If, therefore, there is nothing specific to the contrary, we ought to decide that houses are included. Now I think that the ordinary meaning of the word "street" includes houses. I agree with Lord Chelmsford in *Galloway v. The Mayor and Commonalty of London* (7) as to the ordinary interpretation of the word. But whether this is so or not we have a distinction in the phraseology of the Act. When it speaks of streets the word used is "construction." When it speaks of roadways the word used is "laying out," and I think that the word "construction," though it is certainly applicable to roadways, is also applicable to buildings, and I therefore incline to think that in the present instance it applies to both, and I see nothing

in the section that excludes the view that the words "new street" comprise the buildings by the side of the roadway. When we see that bye-law 5 is impossible to work, and cannot be good unless the word "streets" includes buildings in sub-section 1 of section 34 in the Act, it is a strong argument to shew that it is intended to include them. If it is so, see what follows. The local board is empowered to make bye-laws, not merely defining what the construction of the buildings is to be, but "with respect to the construction of the buildings by the side of the roadway." Have they made such bye-laws? The 3rd bye-law seems obviously to refer to construction—it is, a regulation with respect to buildings at the side of a new street. So is bye-law 5. As to bye-law 32, it has been argued that it was not made under any previous sub-section, but only under the latter part of section 34, and it was argued from that that it might be a good bye-law, but that as it was not made under the four sub-sections of section 34, it could not be enforced by the means provided in the end of that section. But if we look at the general part of section 34 we find that it carries what is done under it into sub-sections 1, 2, 3 and 4. The four sub-sections enable the board to make bye-laws in respect of certain matters, and then the section goes on to say: "They may further provide for the observance of the same by enacting *"therein,"* i.e., in the bye-law of which such enactments at once become a part, such provision as they think necessary as to giving of notices, the deposit of plans and sections, inspection, and "as to the power of the local board to remove, alter or pull down any work begun or done in contravention of such bye-laws," of which bye-laws the provisions as to notice, &c., form part.

As soon as they have made bye-laws under sub-section 4 they may enact *in them* other provisions, which become part of such bye-laws. Among these they have enacted bye-laws with regard to giving notices and depositing plans. These, then, are part of those other bye-laws, and therefore part of the bye-laws enacted

(7) 35 Law J. Rep. Chanc. 477, at p. 492; s. c. Law Rep. 1 H.L. 34.

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under sub-section 4. Mr. Petheram's argument therefore does not apply, for bye-law 32 does enact in those bye-laws certain provisions with regard to notices, and therefore bye-law 32 is as much under sub-section 1 as bye-law 3.

Therefore the board have power to pull down buildings for any contravention of bye-laws 3 and 32, both of which come under sub-section 1 of section 34, and they were legally justified in acting as they have. With the merits of the case we have nothing to do, and therefore our judgment must be for the plaintiffs.

COTTON, L.J.—The powers given to the local authority by this Act to pull down houses that have been built is undoubtedly a very large one. We must therefore be perfectly satisfied that they have exercised that power legally. It was, no doubt, thought by Parliament that the power would be exercised judiciously and for the general benefit, and the only question for us is—Have they the power in this case?

I confess I had doubts, but the argument on behalf of the defendants has removed them. If it could be shewn that the bye-laws were not in respect of matters dealt with by the four sub-sections of section 34, I should have hesitated, but it is not necessary to express an opinion with regard to that. The 3rd bye-law is unquestionably with regard to matters treated of in the first of those sub-sections.

The questions with respect to construction are—What is the meaning of the word "streets," and what are "new streets?" The word is ambiguous, and we must look for an explanation to the context and the purpose of the enactments. We cannot deal with the Act without reference to the bye-laws.

The bye-laws may mean different things. We must therefore look at the Act and see whether buildings come within its meaning. Looking at the words "level and width" we see that they must refer merely to the roadway. Then the phrase "construction of streets" occurs. Is that confined to the "roadway" merely, or does it include houses?

Now the first question in considering

the power of a body to whom Parliament has given general control of public matters is—Why was the power given? Here the powers are given not only for the purpose of regulating roadways, but also over matters with regard to houses, and other things: for instance, by section 45 they have express powers to regulate the line of buildings in old streets. That shews that their powers are not intended to be limited to the matters dealt with by sub-sections 2, 3 and 4. Now nowhere do we find anything about the height, &c., of buildings except in sub-section 1 of section 34. Streets there do not mean merely the roadway as distinct from the buildings, as in the third bye-law, but the "construction of the street" also may mean the construction of houses at the side of the street.

That being so, we cannot say that the 3rd bye-law was not made in respect to new streets within the meaning of the 1st sub-section of section 34. The board therefore have power to pull down houses built in contravention of that bye-law, and the defendants are justified by the Act in doing what they have done.

Judgment affirmed.

Solicitors—Saunders, Hawksford & Bennett, for plaintiff; Gregory, Rowcliffes & Co., agents for J. Howard, Portsmouth, for defendants.

[IN THE EXCHEQUER DIVISION.]

1877. } RAWLENCE AND OTHERS v. THE
Nov. 26. } GUARDIANS OF HURSLEY UNION.

Rating—Valuation List—What Hereditaments to be separately Valued—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 4.

[For the report of the above case, see 47 Law J. Rep. M.C. 31.]

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1877. }
 Dec. 1, 3, 4. } CLARK v. MOLYNEUX.*

*Defamation—Libel and Slander—Malice
 —Privileged Occasion—Rector and Curate.*

In an action of defamation, where the Judge has ruled that the occasion on which the defamatory matter was published is a privileged one, it is his duty to direct the jury:—

That unless they are satisfied that the defendant did not use the occasion for the reason which conferred the privilege, but for some indirect reason or motive, they must find for the defendant:

That the burden of proof of the existence of such indirect reason or motive is on the plaintiff:

That where the indirect motive suggested by the plaintiff is malice, he must shew the existence of actual malice, i.e., a wrong feeling; and it is not enough to shew that the defendant acted unreasonably, or without just cause or excuse.

A defamatory communication made by a clergyman to his curate for the purpose of obtaining his advice as to the course to be pursued by him in an ecclesiastical matter, is privileged. So held per BRETT, L.J., and COTTON, L.J., dubitante BRAMWELL, L.J.

This was an appeal from the decision of the Queen's Bench Division, refusing to grant a new trial on the ground of misdirection, and that the verdict was against the weight of evidence.

The action was for slander and libel. The plaintiff, a clergyman of the Church of England, had been formerly in the army, but left it in the year 1863; and, after taking his degree at Cambridge, was ordained by the Bishop of Exeter, and subsequently became curate at Assington, to the Rev. H. L. Maud.

In March, 1876, the defendant, the Rev. Canon Molyneux, the Rector of Sudbury, which is in the neighbourhood of Assington, when calling on a Mr. G.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

Bevan, a banker, with whom he had been intimate for twenty-four years, was informed by Mr. Bevan that the plaintiff was going to preach one of a course of Lenten sermons at Newton Church, in the neighbourhood, and that he was sure that if Mr. Charles Smith, the rector, knew what sort of a person the plaintiff was, he would never permit him to preach in his church. Mr. Bevan then desired the defendant, as an old friend of Mr. Smith's, to let him know what the plaintiff's character was. In answer to the defendant's enquiry as to what was the nature of the charges against the plaintiff, Mr. Bevan said that he had been obliged to leave the army through cheating with cards, had lived an irregular life at Cambridge, had been guilty of gross immorality when curate at Horringer, and had boasted of it. The defendant, placing implicit reliance on Mr. Bevan, and thinking that it was his duty to acquaint Mr. Charles Smith with the matter, at once rode to his house, and, finding that he was ill in bed, communicated his information to the Rev. H. Smith, his son, who was in the house.

At the end of the same month the defendant consulted the Rev. J. C. Martyn, his rural dean, as to whether he should not speak to Mr. Maud, the plaintiff's rector. Mr. Martyn said he thought the defendant ought to do so. As Mr. Maud was abroad, the defendant spoke to his solicitor on the subject; and on Mr. Maud's return he received a letter from him, asking for information. The defendant wrote an answer detailing the facts substantially as communicated to him by Mr. Bevan; but some of the expressions in the letter were stronger than those used by Mr. Bevan. "Profligate" was used instead of "irregular," and "expelled the army," instead of "obliged to leave the army."

The defendant also consulted Mr. Green, his curate, who was announced to preach one of the same course of sermons as the plaintiff. Mr. Green had been with the plaintiff for twenty years, and was consulted by him on every ecclesiastical matter that came before him.

The communications made to Mr. Green, Mr. H. Smith and Mr. Martyn

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were the slanders complained of, and the letter to Mr. Maud was the libel.

The defendant relied solely on the privilege of the occasions and the *bona fides* of his statements.

The action was tried before Baron Huddleston and a special jury at Bury St. Edmunds, at the Summer Assizes, 1876.

The learned Judge ruled that all the occasions were privileged, and the case went to the jury on the question of express malice.

In the course of his summing up the learned Judge said:—"Now in law if a man says what is not true, or writes what is libellous, or says what is slanderous of another, it is presumed that it is malicious. But where the occasion is privileged, then you require something more, and you require what the law calls express malice. I must tell you what express malice means. It does not mean that hatred and uncharitableness which we usually associate with the word 'malice.' Malice in law means this—a wrongful act done intentionally, without just cause or excuse, that is what malice means. I cannot put it better than in the way I see it is explained by a very eminent Judge, Bayley, J., in *Bromage v. Prosser* (1), where he says:—

"Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned for felony, and wilfully stand mute, I am said to do it of malice, because it is intentional, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it is done of malice, because it is wrongful and intentional. It equally works an

injury, whether I mean to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?"

"When you come to look at the word 'malice,' you will have to interpret it in this way: Was there an intentional act on the part of the defendant, without just cause or excuse, in spreading these reports of the plaintiff? You have also to consider that to excuse him it must be done *bona fide*, and in the honest belief that what he wrote and said of the plaintiff was true. That is the question that I shall therefore leave to you in this case. I always take upon myself to write down what my direction is at the time, then no one can suggest that anything but the very words were used; and what I shall leave to you in this case is—Did the defendant write the letters of the 2nd of May, and make the statement he did *bona fide* and in honest belief that what he wrote and said with reference to the plaintiff was true, or was he actuated by feelings of malice? Because if you think that he did, *bona fide* and in the honest belief that the statements were true, write that letter and use those expressions, then I think you will say at once that there was no malice. But I think if you are of opinion, looking at all the circumstances, that he did not do that *bona fide* and in the honest belief that it was true, then you will have no doubt in coming to the conclusion that there was a motive which would easily be rendered by the legal term 'malice.' Now in considering the *bona fides* and honest belief, you will have to look at a great many things. A man very often, when he wants to do something which is very unpleasant to a neighbour, will cheat himself by believing he is doing an act of the most rigid and honest character. A man who very often acts recklessly and carelessly, without due cause and consideration, covers his feelings by a notion in his own mind that he is discharging a duty; and there is more uncharitableness and sometimes more cruelty done under that word 'duty' than we know of. Although a man may say and declare, 'I had this be-

(1) 4 B. & C. 247.

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lief, and I thought I was doing my duty and consoled myself with that reflection,' and, as the learned counsel says, go out of Court, and remain under that impression to the day of his death, and feeling that before another tribunal, to which he is amenable, he will have a complete defence—still what you have to do is to look at all the circumstances of the case, and consider what is proved here. Ask yourselves, Was this done recklessly? Were these statements made without due and proper enquiry? Was this a course of conduct adopted that we as men of the world would expect to be adopted?

"If you can answer those questions satisfactorily, then you may say, 'We accord to the reverend defendant our belief that he acted *bona fide* and in the honest belief that what he stated was true.' But if you think you would not have acted in that way, and that there is a carelessness, a recklessness, a disregard of the feelings of others, a disregard of that sort of duty which one man owes to another, then I think you will say this was not done *bona fide*, and these statements were not made in the honest belief that they were true. That is good common sense, putting it into English again (as Mr. Willis said very properly, 'Let us have good English about it.') You may, Mr. Molyneux, defend yourself by the fact that these occasions were privileged; but to do so, you must satisfy a jury that what you did you did *bona fide* and in the honest belief that you were making statements which were true."

And again, at the close of the summing up:—

"What you have to consider, then, is really and substantially this—assuming that these occasions were privileged, do you think that the defendant made those statements and wrote that letter *bona fide*, and in the honest belief that they were true—not merely that he believed them himself, but honestly believed them, which means that he had good grounds for believing them to be true. I do not mean to say pigheadedly, pertinaciously and obstinately perhaps persuaded himself of the matter for which

he had no reasonable grounds, and of which you twelve gentlemen would say they were perfectly unjustified. If you think that under these circumstances Mr. Molyneux has taken himself out of the privilege in consequence of the statements not being made *bona fide* and in the honest belief they were true, and that therefore there is what in law is called malice in fact, which I have explained to you, then your verdict will be for the plaintiff."

The jury found a verdict for the plaintiff, with 200*l.* damages.

These passages and the general tenour of the summing up, which was to the same effect, constituted the misdirection complained of.

The defendant moved for a new trial in the Queen's Bench Division, on the ground of misdirection, and that the verdict was against evidence; but the Court refused the rule. The defendant appealed.

Willis and Anderson, for the defendant. —The learned Judge made no clear distinction between malice in law and malice in fact. The passage he cited to the jury from *Bromage v. Prosser* (1) defines malice in law and not malice in fact. The malice which the plaintiff must prove to remove privilege is actual malice, an evil mind—*Wright v. Woodgate* (2). Here there is no extrinsic evidence of malice or of any wrong motive, and the libel itself cannot be considered as such evidence. In *Spill v. Maule* (3) it was held that if the facts were equally consistent with good faith or with bad faith, the defendant is entitled to a verdict. In *Laughton v. The Bishop of Sodor and Man* (4) it is said that some of the defendant's expressions were stronger than was necessary for his defence, yet it was held that there was no evidence of actual malice, and the Court cited with approval the rule in *Somerville v. Hawkins* (5), and

(2) 2 Cr. M. & R. 573.

(3) 38 Law J. Rep. Exch. 138; s. c. Law Rep. 4 Exch. 232.

(4) 42 Law J. Rep. P.C. 11; s. c. Law Rep. 4 P.C. 495.

(5) 10 Com. B. Rep. 583; s. c. 20 Law J. Rep. C.P. 131.

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Whiteley v. Adams (6) follows the same rule. *Child v. Affleck* (7) is a very strong case; there the defendant in giving a character to a servant mentioned reports to the servant's disadvantage which she had heard as to her conduct since the service, and yet the whole communication was held privileged, because made *bona fide*.

[BRAMWELL, L.J.—Assume that the defendant had no reasonable and probable cause for what he said. Is not that *prima facie* evidence of malice?]

No. There must be a real intention to do wrong. As to the absence of enquiries, that cannot be considered in itself evidence of malice. This case is not so strong as *Perryman v. Lister* (8).

Another misdirection on the part of the learned Judge was that he made a confusion between "honest belief" and a belief based upon reasonable grounds.

[COTTON, L.J.—An "honest belief" is an inaccurate expression. I suppose it means a belief which is not induced by intentionally shutting one's eyes to all facts which tell in the opposite direction; but such a belief is no belief at all.]

Again, the learned Judge asked the jury to consider how they would themselves have acted under similar circumstances. That is irrelevant. The question is whether the defendant, as a matter of fact, was acting *bona fide*.—See per *Ellenborough, C.J.*, in *Pitt v. Donovan* (9).

Philbrick and Cuffe, for the plaintiff.—There was evidence of malice, and the direction was practically right. The evidence of malice is this—the story told by the defendant was on the face of it incredible. He took no steps to ascertain its truth by enquiries. He gave a most inaccurate version of the story which had been told to him; and lastly, he still professed a belief in the truth of his assertions, at the trial, upon most inadequate grounds. It is said that

the question how the jury would have acted themselves is irrelevant. But each defendant's own intelligence and common sense cannot be taken as a rule. There must be some common standard, and if a man in defaming another acts upon evidence which ordinary men would consider quite inadequate, the jury may infer that he did not honestly believe what he asserted.

[BRETT, L.J.—If the question is one of intention, why must there be a standard? If you are to judge all by a common standard of action every one who falls below that is a rogue.]

As to "honest belief," Lord Justice Cotton's definition of it may be accepted, except the word intentionally. But here the defendant shut his eyes to all evidence, and came to an unreasonable conclusion.

[BRAMWELL, L.J.—Or rather you say that he never opened his eyes to the facts.]

Yes. He made no enquiries such as it was his duty to make before spreading these reports. Having neglected that duty, he has furnished evidence of malice.

He referred to *Fryer v. Kinnersly* (10), *Whiteley v. Adams* (6), and *Gilpin v. Fowler* (11).

Willis, in reply, referred to *Coxhead v. Richards* (12) and *Hargrave v. Le Breton* (13). He asked for judgment for the defendant instead of a new trial, as there was no evidence of malice, citing Order XL rule 10.

[During the course of the arguments a question was raised as to whether the communication to Mr. Green was privileged.]

BRAMWELL, L.J.—I think this appeal ought to be allowed. I am glad to be able to say that in coming to this conclusion I am satisfied I do not take a different view of the law from that which was taken by Lord Chief Justice Cockburn,

(6) 15 Com. B. Rep. N.S. 392; s. c. 33 Law J. Rep. C.P. 89.

(7) 9 B. & C. 403.

(8) 37 Law J. Rep. Exch. 166; s. c. Law Rep. : Exch. 197; on appeal, 39 Law J. Rep. Exch. 177; s. c. Law Rep. 4 H.L. Cas. 521.

(9) 1 M. & S. 689.

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(10) 15 Com. B. Rep. N.S. 422; s. c. 33 Law J. Rep. C.P. 96.

(11) 9 Exch. Rep. 615; s. c. 23 Law J. Rep. Exch. 152.

(12) 2 Com. B. Rep. 569; s. c. 15 Law J. Rep. C.P. 278.

(13) 4 Burrows, 2423.

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and my brother Mellor, but only a different view of the summing up.

Now I must earnestly agree, if I may say so, with what has been said in the course of the argument, that in dealing with the summing up of a Judge, not out of any fairness to him, but in the interest of the parties, you must not criticise it rigorously; and if you find, in the course of a long, careful and elaborate summing up, an expression which perhaps you would not have used yourself, which you may think wrong if taken separately from the rest of the summing up, I think it would be a most mischievous thing if you were to act on that, and set aside the verdict of the jury on the ground that they might have been influenced by some incautious and possibly inaccurate expression. I think that we ought to take what I may call a liberal view of a summing up, look at the whole of it and see whether upon the whole it afforded the jury a fair guide.

But holding this opinion as strongly as I do, I cannot but come to the conclusion that in this case the question which the learned Judge left to the jury was inaccurately left. I make this remark because a great many of the things which were said by the learned Judge might have been properly said, if I may say so with respect to him, if they had been properly applied, and put in their proper places and used for their proper purpose.

Now the question that he leaves to the jury is this—the learned Judge wrote it down;—he says, “I say the occasions are privileged. Did the defendant write the letter of the 2nd of May and make the statement he did *bona fide* and in the honest belief that what he wrote and said with reference to the plaintiff was true, or was he actuated by feelings of malice towards the plaintiff?” I am of opinion, with great respect to the learned Judge, that that of itself was a misdirection. I apprehend that the proper direction to the jury would have been this:—“These occasions are privileged, and unless you are satisfied that the defendant availed himself of them, or on the occasions spoke *mala fide*, maliciously (with an explanation of what is

meant by that word), then you ought to find your verdict for the defendant.” As it is, the learned Judge leaves it to the jury as though the burden of proof was upon the defendant.

Another objection that I really cannot help making—it may sound hypercritical, but I think it will be found not to be so—is that the learned Judge puts one or the other of two things without putting one thing and its negative; and the jury may have said to themselves, and not unreasonably, “The result of this is that we are to find one or the other of two things. We are either to find affirmatively that the statement was *bona fide*, or affirmatively that it was *mala fide*. If we cannot find the former we must find the latter.” If, however, that were all—if the only fault to be found was with regard to that particular question, and it had appeared in the course of the summing up that the substantial question had been left to the jury, I should not regard the precise words that the learned Judge has written down, and written down for the very useful purpose of there being no mistake as to what he said; as I said before, I will look at the whole summing up. Now, the learned Judge shews, to my mind, what he meant by the statement I have read in almost the concluding words of his summing up. He says:—“What you have to consider, then, is really and substantially this: Assume that these occasions were privileged; do you think that the defendant made those statements and wrote the letter *bona fide* and in the honest belief that they were true?” What does he mean by “honest belief?” He goes on to explain, “Not merely believed them himself, but honestly believed them—I do not mean to say pig-headedly, pertinaciously and obstinately” (that will not do, says the learned Judge) “perhaps persuaded himself of the matter, for which he had no reasonable grounds and of which you twelve gentlemen will say they were perfectly unjustified.” I am not going to comment on the words “honest belief.” It is a very common expression which every one of us makes use of. What, however, the words of the learned

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Judge come to is this, "It is not enough that he should have had an honest belief, but he must have had a reasonable one." I do not desire to go through the rest of the summing up; the passage I have last commented on is at the close of the summing up, and must have been in the minds of the jury when they came to consider their verdict. That, taken with the direction I have before alluded to, gives the general result of the summing up, which is, therefore, on the whole, clearly a misdirection, and there must in consequence be a new trial on that ground.

I must say I am very much confirmed in that belief by thinking that Mr. Willis would be entitled to succeed upon his other ground—namely, that this is a verdict against the evidence. I should have great difficulty in saying that there was not some evidence to go to the jury, not on the ground of any rashness or improvidence or undue credulity or anything of that sort; but I have a doubt and misgiving arising partly from the number of communications that the defendant made, and partly from the fact that in the letter he certainly did use expressions which were stronger than those which had been used to him. Instead of saying that the plaintiff left the army on account of trouble arising from cards, he said he was "expelled," and instead of saying that he had led an "irregular" life at Cambridge, he said he had led a "profligate" life. And here I cannot but think that it is possible, if the case were laid before a jury, that they might have found that the defendant was a person who was indifferent to the character of others, and that he desired to be a person of some consequence and to represent himself as a zealous clergyman anxious for the welfare of the Church and the character of its ministers. I say it is barely possible that the jury may find that the statements were not *bona fide*, if they were left to them. I say barely possible, as I have the greatest misgiving whether there was any evidence at all to go to the jury. My learned brothers, however, have no doubt that there was none. Under such circumstances, I will cer-

tainly not say that there was any; still, I have my misgivings, and I am by no means sure it is not always safer to take the opinion of the jury. We have had strong cases cited to us both ways on that question. I hesitate, therefore, to say that there was no evidence, but I have the very strongest feeling—but with all respect, be it said, to the learned Judges in the Division below, who, I am afraid, entertain a different opinion—that the verdict is against the evidence. I cannot help thinking that if there was anything more than a *scintilla* here, it was what a jury, properly guided and directed, must have disregarded in favour of the positive oath of this gentleman of position and character, who, it was admitted, could not have possibly the least feeling of ill-will or dislike to this particular plaintiff. There must have been something wrong in the summing up for the jury to have found such a verdict as they have.

I therefore think there must be a new trial on that ground also. I may add that I do not think that Order XL. rule 10 is applicable to such a case as the present. I think it is only applicable to those cases where you know all the truth that can be told upon the matter, and I doubt whether it applies to a case like this, where, if the learned Judge had said at the trial, "I think there is no sufficient evidence to go to the jury," further evidence might have been called.

Another difficulty I feel is this: I am by no means sure that the communication to Mr. Green was a privileged one; I have my misgivings about that. I daresay it was perfectly honest on the part of the defendant, but I very much doubt whether, if a man will assist himself by advice from another person, he must not do it in such a way as to do no prejudice to any third person. If he will counsel and guide his curate, he should do it in the same way. The defendant here might have said, "I want your advice upon such and such a subject. There is a certain clergyman, A. B., &c.," mentioning no names; or he might have said, "You shall not preach one of those Lenten Sermons; if you ask me

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why, you must excuse me from telling you, because I may be wrong." Again, suppose that the defendant spoke to Mr. Green merely to unburden his mind, I doubt whether in that case the privilege would attach.

That being so, and, doubting as I do, whether this was in any sense a privileged communication, and whether the question ought not to go to a jury as to whether the defendant was using the occasion for such a purpose as would make it privileged, and doubting also whether there was not some evidence to go to the jury, I do not express any definite opinion as to whether there was any evidence to go to the jury, but my doubts afford a strong reason why Order XL. rule 10 should not be applied.

I think, however, that on both grounds, misdirection and verdict against the evidence, there must be a new trial.

BRETT, L.J.—I am of the same opinion; I think that there was, what amounts in law to a misdirection; that the verdict was against the evidence; and, further, that there was no evidence to go to the jury.

With regard to the alleged misdirection, I do not think that we differ from the Queen's Bench Division in our view of the law, but I think that, whatever the idea Baron Huddleston intended to convey to the jury in his careful, elaborate, and, if I may say so, able summing up, really was, it may have materially misled them, and if it may, that is in law a misdirection.

The summing up is founded on the assumption that the occasions of the alleged slanders and libel were privileged, and that the defendant was therefore excused in that which would otherwise have been actionable, if he used the occasions fairly. Now it is right before criticising the summing up of the learned Judge to state, as clearly as one can, what the law relating to excuse by reason of privilege in cases of libel and slander really is. It is, I apprehend, this:—When a defendant claims that the occasion of a libel or slander is privileged, and when it is held by the Judge, whose duty it is to decide the matter, that the occasion is

privileged, the question arises—under what conditions can the defendant take advantage of the privilege? If the occasion is privileged, it is so for some reason, and the defendant is entitled to the protection of the privilege if he uses the occasion for that reason, but not otherwise. If he uses the occasion for an indirect reason or motive, he uses it, not for the reason which makes it privileged but for another. One, but by no means the only indirect motive which can be alleged, is the gratification of some anger or malice of his own. By malice here I mean, not a pleading expression, but actual malice, or what is termed malice in fact, i.e., a wrong feeling in the defendant's mind. If this malice be the indirect and wrong motive suggested in a particular case, there are certain tests by which its existence may be investigated. Two such tests are these: If a man is proved to have stated what he knew to be false, no one enquires further, everybody assumes thenceforth that he was malicious, that he did so wrong a thing from some wrong motive. Again, if it be proved that out of anger or from some other wrong motive the defendant has stated something as a truth or as true, without knowing or enquiring whether it was true or not, therefore reckless, by reason of his anger or other motive, whether it is true or not, the jury may infer, and generally will infer, that he used the occasion for the gratification of his anger or malice, or other indirect motive, and not for the reason or motive which occasions or justifies the privilege.

These tests have been suggested before, and they were approved by the whole Court of Common Pleas in a case tried before me at Leeds, and I apprehend they are correct.

That being so, I think that Baron Huddleston did not follow these rules and tests, but others. Take his summing up as a whole, as I think we ought, he left the case as if the burden of proving there was no malice lay on the defendant, but if the occasion be privileged, the *onus* of shewing malice is at once thrown on the plaintiff. Further, in order to guide the jury as to what malice was, he read the passage in *Brömage v. Prosser* (1);

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what he read there is not a definition of malice, in fact, at all, but of that malice which is a technical term in certain pleadings, where it simply means "wilfully." It has been held, that in such pleadings the absence of the word maliciously is immaterial if the word wilfully is present—because they are in such pleadings synonymous terms. Then, I think the passage at the end of the summing up is really a recapitulation of the sense of the whole summing up, and might lead the jury to believe that, although they were of opinion that the defendant did believe what he stated, he would not be protected unless his belief was a reasonable one, as distinguished from a pig-headed, obstinate, and insensible one. But the real question, as I have stated, is, whether the defendant did, in fact, believe his statement, or whether being angry or moved by some other indirect motive, did not know, and did not care, whether his statement was true or false. Questions of pig-headedness and obstinacy may be tests as to whether a man really did honestly believe or not, but Baron Huddleston left them as if they were of the essence of the definition of malice.

The direction was therefore wrong if the occasions were privileged. That they were I have a very strong opinion. The only occasion disputed is that of the communication to Mr. Green the curate. I am clearly of opinion that that was privileged. I think that where a clergyman consults his curate as to his conduct in an ecclesiastical matter, the occasion is a privileged one. Mr. Green was called by the plaintiff, and when he explained without contradiction that he believed that the defendant mentioned the matter to him in order to obtain his advice on a church matter, and that he was the defendant's curate, I think that it was the duty of the Judge to tell the jury that the occasion was privileged.

As to the other points, I think that at least the verdict was against the evidence. But I think more, I think there was no evidence fit to be submitted to a jury.

I cannot help thinking that when you consider the oath of the defendant, the fact that he never knew the plaintiff, had

never seen him, and could have no probable indirect motive, the slight discrepancies between the facts narrated to him and those contained in the alleged libel are far too small to be put to a jury for the purpose of asking them whether the defendant was actuated by an indirect motive. There was, therefore, no evidence fit for a jury, and, therefore, if on a new trial the facts remain the same, the Judge's duty will be to direct the jury that there is no case. In this matter, therefore, there has been a miscarriage. But I think that the case is not one in which to apply Order XL. rule 10 and enter the verdict for the defendant, as it does not follow that on a new trial further evidence may not be forthcoming.

COTTON, L.J.—I am also of opinion that this appeal must prevail. I think that the learned Judge at the trial left the case to the jury in such a way not only that their minds would not be directed to what was really the only question after his ruling that these communications were privileged, but it was so put before them that they would be misled as to what the true question was. Now, when once it was laid down and ruled that these were privileged communications, the only question the jury had to consider was whether in fact the defendant acted from a sense of duty, or whether he acted from a motive not being a sense of duty. That, I say, was the question for the jury; and, first of all, I must remark this, that in considering that question the burden of proof was decidedly on the plaintiff. When once it was laid down that these communications were privileged, the presumption was in favour of the defendant that what was done in his privileged communications was not done maliciously; but the plaintiff was at liberty to prove, and if he was to get a verdict after that ruling, it was his business and duty to prove, that there had been actual malice in the sense in which I have referred to in the previous part of my judgment—that is, an acting not from a sense of duty, but from some other indirect motive. That point the learned Judge

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did not, in my opinion, put before the jury as it ought to have been; for I find in the summing up this passage, "You may, Mr. Molyneux, defend yourself by the fact that these occasions were privileged, but to do so you must satisfy the jury that what you did you did *bona fide* and in the honest belief that you were making statements which were true;" and, as I have said, it is for the plaintiff to make out the contrary, and not for Mr. Molyneux to prove that he acted *bona fide*.

The *onus*, then, being on the plaintiff, what is to be considered? It really is only the state of mind of the defendant whether or not there was *mala mens*. In considering that, of course you must look, as you do in ascertaining any other fact (for it must be considered as a fact), at the circumstances. I agree that in considering how far these circumstances do or do not shew the defendant was acting *mala mente* you must apply to them your reason, and must act in dealing with those circumstances as reasonable men do and must do. But still the question is, after all, what is the state of mind of the defendant; and want of sufficient reasoning power or stupidity is not malice, is not of itself acting otherwise than in a *bona fide* sense of duty, and therefore, although it is true that, as here, in considering this case and in arriving at a decision in it you must use your reason, yet the question is not, as suggested by the learned Judge, whether or not the defendant was doing what he could reasonably have considered his duty, or was doing what other men would consider to be a discharge of his duty. Of course, reason enters into the matter in another way, and, therefore, the opinion I express does not in any way enable people to scatter about slander by saying "we thought it matter of duty, and, therefore, we did it." The Judge must say whether or not the communication was privileged—that is to say, whether or not, looking at the circumstances of the case, they are such as that a defendant has reasonably a moral or legal or essential duty to perform in making such a communication. But when it is once laid down

that the circumstances are such that a communication must be privileged, the defendant can be deprived of that only by the plaintiff shewing that he acted from something other than a sense of duty, which, of course, is a question as to the man's mind.

I need not add any more on this part of the case, but I must say something on the question which has been raised as to whether or no the learned Judge was right in ruling that these communications were privileged. The only one as to which any real doubt has been raised is the communication to Mr. Green. Now, in my opinion, that was a privileged communication. I threw out during the course of the argument for Mr. Willis's consideration whether or not it might not be for the jury to say under what circumstances this communication was made, and then it would be for the Judge to rule when those facts were found. Where there was a conflict of evidence as to the circumstances under which the communication was made probably that would be so, I give no opinion on it. But in the present case what the plaintiff's own witness says—for Mr. Green was called by the plaintiff to prove that the communication had been made to him—is that the defendant spoke to him for the purpose of asking his advice. Under those circumstances, I think the learned Judge was quite right in saying that this was a privileged communication. It was a communication made by the vicar of a parish to his curate, with whom he was on intimate terms, with reference to a matter which was very seriously affecting two parishes at least in the neighbourhood, and which might seriously affect Mr. Green if preaching at the church where the plaintiff was curate, or elsewhere, he might be brought into communication with the plaintiff. Therefore, in my opinion, without leaving any question to the jury, the Judge was right in holding that that was within the rule laid down in many cases on privileged communications.

There is only one other point that remains—as to whether or no there was any evidence here to support the

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verdict, supposing it has been properly put to the jury, and what ought to be done. Now, I am of opinion that in this case there was no evidence which, within *Somerville v. Hawkins* (5), "raises a probability of malice, and is more consistent with its existence than its non-existence." You must take into consideration this fact, that the defendant is not brought into connection with the plaintiff before this affair takes place, does not have any difference with him—nothing of the sort—and it is not suggested that there was any such indirect motive which would support the suggestion that he did it for the purpose of shewing that he was a very zealous and active clergyman. I do not think it right to suggest anything of the sort on the present occasion. That being so, do the letters or do any facts shew anything which can be called acting otherwise than in a sense of duty? Possibly there are some things in the letters which go beyond or slightly vary the expressions of the communication made to him by Mr. Bevan; but you must remember that that letter was written some few months after the communication made to him, and must you not fairly attribute, necessarily attribute, those discrepancies to that, and, in the absence of any other proof of *mala mens*, give to the defendant the credit of being desirous to state faithfully what he had been told by Mr. Bevan?

The only other matter which was pressed upon us is the number of persons to whom he made the communication. If, as regards all those communications, the communications were in the nature of privileged communications, that at once explains the number of communications he made—I mean explains them or prevents them from being any evidence of motive other than a sense of duty. One was the clergyman of the parish in whose church the plaintiff was going to preach. He did not see him; he saw his son, which was the same thing. Another was his curate. The other was Mr. Martyn, the rural dean. It appears he went to him to take his advice as to what was to be done. The only other person was Mr. Maud, except Mr.

Maud's solicitor, who must be considered as Mr. Maud. The mere fact of communications being made to various persons, those being all communications made in circumstances which, in my opinion, made the communications privileged, does not afford, in my opinion, any evidence raising a probability of malice. I quite agree that it would not be right for us at once to give judgment for the defendant, and, therefore, I agree with the rest of the Court that this case must go to a new trial.

Appeal allowed.

Solicitors—J. Grout, for plaintiff; Few & Co., for defendant.

1877. { WILSON AND ANOTHER v. THE
Dec. 21. { GENERAL IRON SCREW COL-
LIBRY COMPANY (LIMITED).

Damages—Breach of Contract—Improper Repairs to Steamer—Consequent Non-Employment of Vessel.

In an action against the defendants for breach of contract in improperly repairing a sea-going steam vessel, the plaintiffs claimed damages for the loss sustained by the detention of the vessel by reason of such improper repairs:—Held, on the authority of Hadley v. Baxendale, that they were entitled to do so, the detention of the vessel being the probable result of the breach of contract.

This was an action tried before Cockburn, L.C.J., at the last assizes for the county of Surrey. It was an action brought against the defendants, who are a company engaged in the repairs of steam vessels, for breach of a contract to furnish a new brass liner to the propeller shaft of a steam vessel of the plaintiffs, and a new brass stern brush, the allegation being that these articles were not constructed, or fitted on, in a workmanlike and proper manner, in consequence of which they became useless, and the

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plaintiffs were obliged to replace them, whereby they were not only put to expense but lost the use of the vessel for nine days, and they claimed damages, not only for the new brass liner and brush, but also for the loss sustained by the detention of the vessel.

The jury found for the plaintiffs, as to the machinery being defective, and it was not disputed that judgment should be given for the cost of the new machinery amounting to 157*l.* 15*s.* 6*d.*, but it was contended by the defendants that the plaintiffs were not entitled to recover damages for the loss sustained by the vessel remaining unemployed during the time the new machinery was being made and fitted. Evidence was given by the plaintiffs that the earnings of such a vessel as the one in question would be from 26*l.* to 27*l.* a day. No evidence was adduced to shew that the vessel would have been actually so employed, but no objection was made on that score, the contention of the defendants being based on the general proposition that the damages claimed in this respect were too remote.

The question having been reserved by the learned Lord Chief Justice for further consideration, now came on to be argued.

Day and *Edwin Jones* appeared for the plaintiffs.

Murphy and *J. O. Mathew* were for the defendants.

Cur. adv. vult.

COCKBURN, L.C.J. (after stating the facts as set out above, thus continued).—On consideration I am of opinion that the damages thus claimed are not too remote, but fall within the rule laid down by the Court of Exchequer in *Hadley v. Bazendale* (1). It is said there, "When two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising natur-

ally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." It appears to me that when machinery is ordered for a sea-going steam vessel it must be in the contemplation of the parties that the use of the thing ordered is to enable the vessel to resume her usual employment, and that in the event of the machinery being defective the defect will have to be made good before the vessel can again be employed, and that the detention of the vessel will be the probable result of the breach of contract. I therefore hold that the plaintiffs are entitled to recover the loss sustained by the detention of the vessel amounting to 234*l.* as well as the cost of replacing the machinery. This judgment will therefore be entered for 391*l.* 15*s.* 6*d.*

Judgment for the plaintiffs.

Solicitors—Lowless & Co., for plaintiffs; Hollams, Son & Coward, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE GUARDIANS OF THE POOR OF
Jan. 24. { BARTON REGIS UNION (*appellants*)
v. THE CHURCHWARDENS, ETC., OF THE PARISH
OF LIVERPOOL (*respondents*).

Poor Law — Settlement — Order of Removal quashed — Abolition of Derivative Settlements — Pending Order of Removal — Divided Parishes, &c., Act (39 & 40 Vict. c. 61), ss. 35, 36.

[For the report of the above case, see 47 Law J. Rep. M.C. 62.]

(1) 9 Exch. Rep. at p. 354; s.c. 23 Law J Rep. Exch. at p. 182.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1877. } JOHNSON v. THE CREDIT
 June 9, 27, 29. } LYONNAIS; JOHNSON v.
 Dec. 1. } BLUMENTHAL.*

Factors Acts—Agent Entrusted with the Possession of Goods—What Amounts to an Entrusting—Goods left in Possession of Vendor after Sale—Negligence—Estoppel—6 Geo. 4. c. 94. s. 2.

The plaintiff bought tobacco of H., a tobacco merchant and broker. The tobacco was left in a bonded warehouse, and the dock warrants were left in the possession of H., and no entry of the plaintiff's name as owner was made in the books of the dock company. H. afterwards, in fraud of the plaintiff, obtained advances by pledging the tobacco to the defendants, who took the dock warrants and obtained fresh ones from the dock company:—

Held, that the plaintiff had not entrusted H. with the documents of title as the factor or agent within the meaning of 6 Geo. 4. c. 94. s. 2, and that the plaintiff had not been guilty of such negligence in leaving the dock warrants in the hands of H. as to disentitle him to recover the value of the tobacco from the defendants.

[See now Stat. 40 & 41 Vict. c. 39.]

These two actions were brought by the plaintiff, the owner of certain tobacco, against the defendants, to whom portions of the tobacco had been respectively pledged by one Hoffmann.

Hoffmann was a tobacco merchant and broker. On the 3rd of December the plaintiff bought from him the tobacco in question, which was then lying in bond at the London and St. Katharine's Dock.

The plaintiff left the dock warrants in the hands of Hoffmann, who afterwards fraudulently and without any authority from the plaintiff pledged part of the tobacco to the defendants the Crédit Lyonnais, and part to the defendant Blumenthal, handing over to them the dock warrants, which were cancelled and others issued in the names of the defendants.

The action against the Crédit Lyonnais was tried before Denman, J., without a

* *Coram* Cockburn, L.C.J.; Bramwell, L.J.; and Brett, L.J.

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jury, and the learned Judge, having power to draw inferences of fact, held that Hoffmann was not entrusted with the tobacco as factor or agent for sale, but merely as agent to clear and forward it, and had therefore no authority to sell or pledge it, and also that the plaintiff had not by the course of business between him and Hoffmann held the latter out as ostensibly having power to pledge. The learned Judge therefore gave judgment for the plaintiff.

The action against Blumenthal was tried before Field, J., and a jury. His Lordship asked the jury whether authority or ostensible authority had been given by the plaintiff to Hoffmann to deal with the goods as owner, and on the jury answering in the negative, gave judgment for the plaintiff.

The defendants appealed, and the facts and the questions of law raised in the two cases being precisely similar, they were ordered to be argued together.

The facts are stated in the judgment of the Lord Chief Justice, where the material sections of the Factors Acts are cited.

Benjamin (Watkin Williams and Woolf with him), for the Crédit Lyonnais Company.—The two questions which arise here are, first—Are the transactions of the defendants protected by the Factors Acts? And second, has the plaintiff allowed Hoffmann so to deal with the goods and documents of title as to disentitle him to recover from the defendants? First, the Factors Acts do apply, and the defendants are therefore entitled to the judgment of the Court. It is not necessary that factor or agent should be intrusted with the goods or documents of title for the purpose of sale, and the defendants are protected by the fact that Hoffmann was intrusted with the documents of title within the meaning of 5 & 6 Vict. c. 39. Even if the plaintiff had been induced by fraud to trust Hoffmann as an agent, still a pledge by such an agent would be valid—*Baines v. Swainson* (1). The decision in *Cole v. The North Western Bank* (2) turned on the facts of that case, and the

(1) 4 B. & S. 270; s. c. 32 Law J. Rep. Q.B. 281.

(2) 43 Law J. Rep. C.P. 194; in error, 44 Law J. Rep. C.P. 233; s. c. Law Rep. 9 C.P. 470; s. c. Law Rep. 10 C.P. 354.

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Judges in both Courts found that Slee was not intrusted as an agent. Moreover, Slee carried on two kinds of business. In the transaction in question Hoffmann was only acting as a broker.

Secondly, the object of the Factors Act is to put the factor in the same position as the owner would be at common law, and independently of the Factors Act the plaintiff cannot recover, as he has put himself in the position described by Lord Cairns in *Goodwin v. Roberts* (3). He has in fact by his conduct made a representation that Hoffmann was his agent to deal with his goods, and therefore he is now estopped from defeating the title of the defendants. If the real owner of goods enables another to hold himself out as having the property in the goods, a sale by such person will bind the true owner—*Dyer v. Pearson* (4). The plaintiff here left with Hoffmann documents purporting to transfer the goods, and he cannot now deny they did transfer them—*Eumball v. The Metropolitan Bank* (5). He cited also—*McEwan v. Smith* (6) *Higgins v. Burton* (7), *Hayman v. Flewker* (8).

Philbrick (Woolf with him), for the defendant Blumenthal.—The plaintiff trusted Hoffmann to deal with the goods according to his rights. He *de facto* entrusted the goods to him, and the transaction is protected. Hoffmann parted with the goods in an ordinary mercantile transaction. The object of the Factors Act is to protect those who deal with factors in the ordinary course of business—*Baines v. Swainson* (1). Hoffmann is a person entrusted with the goods within the meaning of 6 Geo. 4. c. 94. s. 2, which was extended by the later Act of 5 & 6 Vict. c. 39. s. 1. In *Fuentes v. Montis* (9) the agent had

been entrusted up to a certain time with wine for sale. After that time the employment was expressly revoked, but the agent refused to give up the documents. Afterwards he sold or pledged them, at a time when he was in no sense entrusted. That was the ground of the decision. See the judgment of Willes, J., in the Court below.

[BRETT, L.J., referred to *Cole v. The North-Western Bank* (2).]

In that case the agent was not an agent for sale, and was not a person who would sell the goods in the ordinary course of his business. A man who has the goods merely for the purpose of delivering them is not an agent entrusted within the meaning of the Acts. But if the owner leaves them for a long time in another man's hands for his own convenience, then there is a sufficient agency.

[BRETT, L.J.—Suppose you put the goods in a man's hands, not knowing that he is a factor?]

It is immaterial what may be present to the mind of the person who entrusts.

[BRAMWELL, L.J.—Then you strike out the word entrusted.]

The agent has possession with the owner's consent.

[BRETT, L.J.—Is not the question decided in the wharfinger's case, *Monck v. Whittenbury* (10)?]

That case was remarked on in *Baines v. Swainson* (1), where the right rule is laid down. Crompton, J., says, referring to *Monck v. Whittenbury* (10), "It was said the Act did not include a person in the situation of wharfinger any more than a carter, a warehouseman, a packer or persons of that kind who may be sometimes called agents. And in *Lamb v. Attenborough* (11) we held that the statute did not apply to the agency of a servant, but there must be the relation of principal and agent, and perhaps it does not apply in every such case. My notion is that it does not apply to the relation of bailor and bailee where a person obtains money on the deposit of his goods on pledge. I think the right distinction was taken by Wigram, V.C., in

(3) 46 Law J. Rep. Exch. 748; s. c. Law Rep. 1 App. Ca. 476.

(4) 3 B. & C. 38.

(5) 46 Law J. Rep. Q.B. 346; s. c. Law Rep. 2 Q.B. Div. 194.

(6) 2 H.L. Cas. 309.

(7) 26 Law J. Rep. Exch. 342.

(8) 13 Com. B. Rep. N.S. 519; s. c. 32 Law J. Rep. C.P. 132.

(9) 37 Law J. Rep. C.P. 137; in error 38 Law J. Rep. C.P. 95; s. c. Law Rep. 3 C.P. 268; 4 C.P. 93.

(10) 2 B. & Ad. 484.

(11) 1 B. & S. 831; s. c. 41 Law J. Rep. Q.B. 31.

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Wood v. Bowcliffe (12), where he said the Act does not apply to other than mercantile transactions."

Woolf was then heard for both defendants.—*Blackburn, J.*, in *Cole v. The North-Western Bank* (2), p. 362, shews that the Factors Acts are partly in confirmation and partly in extension of the law previously existing; and the effect of them is that where a man is allowed to appear as the owner, the apparent owner is to have, as regards third persons, all the powers of a real owner. This was the principle acted on in *Pickering v. Bush* (13) before the passing of the Acts, and also in *Boyson v. Coles* (14). The 6 Geo. 4. c. 94. s. 2, was an extension of the law, and *Phillips v. Huth* (15) was decided on that section, and 5 & 6 Vict. c. 39. s. 4, remedies the defect there shewn, and covers the present case, so that here there is what is equivalent to an entrusting within that enactment. In *Vickers v. Hertz* (16), Lord Westbury shews what such "entrusting" is. In this case Hoffmann was entrusted with the goods, and thus got possession of the documents, and the transaction is protected whether the defendants dealt with Hoffmann as agent or as owner. It is enough that the goods have been entrusted to an agent who, as part of his business of agent, carries on the business of factor. *Wightman, J.*, in *Baines v. Swainson* (1) gives the three requisites for protection:—1. That the goods should be entrusted to an agent who carries on the business of factor. 2. That the sale should be in the ordinary course of business. 3. That it should be in a mercantile transaction. All these requirements are satisfied here.

Thesiger, for the plaintiff.—Hoffmann sold these goods as his own, and is not an "agent entrusted" within the meaning of 5 & 6 Vict. c. 39, and the documents which he held are not negotiable instruments. The evil intended to be remedied by the statutes was that the common law

only protected sales, but not pledges. The 4 Geo. 4. c. 83, dealt solely with shipments, and gave to consignees from abroad a lien for advances as against the real owners of the goods; and section 2 protects the person to whom the consignee sells to the extent of the consignee's lien. That Act extends the common law as laid down in *Pickering v. Bush* (13). Then comes 6 Geo. 4. c. 94, by which several alterations were made—1. It extended to mercantile goods and indicia of title of all kinds. 2. It protected cases where the purchase was made from a factor, though known to be a factor. 3. It gave a general protection to the pledgee where goods had been pledged, where there was no notice of agency. That enactment is commented on in *Cole v. The North-Western Bank* (2), at p. 367. Then 5 & 6 Vict. makes further alterations, rendered necessary by the decisions in *Phillips v. Huth* (15) and *Hatfield v. Phillips* (17). In section 1 the protection is extended to cases where the pledgee knew the pledger was an agent, and by section 4 documents of title are put on the same footing as goods. It makes the man who gets the documents of title through the possession of other documents, a person entrusted with the goods, and enlarges the number of documents of title. But it leaves untouched the existing law as to who is the factor or person to be entrusted. And the Legislature had no intention of making dock warrants negotiable instruments. There must always be an actual entrusting by the owner, and the goods must be entrusted to the agent, *qua* agent, either absolutely for sale, or in some way in connection with sale. The idea that the fact that a man is a factor, if he is not entrusted as a factor, makes any difference is incorrect. See the judgments of *Crompton, J.*, and of *Wightman, J.*, in *Baines v. Swainson* (1). See also per *Willes, J.*, in *Fuentes v. Montis* (9) at p. 277; he assents to the doctrine of *Baines v. Swainson* (1). The case of *Vickers v. Hertz* (16) is not really against this view. As to the remarks of Lord

(12) 6 Hare, 191.

(13) 15 East 38.

(14) 6 M. & S. 14.

(15) 6 Mce. & W. 572; s. c. 10 Law J. Rep. Exch. 65.

(16) Law Rep. 2 Sc. App. 113.

(17) 9 Mce. & W. 647; s. c. 11 Law J. Rep. Exch. 425.

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Westbury in that case, which are relied on by the other side, they are explained by Blackburn, J., in *Cole v. The North-Western Bank* (2), p. 374. No ostensible authority was given to Hoffmann to sell, therefore there is no estoppel, which can only exist where a representation is made, either by words or conduct, with the intention of its being acted on, and it is acted on.

[COCKBURN, L.C.J.—Add to that the doctrine of standing by.]

In *Swan v. The North British Australian Company* (18) an attempt was made to enlarge the doctrine of estoppel, but unsuccessfully.

[BRETT, L.J., referred to *Carr v. The London and North Western Railway Company* (19).]

The doctrine of estoppel is founded on the existence of *mala fides*. A mere omission of an act does not create it—*Dyer v. Pearson* (20). Also the negligence must be the proximate cause of the loss—*Young v. Grote* (21) and the judgment of Mellor, J. (p. 274), and of Blackburn, J. (p. 276), in *Swan v. The North British Australian Company* (18). The facts in *MacCombie v. Davies* (22) are very like the present case. That case was decided on the common law, and the retention of the goods by the pledgee was held a conversion. There is no suggestion that it is usual for purchasers in a case like this to protect themselves by taking delivery orders. In fact, the custom proved was the other way. As to the effect of custom, see *Priestly v. Pratt* (23). *Goodwin v. Roberts* (3), cited by Mr. Benjamin on the question of estoppel, is distinguishable, for there the scrip which was dealt with contained on the face of it an intimation that the holder would be entitled to the value.

Woolf replied.

Cur. adv. vult.

(18) 32 Law J. Rep. Exch. 273; s. c. 2 Hurl. & C. 176.

(19) 44 Law J. Rep. C.P. 109; s. c. Law Rep. 10 C.P. 307.

(20) 3 B. & C. 38.

(21) 4 Bing. 253; s. c. 5 Law J. Rep. (o.s.) C.P. 166.

(22) 6 East, 538.

(23) 36 Law J. Rep. Exch. 89; s. c. Law Rep. 2 Exch. 101.

On the 1st of December the following judgments were delivered:—

COCKBURN, L.C.J.—These cases come before us on appeal. The first from a judgment of Mr. Justice Denman, after a trial before himself without a jury; the second from a judgment of Mr. Justice Field after a trial with a jury.

The facts were the same in both actions, as well as the questions of law arising thereupon. The facts were as follows:—

One Hoffmann, a broker in the tobacco trade, but who also dealt in tobacco as an importing merchant, having imported a quantity of that article, left it in bond in the warehouses of the St. Katherine's Dock Company, receiving the usual dock warrants, and the tobacco was entered in the books of the company as that of Hoffmann.

This tobacco Hoffmann sold to the plaintiff, who carried on the business of a tobacco manufacturer at Bolton, in Lancashire, but it not suiting the plaintiff's purpose to take the tobacco out of bond, which would have involved the necessity of paying the duty before he wanted the tobacco, he did what it appears is frequently, but not always, done in the tobacco trade by purchasers leaving tobacco in bond, in order to avoid the immediate payment of the duty, he left the tobacco in the possession of Hoffmann, and with it the dock warrants, and took no steps to have any change made in the books of the Dock Company as to the ownership of the goods. According to the plaintiff's statement, he was ignorant of the fact that, when goods are thus deposited in the warehouses of the Dock Company, dock warrants are issued to the party depositing, which represent the goods, and are capable of being transferred, so as to enable the transferee to obtain possession of the goods.

Being thus the ostensible owner of the tobacco, Hoffmann fraudulently obtained advances, on the pledge of a portion of the tobacco, from the *Crédit Lyonnais Company*, the defendants in one of these actions, and from Blumenthal, the defendant in the other; both these parties, acting in perfect good faith, under the

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belief, induced by his being in possession of the goods, and of the indicia of ownership, that Hoffmann was the owner of the tobacco.

Each of the defendants, on completion of the transaction, proceeded to do that which as it seems to me, the plaintiff as a matter of common prudence should have done. They caused the entry of the goods to be transferred from the name of Hoffmann to their own in the books of the Dock Company, and took fresh dock warrants from the company giving up the former ones. The transactions between Hoffmann and the defendants were wholly unknown to the plaintiff. He further stated, as I have already mentioned, and the statement does not appear to have been questioned, that he was unaware of the practice of giving dock warrants as evidence of the title of the party to whom they are given, or of the transfer of such warrants on alienation of the property.

Upon this state of facts Mr. Justice Denman, in the action against the *Crédit Lyonnais Company*, gave judgment in favour of the plaintiff for the value of the tobacco pledged to the defendants.

In the action against *Blumenthal*, Mr. Justice Field put the question to the jury, whether authority, or ostensible authority, had been given by the plaintiff to Hoffmann to deal with goods as owner or as agent to pledge them; and, on the jury answering in the negative, gave judgment in a like manner for the plaintiff.

Two questions are raised by the defendants, the first, whether the case comes within the *Factors Acts*; the second, whether the conduct of the plaintiff, in leaving the indicia of title in Hoffmann's hands, and thus enabling him to obtain money on the security of this tobacco, has been such as to disentitle him to recover its value from the defendants.

Upon the first question, namely, whether the case comes within the *Factors Acts*, I entertain no doubt, I consider it to be settled by the authority of decided cases; but I may add that if the question had presented itself now for the first time, it being clear to my mind that Hoffmann was not intrusted with these goods, or

with the documents of title relating to them as agent to sell or consign, or indeed as agent in any sense, but stood only in the position of a paid vendor remaining in possession of the things sold till it suited the convenience of the buyer to accept delivery, I should have had no hesitation in arriving at the same conclusion.

The other question, namely, whether the plaintiff, having not only by leaving the goods in the possession of Hoffmann, but also by leaving with the latter the indicia of ownership, enabled him to dispose of the goods, as apparent owner, to the defendants, can recover the value from them, is a far more difficult question, and one on which I have entertained considerable doubt.

That, Hoffmann having been thus (by being left in undisturbed possession of the goods and the indicia of ownership, there having been nothing to raise a doubt as to the latter, or any means open to defendants to ascertain the fact) enabled to defraud one of two innocent parties, when the question arises as to which of these the loss should fall upon, in reason and justice the loss ought to fall on him who might have prevented, and, as a matter of common prudence, ought to have prevented the possibility of the fraud, is what I cannot bring myself to doubt. And I am strongly fortified in this view by the fact that, as soon as the decisions here appealed from had been made public, the Legislature, by statute (40 & 41 Vict. 39), at once proceeded to settle the question in that view in the future by applying the protection given by the *Factors Acts* to persons acquiring title from agents, to innocent parties purchasing or making advances in such cases as the present. Whether, prior to and independently of such legislation, the law as it stood would have afforded protection, is a different matter. I have come, though I confess with reluctance, to the conclusion that, as the law stood, the action could not be resisted, and consequently that this appeal must be dismissed.

The case for the plaintiff rests on the general proposition of law, which, as a general proposition, cannot be contested,

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that the mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter may have been.

The defendants, on the other hand, insisted on two grounds as taking the case out of the general rule. First, that the plaintiff, by leaving the possession of the goods and the indicia of property in the hands of Hoffmann, had enabled the latter to pledge the goods to them, and was, therefore, estopped from denying the right of Hoffmann so to deal with them. Secondly, they contended that even if the property in the tobacco still remained in the plaintiff so as to entitle him to recover its value, on the other hand, the plaintiff had, in the conduct in question, been guilty of negligence by which defendants had been induced to deal with Hoffmann as the owner of the tobacco, and to pay him for it, which would entitle them by way of counter-claim to recover back, or, what would come to the same thing, to set off the amount in the present action. There have, no doubt, been decisions which would, at first sight, appear to favour the first of these contentions; but they are, I think, distinguishable from the case before us.

In *Pickering v. Busk* (13), the purchaser of hemp lying at a wharf had himself directed the hemp to be transferred in the wharfinger's books into the name of the broker who had bought it for him. It was held that from this an authority to the broker to sell might be implied, though no such authority had in fact been given, and that his sale and receipt of the money, though fraudulent as to his principal, nevertheless bound the latter. "The sale," said Lord Ellenborough, "was made by a person who had all the indicia of property, the hemp could only have been transferred to his name for the purpose of sale, and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he

should have placed it in the wharfinger's books in his own name."

Bayley, J., says, "It may be admitted that the plaintiff did not give the broker any authority to sell. But an implied authority may be given, and if a person puts goods into the custody of a vendor, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them." This language might appear applicable to the present case, but there is a material difference between the two cases. In *Pickering v. Busk* (13) the purchaser had himself expressly directed that the goods should be entered in the broker's name. In the present case the plaintiff has simply remained passive; he has left things as he found them at the time of his purchase.

The same observation will apply to the case of *Boyson v. Coles* (14), a case which arose prior to the passing of the 6 Geo. 4. c. 94, and in which goods had been pledged by a person alleged to have been a factor, but in which the defence was that the plaintiff had dealt with the broker as purchaser, or, at all events, by the documents which had passed between them, had enabled him to appear as such to others. Lord Ellenborough left it to the jury whether the plaintiff had dealt with the parties pledging as purchasers of the goods, or as brokers, directing them that, if as brokers, the latter had no right to pledge the goods to the defendant, unless the jury considered that the plaintiffs had armed them with such indicia of property as to enable them to deal with it to others as their own. A new trial was applied for, but this ruling was not quarrelled with. On the argument on the rule Abbott, J., approves of the question left to the jury, one of them, he says, being whether the plaintiffs had by their own acts enabled Coles Brothers (the brokers) to hold themselves out as the purchasers, and then to induce the defendant to advance his money on the credit of the goods.

In *Dyer v. Pearson* (20) where a similar question arose, Abbott, C.J., told the jury that, "if a man takes upon himself to purchase from another under circumstances which ought to excite his sus-

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picion, and to have induced him to distrust the authority of the person selling, such a purchaser could not hold the property if it afterwards turned out that the person from whom he bought had no authority to sell; and he left it to the jury to say, whether Clay, the defendant, had purchased under circumstances which would induce a reasonable, prudent and cautious man to believe that Smith, of whom he purchased, had authority to sell. If they thought that he had purchased under such circumstances, they were to find for the plaintiffs." This ruling was held to amount to misdirection, and a new trial was granted. "The question," says the Chief Justice, "which I left to the consideration of the jury, does not appear to me to have embraced the whole case. The general rule of the law of England is, that a man who has no authority to sell, cannot, by making a sale, transfer the property to another. There is one exception to that rule, viz., the case of sales in market overt.

"This was not a sale in market overt, and therefore does not fall within the exceptions. Now this being the rule of law, I ought either to have told the jury, that even if there was an unsuspecting purchase by the defendants, yet as Smith had no authority to sell, they should find their verdict for the plaintiffs, or I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property, for if the real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of property, then perhaps a sale by such a person would bind the true owner. That would be the most favourable way of putting the case for the defendant, and that question, if it arises upon the evidence, ought to have been submitted to the jury."

It is to be observed that the Chief Justice here states the proposition in anything but positive terms. No further mention of the case appears in the reports, and we are consequently not informed what became of it on the new trial, the rule for which was made absolute. Mr.

Chitty, however, in his work on Contracts, 6th ed., p. 344, referring to these cases, writes thus:—"It is said, if the real owner of goods suffer another to have possession thereof, or of those documents which are the indicia of property therein, thereby enabling him to hold himself forth to the world as having not the possession only but the property, a sale by such a person to a purchaser without notice, will bind the true owner." But he adds this qualification. "But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who, from the nature of his employment, might be taken *prima facie* to have had the right to sell." The law, as thus stated, was approved by the Court of Exchequer in *Higgins v. Burton* (7). But the present question was not before the Court in the latter case, the question there being whether a person who had bought goods in the name of A., fraudulently represented himself as A.'s agent, and had thus obtained possession of the goods, could pledge them so as to give a title to the pledgee as against the real owner. And it was held, following *Kingsford v. Merry* (24), that he could not.

Sitting here in a Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this has been so, there would have been, as it seems to me, no necessity for giving effect by statute to the unauthorised sale of goods by a factor.

The doctrine established in *Pickard v. Sears* (25), and *Freeman v. Cooke* (26), and the subsequent cases which have proceeded on the same principle, carry the case no further. In all the cases

(24) 11 Exch. Rep. 577; s. c. 25 Law J. Rep. Exch. 166.

(25) 6 Ad. & E. 469.

(26) 2 Exch. Rep. 654; s. c. 18 Law J. Rep. Exch. 114.

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decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him. Here it is clear that the plaintiff had no knowledge whatever of the advances obtained by Hoffmann on the security of the goods, or even of the existence of the dock warrants which made him appear to be the owner. It would be to carry this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interest, to invade or encroach upon his rights, in the absence of knowledge on his part of anything done from which his assent to it could reasonably be implied.

The defence founded on the allegation of negligence, remains to be considered. That the plaintiff, in omitting to have the goods transferred to his own name, and to have the dock warrants delivered over to him, was wanting in common prudence; in other words, was guilty of negligence, I cannot bring myself to doubt. The legislature must have proceeded on the view that there is default in the owners in such a case (and I am strongly confirmed in this view by the passing of the recent statute), and it appears to me no answer to say that he was ignorant of dock warrants being issued in respect of goods warehoused in the docks. A man who deals in a given market, should make himself acquainted with the course of business prevailing there. Moreover, he knew that the tobacco was warehoused in the bonded warehouse of the company. He must have known that the goods would be entered in the books of the company as the goods of Hoffmann. He should at least have taken care to have them transferred into his own name. It is no answer, as it seems to me, to say that it is common in the trade for buyers of tobacco to leave the goods and the indicia of title in the hands of the seller, and that hitherto no dishonest advantage has been taken of the opportunity thus afforded for fraud. The mercantile community are, as a body, honourable men; but experience unfortunately tells us that frauds occasionally happen where

they might least be expected. The case of *Goodwin v. Roberts* (3), which was recently before the Court, affords an example, and other instances of a similar character occur in the books. In the majority of instances this occurs, as in this case, from the carelessness of those concerned, and the omission to take the precautionary measures which the regular course of business would prescribe. This manner of proceeding is not the less imprudent and negligent because a number of persons, confiding in the honesty of those with whom they have dealings, think proper, in order to save themselves trouble, to expose themselves to a like risk.

Evidence was gone into at the trial, of what was called the practice in the tobacco trade of following the course pursued in the present instance by the plaintiff, namely, that of leaving, on the purchase of tobacco in bond, the tobacco and the dock warrants in the hands of the seller, whether with a view of meeting the allegation of negligence, or as a substantive answer in point of law to the defendant's claim, as amounting to a usage of trade, it may be difficult to say. If the former, I have given the answer which occurred to me; namely, that that which would be negligence in one, does not become the less so because others are equally negligent. If the latter, two answers present themselves.

First, a practice, to amount to a usage of trade, must be general and uniform. But of this the evidence falls altogether short. The plaintiffs' witnesses called to prove the practice, while they asserted that the practice was common, fully admitted that there were many houses in the trade who, when they bought tobacco under similar circumstances, insisted on having the indicia of title made over to them.

Nor did these witnesses for a moment deny that a purchaser was entitled to have such a demand complied with. This being so, any assertion of usage of trade necessarily fails. But besides this, a usage of trade, like any other custom, to be valid, must be reasonable. But a usage cannot be said to be reasonable which enables a dishonest vendor, through the negligence of his vendee, to defraud

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a second purchaser, or pledgee, by a pretended sale or pledge. But whether this negligence of the plaintiff will, under the circumstances, give the defendant any ground of complaint which can be enforced in point of law, is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. The law is, in my opinion, correctly stated by Blackburn, J., in *Swan v. The North British Australian Company* (18), where, after referring to what was said by Parke, B., in *Freeman v. Cooke* (26), namely, that "negligence to have the effect of estopping the party, must be the neglect of some duty cast upon the person guilty of it," he goes on to say, "This, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt." The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is obviously applicable here.

The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least, no duty which the law can recognise—either as individuals or as members of the general public.

The case of *Young v. Grote* (21) is, as was pointed out in the case just referred to, plainly distinguishable. For there, there was a duty on the part of the customer to use due care in drawing the cheque, so as to protect the banker against the risk of forgery in the amount for which the cheque was drawn.

This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counter-claim for the money which they

have advanced to Hoffmann on the security of the goods.

I am, therefore, of opinion that the judgment of Mr. Justice Denman, in the case of *Johnson v. The Credit Lyonnais Company* should be affirmed.

With regard to the judgment of Mr. Justice Field in *Johnson v. Blumenthal*, I feel bound to say that the question put to the jury, and the answer given to it, do not appear to me to be conclusive of the case, or sufficient to found the judgment; and if there were any material facts in dispute, I should think it necessary to send the case back to a new trial. But, as upon the admitted facts, the plaintiff is, for the reasons I have given, in my opinion entitled to judgment, a new trial would be useless and unnecessary.

In this action, therefore, I think the judgment should be affirmed, and the appeal dismissed.

BRAMWELL, L.J.—In these cases I agree in the judgment of my Lord Chief Justice and my brother Brett; but I propose to add some remarks of my own, for this reason:—It has been laid down that the "entrusting" under the Factors Acts must be to a factor or agent as such, but the language of the statute has not, as it seems to me, been critically examined to shew that that is the meaning till Mr. Thesiger did so in these cases. The following observations are for the same purpose. On examination it will be found that the defence on those acts in these cases turns on the 2nd section of 6 Geo. 4. c. 94. For 5 & 6 Vict. c. 39. s. 1, so far as these cases are concerned, only repeals the proviso in the 2nd section of 6 Geo. 4. as to the pledgee not having notice. But to understand this 2nd section of 6 Geo. 4. and shew that it alone could apply to these cases, it is necessary to examine several of the clauses of the statutes called Factors Acts. The 1st section of the first of them (4 Geo. 4) enacts that any person entrusted for the purpose of sale with any goods, and by whom they shall be shipped, or when shipped in his name by any other person, shall be deemed to be the true owner so far as to entitle the consignee to a lien thereon for advances. It is manifest that this only applies to

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cases where the person in whose name the goods are shipped is entrusted with them for the purpose of sale. And it only applies to advances by consignee to the person in whose name goods are shipped. The 2nd section says that any person may make advances on goods or bills of lading to consignees thereof, but only to the extent of the interest of the consignee. This section, then, would enable a consignee who had a lien for advances by Common Law, or by the 1st section, to give a right to the same extent to another. But as far as the statute is concerned, it only confers a title to a consignee whose goods are *entrusted to a person for sale and shipped in his name*.

The next Act is the 6 Geo. 4. c. 94. By section 1, "any person entrusted, for the purpose of consignment or of sale, with goods which he has shipped in his own name, is to be deemed the true owner—with the same powers as in the former statute. Here also there must be an entrusting for sale or consignment. But the section contains a further provision with language different from the first Act: "any person in whose names goods shall be shipped by any other person shall be deemed, &c." This does not say in words "any person entrusted for sale," but it must mean so; because it is impossible to suppose that there was to be a difference between a case where goods are shipped by A. in his own name, and one whose goods are shipped in A.'s name by B. It is also obvious that, if taken literally, stolen goods might be shipped in somebody's name by the thief, so as to give that person a right in respect of advances. But the matter is concluded by the last proviso in that section which supposes that it only applies "where goods are entrusted for the purpose of consignment or sale." The only difference then between this section and the 4 Geo. 4 is, that the latter Act includes the case of goods entrusted for consignment, in addition to that of goods entrusted for sale. The 2nd section of 6 Geo. 4, which is that on which this case, as far as the Factors Acts are concerned, depends, has a more extensive operation than the previous provisions. They only apply to consignees under shipment. This section applies to

all cases where persons are entrusted with and in possession of bills of lading, warrants, certificates which suppose a right to the possession of goods. It does not mention "goods" themselves. It provides that it shall not apply where by the document or otherwise there is notice that the person entrusted is not the true owner of the goods, so that possession by A. of a bill of lading to the order of B., would not be within the section. It says that the person entrusted shall be deemed the true owner of the goods, so as to give validity to contracts for sale and disposition or pledge thereof. It does not say "factor" or "agent" entrusted, but "person." What is the "entrusting" and who is the "person" within this section? Must the entrusting be to a person who is factor or agent, and to him to act as such factor or agent, or does it apply wherever possession of the document is given to another by the person entitled? Arguments can be found to shew it does. I believe the documents specified in the statute always mention the name of the person entitled, so that if the true owner has endorsed the document, or allowed it to be made out in another's name, there is ground for saying that he is *by his own act* no longer the true or apparent owner of the goods, or has given the power, or apparent power, of disposing of these goods to the holder of the warrant. The following considerations, however, seem to me conclusive the other way:—As I said before, "goods" are not mentioned. In the 3rd section, however, goods only are, and not bills of lading and other documents. It does seem impossible to suppose it was meant that entrusting a clerk or other person with bare possession of a bill of lading should enable that person to dispose of the goods mentioned in it, and that entrusting with possession of a document of title would have greater effect than entrusting with goods. Further, by 6 Geo. 4. sec. 1, consignees can pledge bills of lading, but only where entrusted therewith for sale or consignment. It cannot be, then, that section 2 means that any person entrusted with the possession merely, can pledge them. Further, by section 4, persons may buy goods of known agents entrusted therewith, and

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pay them in the ordinary course of business, and without notice of want of authority. This would also seem to be the law, independently of statute. But the "person" who can pledge must surely be a person of the same character as the one that can sell, namely, an agent. Section 5 enacts that it shall be lawful to accept and take goods or "any such document as aforesaid" in deposit or pledge from any such factor or agent, though known to be such, but so as to get no greater right than could have been enforced by such factor or agent. In this section "factor" is mentioned for the first time, "agent" occurred in the preceding section. It goes further than section 2 of the former Act in the following particulars:—It is not limited to consignments and bills of lading, nor to cases where there is no notice that the pledgor is an agent. What is the meaning of such "factor" or "agent," factor not being previously named? The 2nd section of 4 Geo. 4 is unrepealed. It cannot be that the consignee must be entrusted for sale, but the factor need not be. It seems to follow, then, that such factor or agent as is mentioned in section 5 of the 6 Geo. 4, is a factor or agent entrusted for consignment or sale. This is confirmed by section 6, which says that the true owner may recover his goods from his factor or agent before the same are sold or pledged. This supposes that "person entrusted" in section 2 means as factor or agent, and agent in the nature of factor. Again, section 7 recites, "it is expedient to prevent the improper deposit or pledge of goods entrusted or consigned as aforesaid to factors or agents," and then enacts that if any such factor or agent shall deposit or pledge any goods entrusted or consigned as aforesaid to his care or management, or any of the said documents so possessed or entrusted as aforesaid in violation of good faith, he shall be guilty of a misdemeanour; and in the next sections "principals" are spoken of. Further, the preamble of 5 & 6 Vict. c. 89 supposes that the entrusting is to an agent, and that pledges are only to be valid where sales would be; and it enacts, any agent who shall be entrusted with the possession of goods or

of documents of title to goods shall be deemed to be the owner, so far as to give validity to pledges, &c., *bona fide* made though the pledgor was only an agent. This, in effect, repeals the qualification in the former Act as to notice, and shews conclusively that the "entrusting" in 6 Geo. 4. s. 2 must be to a person who is an agent, and necessarily, therefore, an entrusting to him as such, because it is absurd to suppose that the entrusting must be to a factor or agent, but need not be to him as such. The consequences would be that a sugar warrant left for safe custody with a tobacco broker might be pledged by him though he could not sell. In the result, it seems to me, that the combined effect of the first two statutes is, by section 1 of 4 Geo. 4, and section 1 of 6 Geo. 4, persons in whose names goods are shipped, who are entrusted therewith for sale or consignment, shall be deemed to be the true owners, so as to entitle consignees without notice to a lien for advances. By the 2nd sections of both Acts, consignees of goods may pledge them on the bill of lading thereof, and factors or agents in the nature of factors entrusted with bills of lading and warrants to deal with them as factors, may make valid contracts of sale or pledge as to them to persons not having notice; where there is notice, then, the contract of sale is only valid to the extent of the pledgor's interest. Unless "person entrusted" in section 2 of 6 Geo. 4. means factor or agent entrusted as such, that section will differ in that particular from all the others of all three statutes. It will appear from this that Lord Tenterden, as quoted Law Rep. 10 C.P. 361, is not quite accurate. He says, "The person in whose name the goods are shipped is to be deemed," &c. He should have added "where entrusted therewith for sale or consignment." There are other provisions in these Acts not necessary to be mentioned further. The cases before us turn on these provisions, and not on those of 5 & 6 Vict. c. 39, which is only important in these cases as shewing the meaning of the former Acts. Section 6 may be referred to. It makes it a misdemeanour for an agent "entrusted as aforesaid," for his own benefit and in

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violation of good faith, to make any deposit, &c., of such goods or documents "contrary to or without such authority." In the present case there was no entrusting to Hoffmann as an agent, nor indeed at all. I have not forgotten that by section 4 of 5 & 6 Vict., "an agent entrusted as aforesaid, and possessed of such document of title obtained by reason of such agent having been entrusted with the possession of goods, shall be deemed to be entrusted with the possession of the goods, and that he shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody or be held by another subject to his control." But in those cases there is an entrusting as agent. Here there was nothing of the sort. The plaintiff, the vendee from Hoffmann, left the goods in the control of Hoffmann because they stood in Hoffmann's name. But he left them there, not that Hoffmann should deal with them as his, or as a factor or agent, but that he might forward them to him or his order, in pursuance of the practice that existed in dealings between them, and which, therefore, was part of the contract between them of vendor and purchaser. The case may be tested thus: Suppose Hoffmann was indicted under section 7 of 6 Geo. 4, would it be possible to make out that he was such "factor or agent" as there mentioned? I am of opinion, therefore, that these cases are not within the Factors Acts; that the question turns on section 2 of 6 Geo. 4; that the "person entrusted" there, means "factor or agent entrusted as such;" but Hoffmann was not entrusted by the plaintiff as his factor or agent. The 40 & 41 Vict. c. 39 is not retrospective, otherwise the case would be within section 3 of that statute, if the continued possession of goods by a vendor is within it. One may observe that it shews what words would, and consequently what do not include the present case.

I need say nothing on the other point, except that I agree with the Lord Chief Justice and my brother Brett.

BRETT, L.J.—The first of these cases was tried before Field, J., and a special jury, the second before Denman, J., without a jury. In the first case the only question proposed on behalf of the defendant

for the consideration of the jury, and the only question left to them was, whether the plaintiff did give to Hoffmann authority or ostensible authority to deal with the goods as owner, or as agent with authority to pledge? The jury answered certainly not. It was admitted that Hoffmann was originally the owner of the tobacco; that he had sold it to the plaintiff so as to pass the property in it to the plaintiff; that the tobacco was only left in bond in Hoffmann's name in order to avoid payment by the plaintiff of duty until the tobacco should be forwarded to him by Hoffmann on request as the plaintiff might require it. It was admitted that this was an ordinary practice in the tobacco import trade. It was expressly admitted that there was no negligence on the part of the plaintiff in leaving the goods in bond and in Hoffmann's name.

It was admitted on behalf of the plaintiff that Hoffmann, besides being an importer and seller of tobacco on his own account, did carry on the business of a tobacco broker or factor. Upon this last admission it was submitted to the learned Judge that notwithstanding the finding of the jury the defendant was entitled to judgment. The proposition submitted to us was, that the defendant was entitled to judgment because the goods were intentionally left by the plaintiff in the apparent possession of a man whose business or a branch of whose business it was to sell that sort of goods. Whether this was alleged to be by virtue of the Factors Acts, or as conclusive evidence in favour of the defendant of the proposition which was submitted to the jury, is not clear. In either view the learned Judge gave judgment for the plaintiff.

In the second case Denman, J., determined the same question of law in the same way, and found on the questions of fact "that the plaintiff only left the possession and control of the documents respecting the tobacco in the power of Hoffmann as his agent for the purpose of forwarding the tobacco to him or to his order; that Hoffmann was a mere vendor to the plaintiff, who was, in accordance with the practice of the trade, left in possession of the goods in bond so as to avoid premature payment of duty, undertaking to clear and forward the goods for

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the plaintiff as required; that under such circumstances Hoffmann was not in law or in fact instructed by the plaintiff as agent, *qua* sale or pledge, or dealing of any kind of or in the goods."

The learned Judge held, as a matter of law upon such finding of facts, that neither the 9th or 10th paragraphs of the defendant's statement of defence was proved.

There was no allegation, it will be observed, in either of these paragraphs or in any other part of the statement of defence, that the plaintiff had been guilty of negligence.

It seems to me that the evidence in the two cases was substantially to the same effect, and that the findings of fact and rulings of law are substantially the same. It follows that the questions are—

1. Can the findings of fact, which in neither case include a finding of negligence on the part of the plaintiff, be set aside as unsatisfactory?

2. If not, are the transactions of the defendants respectively protected by the Factors Acts?

3. Or, in consequence of the plaintiff's conduct, though he was not guilty of negligence?

4. Or, was there evidence of negligence on the part of the plaintiff so striking as to oblige the Court to send the first case to a new trial, and to enter judgment for the defendants in the second case as upon a re-hearing?

Omitting for the present the question of negligence on the part of the plaintiff, I think that the answer of the jury in the first case, and the findings of fact by the learned Judge in the second case, cannot be set aside by us. It follows that Hoffmann was not entrusted by the plaintiff with the possession either of the goods or of the documents of title as an agent for sale or pledge, or in order to carry out any part of a contract of sale or pledge, but if entrusted as an agent at all, only at the utmost as agent to hold the goods in custody, and the documents for the purpose of clearing the goods and forwarding them to the plaintiff, or his order or request. Under such a state of facts, I am of opinion that the cases of *Fuentes v. Montis* (9) and *Cole v. The North-Western Bank* (2) are conclusive authorities on the

construction of the Factors Acts, and that the transactions of the defendants are not protected by the Factors Acts. If the plaintiff was guilty of no negligence, and did not give either authority or ostensible authority to Hoffmann to pledge the tobacco, the defendants cannot, I think, be protected by any principle of law independent of the statutes. There is nothing done by the plaintiff to estop him from maintaining against the defendants his rights of ownership.

The only question remaining is that as to the alleged negligence of the plaintiff, and the consequences of such negligence should it exist. The negligence suggested is the omission to have the tobacco transferred into his own name at the dock bonded warehouse, or to have the dock warrants or delivery orders transferred to him by Hoffmann. But in the face of the finding of a mercantile jury in one of the present cases, and the admission in both that what the plaintiff did was what many mercantile men have up to this time habitually done, and that to do otherwise was an exception, I feel that we ought not to hold that in the present cases the plaintiff was guilty of negligence, and therefore that we have not to consider what the consequences of such negligence might be.

I am, therefore, of opinion, that both judgments ought to be affirmed with costs (27).

Judgments affirmed:

Solicitors—Chester, Urquhart, Mayhew & Holden, agents for Bailey & Read, Bolton, for plaintiffs; Michael, Abrahams & Roffey, for the Credit Lyonnais Company; Munton & Morris, for Blumenthal.

(27) The law is now altered by 40 & 41 Vict. c. 39 (The Factors Act Amendment Act, 1877).

By section 3 of that Act where vendors are permitted to retain the documents of title to the goods sold, sales by such vendors or any person or agent entrusted by them, are made "as valid and effectual as if such vendor or other person were an agent or person entrusted by the vendor with such documents within the meaning of the principal Acts."

Section 4 contains a similar provision with regard to vendees permitted to have possession of documents of title to goods.

IN THE COURT OF APPEAL.]

1878. }
Jan. 14. }

TAYLOR v. NEVILLE.*

Dramatic Copyright Acts—Right of Representation—Penalties—Assignment of "London Right"—3 & 4 Will. 4. c. 15, sections 1, 2—4 & 5 Vict. c. 45. s. 22.

The plaintiff, the author of a drama, entered into the following agreement with R. & E.: "Received of Messrs. R. & E. the sum of 75l. in part payment of 150l. for the London right of a piece to be called 'Ticket of Leave,' the residue to be paid at 2l. per night, after the first twenty-five nights of the representation of the same."

In an action against the defendant for representing the piece without license, the Judge at the trial having found that the term "London right" meant the whole of the plaintiff's right of representation in London, and that the license was to R. & E. and their assigns,—Held, that the plaintiff could bring no action for penalties under 3 & 4 Will. 4. c. 15, in respect of representations in London, except as trustee for R. & E. or their assigns.

This was an appeal from a judgment entered at the trial, before Manisty, J., without a jury.

The plaintiff is the author of "The Ticket of Leave Man" and other dramas. In the year 1863 he entered into an agreement with Messrs. Robson & Emden, who were both actors and theatrical managers, the effect of which is shewn by the following receipt:—

"May 16, 1863.—Received of Messrs. Robson & Emden the sum of 75l. in part payment of 150l. for the London right of a piece to be called 'Ticket of Leave,' the residue to be paid at 2l. per night after the first twenty-five nights of the performance.

"Tom Taylor."

Robson & Emden (both since dead) assigned their rights, under this agreement, to Lacey, and Lacey to French.

In 1875, the defendant brought out the piece at the Olympic Theatre, with the consent of Mr. Taylor, to whom he paid 2l. per night for the permission.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

Thereupon Mr. French claimed a right to penalties, as assignee of the original license given to Robson & Emden, and the defendant, under a threat of proceedings, ceased to pay the plaintiff, and paid the 2l. per week to French instead. The plaintiff, then, for the purpose of trying the right, brought this action for penalties, under 3 & 4 Will. 4. c. 15. Notice of the action was served on Mr. French, and an order was made that the action should be defended by French in the name of Neville, who should indemnify the plaintiff against extra costs incurred by the joinder of French.

At the trial, the learned Judge found upon the evidence that the phrase "London right" in the receipt meant the whole of the plaintiff's rights with regard to the representation of the piece in London, during the continuance of his interest; and that Messrs. Robson & Emden had acquired by the agreement an assignable interest in such rights; and held that consequently the plaintiff had no further power to restrain representations in London, or to sue for penalties, except as trustee for French, and that this action would not lie. Judgment being entered for the defendant, the plaintiff appealed.

Willis and Crump, for the plaintiff.—
The 3 & 4 Will. 4. c. 15 (1) was passed to

(1) By 3 & 4 Will. 4. c. 15. s. 1, it is enacted that the author of any dramatic piece shall have as his property the sole right of representing it, or causing it to be represented at any place of dramatic entertainment in any part of the British dominions.

By section 2, "that if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author, or other proprietor, first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, which ever shall be the greater damages to the author or other proprietor of such production."

By 5 & 6 Vict. c. 45. s. 22—"No assignment of any book, consisting of or containing a dramatic

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give authors of dramatic pieces the sole right to represent them; but the assignment of such a right before 5 & 6 Vict. c. 45 was merely a matter of implication from the assignment of the copyright—see *Cumberland v. Planché* (2). But the 4 & 5 Vict. c. 45. s. 22, virtually separates the two rights. The copyright is one indivisible right which cannot be assigned in part, and so is the right to represent. The plaintiff therefore could not part with the “London right” to represent the piece even if he would, in the sense in which the learned Judge found at the trial. This is really only a personal license to act the drama at a particular place, and passes no property. The property in the right is still in the plaintiff, who is the only person who can sue—see *Jefferies v. Boosey* (3), where Lord St. Leonards says, at p. 113, “The assignment was expressly confined to publication in this country. Now, if there is one thing which I should be inclined to represent to your Lordships as more clear than any other in this case, it is that copyright is one and indivisible.” The assignment must be by writing attested by two witnesses, under 8 Anne, c. 19 (see *Jefferies v. Boosey* (3), p. 114), and a mere license is not equivalent to an assignment of the author's rights—*Power v. Walker* (4). *Shepherd v. Conquest* (5) shews that right of representation stands on the same footing as copyright.—See per Jervis, C.J., at p. 436. *Lacey v. Rhys* (6) was a question of registration, and did not shew that a mere license had the effect of an assignment. See also *Lover v. Davidson* (7). Robson & Em-

den had the right of representation at any theatre in London, and nothing more. The way to obtain an assignment of the plaintiff's interest is laid down by statute, and that method has not been followed. Again, even if Robson & Emden had a right which they could assign, the defendant is not their assignee, and has no right under the agreement.

J. J. Powell and Kydd, for the defendants, were not heard.

J. J. Powell and Kydd, for the defendants, were not heard.

BRAMWELL, L.J.—I do not think we need trouble Mr. Powell. I am of opinion that this judgment should be affirmed. The plaintiff was at one time the owner of the whole right of representation of this play. He was the author of the play, and had the whole and sole liberty of representing it within the meaning of section 2. Then it is argued that this right still continues in the plaintiff, as far as the property in such right is concerned; and Mr. Willis says that even if he had tried he could not have parted with that property; for which proposition he cites the judgment of Lord St. Leonards in *Jefferies v. Boosey* (3). Now, whether the rules as to copyright apply to this kind of property or not does not matter in the present case. And I am of opinion that Mr. Willis is right in saying that there has been no assignment, technically speaking, of the title of the plaintiff. Then the defendant has represented the piece; and if he has done so without the consent in writing of the author, he would be liable under the Act. But I am of opinion that he has not represented the piece without the consent of Mr. Taylor, but with his consent. Mr. Taylor has signed a consent in the form of a receipt to Robson & Emden, and that is a consent which justifies Neville in producing the play, and is within the terms of the Act or Parliament. He licensed them to perform the piece so far as the right of representation can be given by license, which it undoubtedly can, for no doubt the author could give Robson & Emden the right and the sole right to represent the piece in London. I should have thought that, except on grounds analo-

piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said register book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right shall pass by such assignment.”

(2) 1 Ad. & E. 580; s. c. 5 Law J. Rep. K.B. 194.

(3) 4 H.L. Cas. 815; s. c. 24 Law J. Rep. Exch. 81.

(4) 4 Campb. 8.

(5) 17 Com. B. Rep. 427; s. c. 25 Law J. Rep. C.P. 127.

(6) 4 B. & S. 783; s. c. 33 Law J. Rep. Q.B. 157.

(7) 1 Com. B. Rep. N.S. 182.

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gous to the rule that a grant to A. alone confers merely an estate for life, the document in question would confer on them a right to be exercised by themselves and such persons as they should authorise. For suppose the right had been granted to persons who were neither actors nor lessees of a theatre, but merely speculators, would it have been nothing but an empty grant? I should think not. The witnesses say it is a grant of a right to them and their assigns or licensees during the continuance of Mr. Taylor's interest. I am perfectly satisfied with the judgment of Mr. Justice Manisty, who believed them. There is no one whose intelligence, veracity and skill would have been more relied on than Mr. Taylor's if he had come as a witness to prove the contrary, but he has not come. That being so, if Mr. Taylor had recovered in this action he would have been bound to hand over the proceeds to Mr. French. Can he then maintain his action under present circumstances, where Mr. French is made practically the defendant? It is almost impossible to conceive that he can. Mr. Willis questions whether there is a consent within the Act, but the Act does not say that the consent is to be given to any person representing the play, but only that penalties may be recovered if any person shall cause it to be represented without consent. But if a license is given by the author to A. and anyone that A. authorises, and A. authorises B. to represent the play, then there is a consent in writing from the author to B. Then suppose all the other points to be decided in favour of the plaintiff, yet as the plaintiff has granted to Robson & Emden, their assigns, licensees and persons authorised by them, the right and the exclusive right to represent this piece in London during the continuance of Mr. Taylor's interest, he has assented to the representation of the play by Mr. Neville, and I am therefore of opinion that the judgment in this case should be affirmed.

BRETT, L.J.—I cannot doubt that after 5 & 6 Vict. c. 45 two rights are reserved to authors, which may be separated—first, copyright; secondly, right of repre-

sentation, or the right to prevent others from representing the play. Both are in the nature of property; both are separate and distinct rights of property. The plaintiff at one time had both these rights. The only right we have to deal with here is the right of representation, or of preventing others from representing the piece. The question is, has he parted with that right? It is unnecessary to decide whether the property has actually passed from him, but I am inclined to think that it has not; for he has only been assumed to part with the right to represent the piece in London, and he has reserved to himself the right to prevent its representation in any other part of the United Kingdom. I also incline to think that this document is not enough in itself to create an assignment. Therefore, there is no actual assignment of the property in the right of representation. But it does not seem necessary to decide either of those points. Assuming, then, that the property did not pass, and that Mr. Taylor still has that property, I think he is the only person who can maintain an action for penalties. The next question is whether he has prevented himself from maintaining his action as against this defendant. Now, he has given, in consideration of money which he has received, a document in the form of a receipt. But it is more than that—it is a consent in writing to the representation of the piece by Robson & Emden in London. Mr. Willis has not contended to the contrary, for he allows that it is a good consent in writing to such representations by Messrs. Robson & Emden.

Then is it a consent in writing to others as well as Robson & Emden? It contains a particular term, "the London right;" and there is evidence that that phrase is generally so understood as to allow the Court to interpret it to mean not only a consent to Robson & Emden to represent the piece, but also to their assigns; and, more than that, to their assigns for ever during the continuance of Mr. Taylor's right. If we are to judge of the evidence in this case, I am of opinion that that evidence preponderates, and, whether Mr. Justice Manisty

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intended to find so or not, we ought to find that this is a consent in writing to the same effect as if the document had said in terms, "I consent to the representation of this piece in London by Messrs. Robson & Emden and their assigns for ever." If that is so, there is a good consent in writing to representation of the piece by anyone who may be made legally assigns of these persons, by purchase or otherwise, during their lives, or by will; and, therefore, a good consent by devolution to representation by Mr. French. He has the sole right of representation in London at this moment. There is nothing to make Neville the assignee of the right, but French has it. Now, French is a defendant in the action for the purpose of defending Neville. Then it must be taken that Mr. French has a right to represent the defendant, as he has the sole right to allow Neville to represent the piece. Therefore, Mr. Taylor is maintaining an action on such a bare right as he possesses, contrary to the will of Mr. French, to whom he has given the sole right to represent the piece and to allow others to represent it. I am of opinion that such an action cannot be maintained.

COTTON, L.J.—In this case I think Mr. Taylor cannot maintain his action. There is no assignment of anything which can be called copyright. I think by 3 & 4 Will. 4. c. 15 the proprietor of the copyright is the only person who can sue for penalties; but by 5 & 6 Vict. c. 45 the assignee of the right to represent has a right to the same remedies with respect to the right of representation, if that right is properly dealt with, as the author or his assign has in respect to copyright. The two rights may be dealt with separately.

I do not think that there has been any assignment of the right of representation. There is nothing here which amounts to a legal assignment; and it may be enough to say that the right is indivisible so far as the right to restrain representations or bring actions for penalties is concerned.

But you may have a good agreement or
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license that a certain person may represent a piece at a certain theatre or in a certain place. Robson and Emden having such a license, could Taylor against their will have maintained an action against any other person giving such a representation, and if not, can he do so against French's will? There was a good license in writing for value to Robson and Emden, and therefore a good agreement in equity that they should have the sole right—*i.e.*, that Taylor should grant it to no one else. Therefore, in equity, Robson and Emden could say to Taylor, "Though we cannot sue for penalties, we have a right, as between you and us, that we shall be at liberty to represent this piece, and you will grant a license to no one else." Would that not carry with it a right in Robson and Emden when anyone else improperly represented the piece in London without their consent to call upon Taylor to stop him, as being the only person who had a right to restrain unlicensed representations, under an indemnity as to costs? It follows that against the will of Robson and Emden Taylor could not sue anyone. It is perfectly clear that under 3 & 4 Will. 4. c. 15. s. 2 the right to sue is supposed to be given to some one who is actually damaged, for the right is given to sue either for 40s. penalties, or for the whole amount of benefit arising from the unlicensed performance. Robson and Emden, and not Taylor, in the case I have put would be suffering damage, and they have a right either to say that they do not wish an action to be brought, or to ask Taylor to sue on their behalf. Therefore, without their consent and against their wish it is impossible that Taylor could bring an action.

Then is Mr. French in the same position? It is argued that this license is only a personal license to Robson & Emden, and cannot be carried further. But it is more than that—it is an agreement enforceable in equity, unless we introduce the subtleties of conveyancing, which stand on quite a different footing, into the construction of this document. No doubt it is a mere receipt in respect of something called the "London right." But are you, because nothing is said in

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terms as to "executors and assigns," to say that it is only a personal license? All depends on the meaning of the term "the London right." I would rather not refer to the parol evidence. It may be said that it is the parol evidence of theatrical managers as against the parol evidence of authors, and that the evidence of managers and authors does not agree; though it may also be said that the evidence of the authors goes too far, for they say that the term "London right" is confined to the right of representation at a particular theatre. But on the face of the document it appears to me that "the London right" means the sole right of performing the piece in London. Why should that right be determined when Robson and Emden cease to act? It seems that it is a valuable right, assignable by those who have it. There is no restriction of their power of dealing apparent on the document, and we must not hold that they are restricted, but that they have the London right during the whole duration of the copyright. "The London right" means a general right to represent the piece in London, and is not confined to a particular theatre; and Robson & Emden having given to French whatever rights they possessed under the agreement, those rights did not expire at the death of Robson & Emden. And I am of opinion that against the will of Mr. French this action cannot be maintained.

Judgment affirmed.

Solicitors—Lewis & Lewis, for plaintiff; T. H. Bolton, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1877. { EVANS (*appellant*) v. LADY
April 20. { MOSTYN AND OTHERS (*respondents*).

Mine—Liability to fence Shaft of abandoned Mine—Owner—Person interested in Minerals—Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 13 and 41.

[For the report of the above case, see 47 Law J. Rep. M.C. 25.]

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1878. } THE SOUTHWARK AND VAUXHALL
Feb. 4, 20. } WATER COMPANY v. QUICK.

Inspection of Documents—Privilege—Materials for Instructions to Solicitor—Evidence obtained for Advice of Solicitor in Relation to Intended Action.

Documents which have been prepared by the agent of a party for the purpose of their being submitted to his solicitor for advice in reference to an intended action, are privileged from inspection; and such privilege is not taken away, if the documentary information obtained for such purpose has not, in fact, been laid before the solicitor at the time inspection is sought.

This was a motion, referred to the Court by Field, J., from chambers, on the part of the defendant for the inspection of certain documents for which privilege was claimed by the plaintiffs.

The action was brought by the plaintiffs against the defendant, who had been their engineer, to recover certain sums which they alleged he had improperly credited himself with in his accounts with the company, or which (having received them for specific purposes), he had misapplied.

The documents were of three classes:—

1. A transcript of shorthand writer's notes of a conversation between a chimney-sweep employed by the company, and the engineer of the company, for the purpose of his obtaining information and reporting it to the directors to be furnished to the solicitor of the company for his advice in reference to the intended action.

2. Transcript of shorthand writer's notes of conversations between the chairman of the company and the engineer and other officers of the company, obtained for the purpose of submitting the same to the solicitor of the company for his advice in reference to the intended action.

3. A statement of facts bearing on the question in dispute between the company and the defendant, prepared by the chair-

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man as instructions for the solicitor of the company with the view of taking his advice thereon in reference to the intended action.

From the plaintiffs' affidavits it appeared that the last two sets of documents had actually been submitted to the solicitor; as to the first there was no distinct assertion that the intention with which it was alleged they had been obtained, had been, in fact, carried out.

The solicitor had not been consulted previous to the obtaining of any of the documents.

J. C. Mathew, for the defendant.—These documents are all open to inspection according to the principles and practice of inspection appearing in the recent cases. The only privilege that can now be successfully set up, is that which arises where a solicitor has been consulted, and information is obtained upon his advice—*Anderson v. The Bank of British Columbia* (1). This shews that the protection begins with the advice of the solicitor, but if a man asks for information from his servants to enable him to make up his mind whether he will bring his action or not, then there is no privilege. As to the first class of documents here, they were never submitted to the solicitor at all. So, too, *Bustros v. White* (2) establishes that the only privileged documents are communications from a party's solicitor, or from an agent employed at the instance of the solicitor. In *Friend v. The London, Chatham, and Dover Railway* (3) the same rule is acknowledged. It is not enough, therefore, that the documents are afterwards laid before the solicitor, as was the case with regard to the other two classes of documents here.

Arthur Wilson, contra.—It is admitted that the Court of Appeal has decided that no privilege, except that arising from the relation between solicitor and client, can be set up. But this case is not concluded

by *Anderson v. The Bank of British Columbia* (1). It is intermediate between that case and *Friend v. The London Chatham and Dover Railway* (3). The reason and principle of those decisions is that it is essential to the administration of justice that a client should deal openly with his solicitor; and these documents which were prepared for the instruction of the solicitor in an action already determined on, are within that principle. In the judgment in *Anderson v. The Bank of British Columbia* (1) James, L.J., says it is an intelligible principle that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief. Jessel, M.R., says, in the Court below, that if the communication of the agent was a confidential one for the purpose of being submitted to the solicitor for advice, it would have been protected.

[MELLOR, J.—It is difficult to see why information obtained under a solicitor's advice should be privileged, and that obtained for his advice not.]

There is really no difference. Melish, L.J., in the case cited, distinctly says that evidence obtained for the purpose of litigation is privileged. Nor can it make any difference whether the evidence so obtained be in fact submitted to the solicitor, if it was obtained for that purpose. As to the documents which were afterwards laid before the solicitor, to hold that there was no privilege, would involve the anomaly of leaving a copy open to inspection, while the papers put into the solicitor's hands would be protected.

J. C. Mathew in reply.—Mere intention to submit documents to the solicitor cannot be sufficient to create a privilege, nor can mere intention to litigate. Both these elements existed in *Anderson v. The Bank of British Columbia* (1), and as to the first class, where the alleged intention has never been carried out, the relation of solicitor and client has never arisen with respect to it. But even as to the others, the privilege does not attach because they were afterwards submitted to the solicitor, for the simple reason that the right to inspection had already ac-

(1) 45 Law J. Rep. Chanc. 449; s. c. 2 Chanc. Div. 644.

(2) 45 Law J. Rep. Q.B. 642; s. c. 1 Q.B. Div. 423.

(3) 46 Law J. Rep. Exch. 696; s. c. 2 Ex. Div. 437.

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crued, they having come into existence without the intervention of the solicitor in any way.

COCKBURN, L.C.J.—I am of opinion that the application of the defendant for inspection of these documents should be refused. Of course, we are bound on this subject by the decisions in the Court of Appeal, to which we have been referred, but neither of them embraces the kind of documents mentioned in this case, nor does the principle there laid down seem to me to be such that these documents necessarily fall within it, so as to be liable to inspection. There are various relations of a confidential character, and with regard to some of them I admit that the taking away of the protection claimed for communications between parties in such relations, might be an absolute good, yet in others the maintenance of the confidential nature of the communications is so essential to the well-being of society, that I for my part would not willingly take the protection away. At the same time the Courts of Equity have adopted a different view, in regarding one relation only, and the Court of Appeal, as far as it has at present gone, has followed that view. The one confidential relation which is allowed to remain, is that between solicitor and client, and documents submitted to the confidential adviser by his client are still held to be privileged. Then the question here is, were these documents such as come within the professional privilege? I think that they were. They were documents containing information obtained by the plaintiffs for the purpose of being submitted to their solicitor. Two of the three classes were actually submitted to him, one perhaps was not.

The distinction between information obtained on the suggestion of the solicitor, and that obtained spontaneously by the client with the same intention, viz., that of submitting it to the solicitor for advice, in reference to litigation, is to my mind an unreal one. I confess that I see no distinction, nor do I see any between that obtained for the solicitor's consideration and actually submitted to him, and that which had not up to the time of

inspection being asked, been actually submitted to him, but which was equally obtained for the purpose of his consideration.

I am not prepared to carry the doctrine any further than it has been carried, and certainly not so as to destroy a privilege of this kind, which seems to me to be within the principle of privilege laid down by the Court of Appeal.

MELLOB, J.—I agree in the view which has been expressed by the Lord Chief Justice in this case. Mr. Wilson has satisfied me that the decisions in the Court of Appeal have not decided this case.

When it is once conceded that information obtained by the advice of a solicitor for the purpose of litigation is privileged from inspection, I cannot see any difference in principle if such information be obtained, as my Lord has said, spontaneously by the client for the purpose of taking the advice of his solicitor upon it. In the present instance, I do not see any sound distinction between the statement obtained from the conversation with the chimney-sweep with the intention of its being submitted to the plaintiffs' solicitor, and the other statements, which being obtained for the same purpose, were afterwards submitted to him. Understanding the principle of privilege as I do, I think that it is too fine a distinction to draw between the two classes of documents, and therefore think that the claim of privilege as to all must be upheld.

MANISTY, J.—As to two of the three sets of documents I am quite of the same opinion as the rest of the Court. I have, however, some little doubt about the notes of the evidence of the chimney-sweep. Still, as it has been pointed out what a subtle and fine distinction it is which is suggested between that and the other two classes, I am not prepared to say absolutely that it exists, for the purpose of taking away the privilege in the one which protects the other two. As to them I have no doubt at all. There is no difference in my opinion between asking to see those documents, and asking the plaintiffs what they said to their solicitor.

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It is, I think, to be regarded just as if those persons whose statements were written down had communicated them orally to the solicitor.

Order refused.

Against the above decision the defendant appealed, and the appeal came on for hearing on the 20th of February, 1878.

J. C. Mathew, for the defendant.

Arthur Wilson, for the plaintiffs.

[The arguments used and the cases cited were the same as in the Divisional Court.]

BRAMWELL, L.J.—I am of opinion that this case is governed by the principle laid down in *Anderson v. The Bank of British Columbia* (1), and that the judgment should be affirmed.

BRETT, L.J.—I am of the same opinion. It seems to me true to say that the case of *Bustros v. White* (2) does not help us, as in that case the documents were merely correspondence between the principal and the agent, and there was no question about the solicitors. It is equally true that this case is not exactly governed by the case of *Friend v. The London, Chatham and Dover Railway Company* (3), for there the affidavit stated that the document contained information obtained at the instance of the solicitor for the purpose of the trial, but here there is no such allegation. The question depends on what is the rule to be extracted from the decision in *Anderson v. The Bank of British Columbia* (1). The facts in that case do not correspond with the present. But the judgments do give us a rule to act upon, and one on which I think we ought to act. That rule is stated more particularly by Lord Justice James, and partially also by the Master of the Rolls and Lord Justice Mellish, who has suggested another rule which may some day have to be considered in some other case. But the rule stated by Lord Justice James is in these words:—"Looking at the *dicta* and the judgments cited, they might require to be fully considered; but I think they may all be

based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, so you have no right to see that which comes into existence merely as materials for the brief."

Coupling that with what is said by Lord Justice Mellish in the course of the argument, it must be seen that both propositions hold good. If we can bring the documents within the formula that the document the applicants wish to inspect is something which comes into existence merely as materials for the brief of the counsel of the party interrogated, then it is privileged from inspection. It seems to me that in laying down that rule the learned Judge advisedly left out the term "at the instance or request of the solicitor." It is enough if it comes into existence as materials to be used merely for the purpose of being laid before the solicitor for the purpose of obtaining his advice or giving him instructions. That is the rule. Then the question is, do the affidavits bring these documents within that rule? I do not like to say, "clearly they do," for what is clear to one person may not be clear to another; but it seems to me that they are all brought within the rule. There is only one of them about which there is any doubt, and that is, if I may call it so, the chimney-sweep document. As to that document I confess I had some doubts. But I think we must take it that the Queen's Bench Division has construed the affidavit to mean that the document was a transcript of notes of a conversation made expressly in order that it might be sent to the solicitor for his instruction. Though first it was to be submitted to the board, the real reason of its being made was for the purpose of being sent to the solicitor. If that is so, the document stands on the same footing as all the others, except that it was not actually sent to the solicitor. I cannot think that that fact makes any difference. If the document came into existence for the purpose of instructing the solicitor, it is not taken out of the privilege because afterwards it is not laid before him. That might happen in con-

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sequence of the death of the witness, or because he had gone away; and I cannot think that, although the document was *bona fide* made for the protected purposes, such an accident as I have suggested would take away the privilege. I therefore think that this document stands on the same footing as the rest, and is protected by an affidavit which is sufficient because it states that the documents were brought into existence for the purpose of being sent to the solicitor with a view to taking his advice.

COTTON, L.J.—I think the decision in this case was right. We are not discussing the question of discovery in general, but only discovery of a particular sort, and I think a sufficient distinction has not been drawn between the different methods of discovery—namely, discovery of documents and by interrogatories. In the case of interrogatories it is perfectly true that the directors of a company, in answering, must not only give their own personal knowledge, but must also give all the information they can obtain from people in their employment, and cannot properly say, "We know nothing about it," when there are people in their service who have the required knowledge. If they have obtained that information in communications made to be sent to their solicitor, they must give that information if asked for, although the communication itself is privileged. As to the solicitor himself the case is different. He cannot be compelled to disclose any communication made to him. But the client cannot protect himself from giving information by saying, "I only know that from documents communicated to me by my servants for the purpose of laying before my solicitor."

The question then is, are these documents privileged? The privilege is no doubt arbitrary, but the principle is this: It touches the solicitor only, and only extends to legal advice and communications having something to do with legal advice; for this reason, that laymen cannot be expected to conduct litigations without advice, and for the purpose of

ensuring that the litigation shall be properly conducted all communications between solicitor and client are privileged, and the opposite party cannot call for documents sent to the solicitor for the purpose of instructing him or of enabling him to carry on legal proceedings. But litigants are entitled to all information as to facts which the other side can give.

The most obvious form of privileged communication is where a litigant sends directly or indirectly a document to his solicitor to enable that solicitor to protect him by legal process or to give him legal advice. That is not this case; but when a document is drawn up and given to the solicitor it is admitted that if it was made for the purpose of obtaining advice or giving instructions at the solicitor's instance or request it would be privileged. But it is said that here there was no request, and therefore no privilege. But I think that is an unsubstantial distinction. There is no exact case in point; certainly none which lays down that the absence of a request or advice by the solicitor to his client to procure the document is fatal to the privilege. But the judgment of Cockburn, L.C.J., in the case of *Friend v. The London, Chatham and Dover Railway Company* (3) is opposed to any such distinction. He says, "The defendants intended that the medical men should make the examination merely with the view of informing their solicitor." The true principle is that if the document comes into existence for the purpose of being placed before the solicitor to get his advice, or for the purpose of enabling him to prosecute or defend a suit, then the document is privileged. In reality that which is privileged is any communication between the solicitor and his client, or any act done by the solicitor or by anyone for the solicitor for the purpose of instructing him. Some documents are privileged on another principle—that a litigant cannot ask the other side to disclose the evidence of his case. That principle also may apply to these documents. Except that containing the statement of the chimney-sweep, they were all prepared solely for the purpose

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of being laid before the solicitor. As to the statement of the chimney-sweep, in substance and fairness it may be considered to have been drawn up for the same purpose, but possibly because it was not needed it was never laid before the solicitor. Does that make a real difference? I think not; for the reason of the privilege is that the litigant is not to be fettered in the preparation of such documents by the fear that his opponent should be able by discovery to obtain what he wants from them. To carry out the principle contended for it would be important to know whether the intention with which the documents were prepared has been carried out. What is to be done when the application is made before the documents are laid before the solicitor, but while they still might be laid before him? Is the privilege in that case to be held forfeited? I should think not. All these documents, then, must be taken as coming under the rule already laid down, and are therefore privileged.

Appeal dismissed.

Solicitors—Bircham & Co., for plaintiffs; Hol-
lams, Son, & Coward, for defendant.

[IN THE EXCHEQUER DIVISION.]

1878. } WOODWARD v. THE LONDON AND
Jan. 16. } NORTH WESTERN RAILWAY
Feb. 4. } COMPANY.

Carriers Act (11 Geo. 4. & 1 Will. 4. c. 68)—“*Paintings*”—*Carpet Patterns*.

The word “paintings” in the Carriers Act means articles of artistic value as paintings.

Models and working designs for carpets and rugs, painted by hand and skilfully designed, but of value in the carpet trade only, are not within the class designated.

This was an action to recover the value of twenty “rug models,” eleven “carpet models,” and ten “working designs” lost by the plaintiff while a pas-

senger on the defendants’ railway, and valued at 148*l.* 10*s.* The defendants pleaded the *Carriers Act*.

At the trial held on the 9th of May, 1877, before Cleasby, B., at the Guildhall, it appeared that the plaintiff was a carpet manufacturer of Kidderminster, and on the 19th day of October, 1875, took a ticket from Leamington to Northampton, paying excess fare for his luggage at the “commercial” rate. The value of the packages in which the goods sued for were, was not declared, nor an increased charge paid. The packages were lost. The nature and character of the articles were proved, and specimens of similar articles produced. The “models” were coloured imitations of rugs and carpets painted on cardboard by hand, some being of as much value as 6*l.* each, and the value of them depended on the labour bestowed upon them, and the standing in the trade of the person producing them. The “working designs” were patterns from which the carpets could be worked, and were also of considerable value, some being worth 6*l.* a piece. The Judge left to the jury the question whether the designs and models were paintings within the meaning of the *Carriers Act*. The jury found they were not paintings within the Act, and judgment was entered for the plaintiff for 148*l.* 10*s.*

A rule was afterwards obtained for a new trial on the grounds that the Judge misdirected the jury, and that the verdict was against the weight of the evidence.

Grantham and E. Harrison shewed cause.—The *Carriers Act* (11 Geo. 4. & 1 Will. 4. c. 68) provides that “no common carriers by land for hire shall be liable for the loss of or injury to any article or articles, or property of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks or timepieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes or securities for payment of

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money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger when the value of such article or articles or property aforesaid, contained in any such parcel or package, shall exceed the sum of 10*l.* unless the value and nature of such article is declared and an increased price paid." These articles are not "paintings" or "pictures" within the meaning of that statute. They are used in a purely commercial way, and the statute applies to artistic productions only. The question is one of fact for the jury—*Brunt v. The Midland Railway Company* (1). They referred to Webster's and Johnson's dictionaries.

Staveley Hill and Graham, for the defendants.—These patterns and designs are paintings. It is admitted that they are painted by hand. Everything painted, such as a panel, with a coat of paint on it, may not be within the statute, but if the painting is done with artistic skill, it is within the statute. The value of these models and designs arises from the colours being judiciously blended.

Our. adv. vult.

The following judgments were read by Hawkins, J., on 4th of February, 1878.

CLEASBY, B.—The only question in this case was whether certain painted carpet and rug patterns and painted carpet designs were paintings or pictures within the Carriers Act, 11 Geo. 4. & 1 Will. 4. c. 68.

The plaintiff, a carpet manufacturer, was a passenger by the defendants' railway, and had with him a parcel containing articles of the above description above the value of 10*l.* The parcel was lost, and as the value had not been declared and an increased charge paid, the ques-

tion was whether the defendants could avail themselves of the protection of the Act, in other words, whether the patterns or designs were paintings or pictures within the Act.

There were some differences between the patterns or models and the designs, and if we thought that one class was within the Act, and the other class not, there are materials for entering the verdict or giving judgment accordingly. But as our conclusion is the same as regards them all, it is unnecessary to dwell upon any difference. There was no arrangement made to reserve the question for the decision of the Judge or the Court, as the question is properly one of fact for the jury, as was laid down by this Court in the case of *Brunt v. The Midland Railway Company* (1), and in other cases. The question was left to them, and they considered none of the articles within the Act, and the verdict was given for the full amount, 148*l.* It seems impossible to regard the question as one of law for the Judge to decide, where everything depends upon the effect of the evidence given as to the nature and character of the article and how made, all which may be left in uncertainty and possibly with contradictory evidence. So far as the construction of the statute goes, it must of course be for the Court, and if there was anything in the Act itself to shew that a particular meaning must be given to the word "painting" as distinct from its natural and ordinary meaning, the jury in deciding the question should have had that pointed out to them. But the only remark to be made upon the language of the statute, as affecting the meaning to be given to the word "painting," is that the other matters mentioned in connection with it, engravings, pictures, shew that the statute cannot be construed as meaning everything which has painting done upon it by a workman, it must mean something of value as a painting (value being necessary to make the statute applicable), and something upon which skill has been bestowed in producing it. But although the question is strictly speaking for the jury, it is a question of fact of such a nature that the Court would feel justified in dealing with the

(1) 2 Hurl. & C. 889; s. c. 33 Law J. Rep. Exch. 187.

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verdict as one on a particular subject, and taking care that the conclusion was not one which was not warranted by the evidence by granting a new trial if necessary. And now, if upon the clear and admitted facts of the case it is plain what the proper legal conclusion is, they would be able to give effect to it at any period of the case.

It appears to me that the verdict was right, and that the articles are not paintings in the ordinary meaning of such a word used in connection with the words engravings and pictures. I think they are something different. They are rug patterns and carpet patterns, and working designs. They would not, in my opinion, be described in any transaction relating to them collectively as paintings, but each would be described by its proper description, rug model or carpet model, or working design. And according to the evidence the designs would have been registered, but of course under their appropriate name of designs, not as paintings.

In reality their value is not as paintings for the ordinary purposes for which paintings are valuable as works of art, but from their being attractive models and designs to get orders and to work by. The case was argued upon the effect to be given to the word paintings in the Act; it was hardly suggested that if they did not come within the word paintings, they came within the word pictures.

They certainly appear to be within the mischief intended to be remedied by the Act, and if there were general words in addition, or if they could be brought reasonably under the description of paintings, the Act ought to apply; but they are something different, and the Act must not be strained to apply to something so different as working designs and patterns.

The rule therefore must be discharged.

HAWKINS, J.—I am of opinion that this rule ought to be discharged. I think my brother Cleasby rightly treated the question, whether the lost articles fell within the description of paintings in the Carriers Act, as one of fact for the jury to determine. This was expressly decided in *Brunt v. The Midland Railway Company* (1),

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and I think the jury properly came to the conclusion that they did not. Looking at the articles themselves, which were before us, it is difficult to suppose that anybody would call them "paintings" in the popular and ordinary sense of that word—they are clearly not so. They are simply coloured designs or patterns for carpets and nothing more. It is true they were painted, and painted with great care by hand, and as coloured or painted designs were possessed of great merit and value; but there was nothing about them to give them the character of "paintings" in the ordinary acceptation of that word. Is the language of the Carriers Act, then, such as to shew that a wider and more extended interpretation should be given to that term? I think it is not. In the first place, I look to the collocation of the words of the statute, "paintings, engravings, pictures," which, to my mind, indicates the intention of the Legislature that the word should have its popular signification only. Then I look to the consequences of a wider interpretation extending the meaning of the word to its literal signification—looked at thus, it would include everything that was "*painted*." So interpreted, it would include a plainly painted door or panel, and so on. It would be absurd to suppose that such was the meaning or intention of the Legislature. It is a matter of common knowledge that many beautiful and artistic designs for hangings—paper for walls, muslins and china—representing animals, flowers and landscapes, are so exquisitely drawn and painted that they may partake of the character of *paintings* in the popular sense, in addition to their character as designs in a commercial sense. Whether they do so or not must always be a question for a jury; subject of course to the control which the Court exercises over verdicts if they are manifestly wrong. In the statute 5 & 6 Vict. c. 100, relating to the copyright of designs for ornamenting articles of manufacture, the correct description of the articles in question will, it seems to me, be found. Assuming the patterns in question to be new and original, they would clearly fall within the 3rd section of that Act, as designs applicable for the pattern and

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ornamenting of carpets. Further light upon the subject may also be derived from the statute 25 & 26 Vict. c. 68, giving copyright in paintings, drawings and photographs, the first section of which confers right upon the author of "every original painting, drawing and photograph." It would be exceedingly difficult to suppose that such articles as those in question are protected by this Act as "original paintings"—and that the author of them should have the power under it to secure to himself the copyright in them for the term of his life and for seven years afterwards, as the author of an original painting might do—whereas the copyright in designs under the 5 & 6 Vict. c. 100 is extended only to very limited periods. That the articles in question are of a similar character to those in respect of which the Carriers Act has afforded protection to Carriers there can be no question, but unfortunately the language of the Act is not such as to include them, and the defect in the Act, if it be one, can only be remedied by the Legislature. It may be asked how is one to tell whether that which is painted is a painting or a mere painted design? and where is the line to be drawn? I answer this question by adopting the language of Pollock, C.B., in *Brunt v. The Midland Railway Company* (1)—"The line is shifted according to the circumstances. But the question that we have to answer is, not where to draw the line, but whether this is within the line? I think for all practical and reasonable purposes wherever the line may be, and leaving the line in a state of doubt (which is a doubt which belongs to every line attempted to be drawn either in nature or in the social exigencies of life), that this is without the line." And therefore I think the verdict for the plaintiff ought to stand, and the rule be discharged.

Rule discharged.

Solicitors—Rooks, Kenrick & Co., for plaintiff
R. F. Roberts, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
Feb. 4. }

Ex parte STORY.

Ship and Shipping—Stranding of Ship where no Damage—Jurisdiction of Wreck Commissioner—Suspension of Master's Certificate—17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854), sections 242, 432—39 & 40 Vict. c. 80 (Merchant Shipping Act, 1876), sections 29, 32.

The jurisdiction to suspend the certificate of the master of a ship has not been extended by the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), sections 29 & 32, to cases not within sections 242 & 432 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and therefore where an enquiry into the stranding of a ship where no damage has been done is held by a wreck commissioner under section 32 of the later Act, he has no jurisdiction upon such enquiry to suspend the certificate of the master of the stranded ship.

This was a rule for a *certiorari* to remove into this Division a decision and judgment which had been given in the Court of the Wreck Commissioners, suspending the certificate of the master of the steamship *Ayton* for six months.

It appeared that the vessel, laden with a cargo of coals for Calcutta, sailed from England, and arrived at Port Said. The master there received a telegram from the owner, directing him to go to Zante instead of Calcutta. While off the west coast of the Morea, on her way to Zante, she took the ground on a mudbank, but was got off very soon by the jettison of about fifty tons of coal, and, as was found by the Wreck Commissioner, no damage was sustained by the vessel or crew.

At the instance of the Board of Trade an inquiry into this stranding was held by the Wreck Commissioner under section 32 of 39 & 40 Vict. c. 80, the Merchant Shipping Act, 1876.

At the close of the enquiry the Wreck Commissioner gave judgment, finding the above facts, and ordering that the certificate of the master be suspended for six months.

On a former day *Maclachlan* obtained a rule *nisi* for a *certiorari*, on the ground

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that there was no jurisdiction to make the order, against which,

O. S. O. Bowen now shewed cause on behalf of the Wreck Commissioner.—The question is, whether there is any power given by the Acts to the Wreck Commissioner to suspend a certificate in a case of stranding, where no real damage has been done. Section 32 of the Act of 1876 has given a new jurisdiction over "stranding;" and it is contended that to the jurisdiction to hold an enquiry so created is attached the power incident to the holding of the enquiries authorised by the previous Acts. Enquiries under section 432 of the Merchant Shipping Act, 1854 (1), were limited to cases where a ship was materially damaged, and when upon such enquiry it was reported that serious damage had been caused by the default of the master, there was power under section 242 to suspend his certi-

(1) 17 & 18 Vict. c. 104.—Merchant Shipping Act, 1854. Part VIII.

Wrecks, Casualties and Salvage.

Section 432. In any of the cases following (that is to say):

Whenever any ship is lost, abandoned or materially damaged on or near the coasts of the United Kingdom:

Whenever any ship causes loss or material damage to any other ship on or near such coasts:

Whenever by reason of any casualty happening to or on board of any ship on or near such coasts loss of life ensues:

Whenever any such loss, abandonment, damage or casualty happens elsewhere, and any competent witnesses thereof arrive or are found in any place in the United Kingdom:

It shall be lawful for the inspecting officer of the coastguard or the principal officer of Customs residing at or near the place where such loss, abandonment, damage or casualty occurred, if the same occurred on or near the coasts of the United Kingdom; but, if elsewhere, at or near the place where such witnesses as aforesaid arrive or are found or can be conveniently examined, or for any other person appointed for the purpose by the Board of Trade to make enquiry respecting such loss, abandonment, damage or casualty; and he shall for the purpose have all the powers given by the 1st Part of this Act to inspectors appointed by the said board.

cate (2). This power originally conferred on the Board of Trade was by 25 & 26 Vict. c. 63. section 23 (The Merchant Shipping Amendment Act, 1862), vested in the Court who investigated the case (3); and then section 29 of the last Act, which provided for the appointment of Wreck Commissioners, gave to them the same jurisdiction and powers as such Court had enjoyed (4). The words there-

(2) 17 & 18 Vict. c. 104, The Merchant Shipping Act, 1854.

Section 242. The Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases (that is to say):

If upon any investigation made in pursuance of the last preceding section he is reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness or tyranny;

If upon any investigation conducted under the provisions contained in the VIIIth Part of this Act, or upon any investigation made by a Naval Court constituted as hereinafter mentioned, it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default.

(3) 25 & 26 Vict. c. 63 (The Merchant Shipping Amendment Act, 1862).

Section 23. The following rules shall be observed with respect to the cancellation and suspension of certificates (that is to say):

1. The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the Principal Act conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the local marine board, magistrates, Naval Court, Admiralty Court, or other Court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade.

6. No certificate shall be cancelled or suspended under this section, unless a copy of the report or a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation, nor, in the case of investigations conducted by justices or a stipendiary magistrate, unless one assessor at least expresses his concurrence in the report.

(4) 39 & 40 Vict. c. 80 (The Merchant Shipping Act, 1876).

Investigation into Shipping Casualties.

Section 29. It shall be the duty of a Wreck

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fore in section 32, extending the subjects for enquiry to the case where a ship "has been stranded or damaged" purposely omit all mention of "serious" or "material" damage, and intend to confer on the Wreck Commissioner all the powers as to suspension or cancellation of certificates where the mere fact of stranding is proved before him. If this be not so, then there is a jurisdiction given to enquire into stranding, and no power to punish for it.

MacLachlan, in support of the rule.—The terms stranding and damage in section 32 were meant to justify an enquiry; but then on looking back at the former Act, as well as at section 29, which defines the powers of the Wreck Commissioner, it will be seen that nothing can be punished less than "serious damage."

[COCKBURN, L.C.J.—What is the use of the Court enquiring if it cannot punish?]

Commissioner, at the request of the Board of Trade, to hold any formal investigation into a loss, abandonment, damage or casualty (in this Act called a shipping casualty) under the VIIIth Part of the Merchant Act, 1854; and for that purpose he shall have the same jurisdiction and powers as are thereby conferred on two justices, and all the provisions of the Merchant Shipping Acts, 1854 to 1876, with respect to investigations conducted under the VIIIth Part of the Merchant Shipping Act, 1854, shall apply to investigations held by a Wreck Commissioner.

Section 32. In the following cases—

1. Whenever any ship on or near the coasts of the United Kingdom, or any British ship elsewhere, has been stranded or damaged, and any witness is found at any place in the United Kingdom, or,

2. Whenever a British ship is lost or supposed to have been lost, and any evidence can be obtained in the United Kingdom as to the circumstances under which she proceeded to sea, or was last heard of,

The Board of Trade (without prejudice to any other powers) may, if they think fit, cause an enquiry to be made or formal investigation to be held, and all the provisions of the Merchant Shipping Acts, 1854 to 1876, shall apply to any such enquiry or investigation as if it had been made or held under the VIIIth Part of the Merchant Shipping Act, 1854.

Further proceedings may be taken by the Board of Trade; but in this enquiry no charge is made against the master, and he cannot be subject to punishment without notice of a charge. The rules framed under the Act shew that this is merely a preliminary proceeding (5). Rule 14 says that the master shall be first examined, and rule 15 that afterwards the Board of Trade shall state if they have any charge to make against any one. Until that is done he is not a defendant or a party to the proceedings. The difference of language in section 32 as to stranding from that in section 432 of the Act of 1854 as to wrecks and casualties is intentional; and section 32 does not profess to enlarge the existing jurisdiction, but confers a new and limited power.

He was then stopped by the Court.

COCKBURN, L.C.J.—I think that this rule should be made absolute. It is necessary to look carefully at the Merchant Shipping Acts of 1854 and 1876 to see what is the jurisdiction within which it is alleged that the applicant in this case has been brought.

The VIIIth Part of the 1854 Act, dealing professedly with wrecks, casualties and salvage, must in the consideration of this present question be read

(5) General Rules for formal Investigations into Shipping Casualties, 1876.

Rule 14. The proceedings shall commence with the examination of the master, officers and any other person who was on board at the happening of the casualty, and who can give material evidence in regard thereto.

15. On the completion of their examination the Board of Trade shall state in writing whether they have any, and, if so, what charge to make against any person, and against whom.

16. Where the person against whom a charge is made, in these rules called the defendant, is in Court or before the Court, the Board of Trade may make him a party to the proceedings by handing him a copy of the charge.

18. When the defendant has become a party to the proceedings, or when the time allowed for his appearance has expired, and he has not appeared, the Board of Trade shall produce any further witnesses whom they may wish to examine.

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before section 242 of the same Act, although the latter precedes it in the arrangement of the statute; and this because the power to suspend or cancel the certificate of the master depends entirely on the enquiry previously held under section 432.

Now section 432 gives jurisdiction to certain officers to make enquiry in the following cases:—First. "Where any ship is lost, abandoned or materially damaged on or near the coasts of the United Kingdom." Now it is clear that the present falls under none of these heads; the ship was not lost nor abandoned, and, *ex concessis*, she was not materially damaged. Secondly. "Whenever any ship causes loss or material damage to any other ship on or near such coasts." That is not this case. Thirdly. "Whenever by reason of any casualty happening to or on board of any ship on or near such coasts loss of life ensues." No loss of life has ensued here. Fourthly. "Whenever any such loss, abandonment, damage or casualty happens elsewhere, and any competent witnesses thereof arrive or are found at any place in the United Kingdom." The casualty spoken of is specified as "such" casualty, *i.e.*, such as those before mentioned. It is therefore perfectly clear that the present case is not within any one of those classes in which by section 432 jurisdiction is given to the certain officers therein mentioned. Now let us see what the Board of Trade may do as to suspending a certificate. They may, "if upon any investigation conducted under the provisions contained in Part VIII. of the Act . . . it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default," suspend or cancel the certificate of any master. Then comes the Act of 1876, transferring the jurisdiction of the certain officers before mentioned in the 1854 Act to the Wreck Commissioners. But what is it that the Wreck Commissioners at the instance of the Board of Trade may do? It shall be their duty to hold any formal investigation into a loss, abandonment, damage or casualty under the VIIIth Part of the Merchant

Shipping Act, 1854, and for that purpose shall have the same jurisdiction and powers, &c."

Here again the terms are "loss," "abandonment" and "damage," as in the Act of 1854; and although the word material is omitted, inasmuch as direct reference is made to the Act of 1854, we must read those words as they were found in that Act. Therefore, although at first sight they might seem to enlarge the jurisdiction, yet the clear reference to the former Act satisfies me that all that was intended was the transfer of the jurisdiction existing under the one Act to the Commissioners named in the other.

Thus, when we look at section 29 of the 1876 Act which appoints the Wreck Commissioners, we find no words expressive of any intention to enlarge the jurisdiction. Mr. Bowen indeed says that section 32 extends the jurisdiction; but I am of opinion that it has no reference to the jurisdiction of the Commissioners, which is provided for completely by section 29. Section 32 enables the Board of Trade to cause an enquiry to be made, under certain circumstances, where a ship has been stranded or damaged; but if it had been intended to confer extended powers, specific words would have been used.

I do not mean to say that a case might not arise where it would be very desirable that the powers should be extended. There might be a case where stranding of a ship without any damage to her might nevertheless shew great incompetency on the part of the master. But we must not strain the provisions of the Act, because we think that the powers conferred by it might be stronger. We must not attempt to supply a deficiency which we may fancy or believe that we have discovered in the provisions as they exist. I think that this case is not brought within section 29 of the Act of 1876, and therefore the certificate of the master could not be suspended by the Wreck Commissioner upon this enquiry.

MELLOR, J.—I am entirely of the same opinion. I do not propose, as my Lord has gone through the sections of the

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Acts, to say more than this, that now one sees what is the true effect of the words relied upon by Mr. Bowen as giving jurisdiction here, there is nothing in them which can be construed as extending the jurisdiction of the Wreck Commissioner beyond that of the tribunal he superseded. It was thought desirable that the Board of Trade should be empowered to cause an enquiry into the stranding of a ship to be held, and it was provided that they should do this in the same way as formerly; and it was for the Board of Trade to decide what was to be done afterwards, in the same manner as they had done before.

MANISTY, J.—I am of the same opinion. I entertained considerable doubt for some time, but I am now satisfied that the construction of the Acts given by my Lord and my brother Mellor is correct. The object of the Act of 1876 is pretty plain as I read section 32. Where a ship has been stranded, and witnesses of the matter are to be found in the United Kingdom, the Board of Trade, without prejudice to any other powers, may cause an enquiry to be made, and nothing else. Then if the enquiry results in their getting evidence for putting the other provisions of the Acts in force, they may do so, as the enquiry is expressly to be held without prejudice to all the other powers. It is to be an *ex parte* enquiry, and quite different from the other proceedings which are said to be trials. I therefore agree that the Wreck Commissioner had no jurisdiction to make this order, and that the rule for a *certiorari* should be made absolute.

Rule absolute.

Solicitors — Oliver & Botterell, London and Sunderland, for applicant; W. Murton, for the Wreck Commissioner, for Board of Trade.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
Feb. 11. } WINTERFELD v. BRADNUM.

Security for Costs — Plaintiff residing Abroad—Admission of Plaintiff's Claim—Counter-claim for Damages on Independent Cause of Action—Effect of Order XIX. rule 3, on Plaintiff's Liability to give Security for Costs.

The provisions in Order XIX. rule 3, enabling a defendant to counter-claim in respect of unliquidated damages instead of being obliged to bring an independent action, has in view the convenience of the mode of trial, and does not put a plaintiff residing out of the jurisdiction in any worse position as to giving security for costs, than he was when a cross action against him was necessary.

Where, therefore, a defendant admitted the claim of a plaintiff residing out of the jurisdiction, but set up a counter-claim for damages arising out of another transaction, overtopping the plaintiff's claim in the action, he was held, as being virtually plaintiff in respect of the balance on the counter-claim, not entitled to require security for his costs from the plaintiff.

In this case the plaintiff, who was a foreigner residing out of the jurisdiction, brought an action against the defendant to recover a sum of 116*l.* 13*s.* for goods sold and delivered.

The defendant in his statement of defence admitted that the money was due, but alleged the breach by the plaintiff of another contract between them, for which he counter-claimed against the plaintiff damages to the amount of 700*l.* Setting off the amount of the plaintiff's admitted claim, the defendant claimed the balance of about 580*l.* in this action.

The defendant then applied to the district registrar for an order on the plaintiff to give security for costs. This was refused, but Field, J., afterwards made an order staying all proceedings in the action until the plaintiff should give security for the defendant's costs.

The plaintiff appealed against the order of Field, J.

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Gainsford Bruce, for the plaintiff.—As the plaintiff's claim is admitted, the defendant is really suing for the balance of his counter-claim. He cannot require security for costs, as he raises no defence to the plaintiff's action. It is true that the Judicature Act allows a defendant to counter-claim for unliquidated damages, but this cannot be treated as a set-off. It is only the mode of trial that has been altered, and instead of the defendant being obliged to bring a cross action for breach of contract, he is allowed for convenience to set it up and have it tried in the one action. The Judicature Act treats this as two actions tried in one, and the defendant becomes plaintiff for the balance over and above the original claim. A defendant out of the jurisdiction can never be required to give security for costs. In *The Julia Fisher* (1), a counter-claimant out of the jurisdiction was ordered to give security for costs; shewing that he was treated as a plaintiff, and as if there were two actions. If, therefore, the defendant could not have had security if these were two actions, why, because for his convenience his counter-claim is tried in the one action, is the foreigner to be in any worse position?

Anstie, contra.—It is a general rule that a plaintiff residing out of the jurisdiction must give security for costs. It is stated in *Ohitty's Practice*, p. 1414, and it is said that a Judge will so order, although the defendant has no defence on the merits. If this application had been made at once when the writ issued, it would have been granted as a matter of course.

[COCKBURN, L.C.J.—Do you contend that the Judge has no discretion?]

In *The Edinburgh and Leith Railway Company v. Dawson* (2) it is put as a right that the defendant has to compel the plaintiff to give security. The object is to put the parties on equal terms. The defendant will be at a disadvantage unless he has security. This is really only one proceeding; only one judgment is given—*Staples v. Young* (3).

[MELLOR, J.—Is the defendant obliged to put in a counter-claim?]

No; he might bring another action.

[MELLOR, J.—Then it is for his own convenience he does so.]

If the plaintiff bring the defendant into Court he must give security for costs; *non constat* that defendant would ever have brought an action for the counter-claim. The case cited from the Admiralty Court (1) depends on the practice of that Court, which is to make a defendant out of the jurisdiction give security.

G. Bruce, in reply.

COCKBURN, L.C.J.—I am of opinion that the order of Field, J., was wrong and must be reversed. It is quite true that by the law of this country, a foreigner residing out of the jurisdiction, if he brings an action in the jurisdiction, may be called upon for security for costs before he brings his action into Court. I do not say that this is not a right and just law; I think that it is, because otherwise if the plaintiff were defeated in the action, the defendant, though successful, would have no remedy against him for his costs. So the law stood before the Judicature Acts; so, as I think, it stands now, for there is nothing in those Acts to alter it.

As the law stood before, it was competent for a defendant who had a claim for liquidated damages to set it off against the plaintiff's claim in the action. If this were a claim for liquidated damages on the part of the defendant he could even then have set it off in this action. But it is not; and it is clear that before the Judicature Acts the defendant in this case must have brought a separate and independent action in order to assert his rights. What would have been the position of the foreigner in such a case? He would then be defendant, and the law has never been that a foreign defendant must give security for costs. This practice has been somewhat altered by the Judicature Act, which has provided that where he has a claim for unliquidated damages, the defendant may, instead of being obliged to bring a separate action, set up in a counter-claim appended to his statement of defence in the action brought against him, his own claim, which he would otherwise have to

(1) Law Rep. 2 Prob. Div. 115.

(2) 7 Dowl. 573.

(3) Law Rep. 2 Exch. Div. 324.

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assert in a distinct action, and have it adjudicated upon in the same action, together with the plaintiff's claim against him. He then is entitled to judgment if it should turn out, in the event of the trial, that his claim overtops that of the plaintiff.

But there is nothing in all this to say that the plaintiff shall be in any worse position as to giving security for costs than he was before this convenient mode of trial was adopted.

The case is simply this—the plaintiff sues, and the defendant in resisting, sets up in his defence, instead of in a new action, his new claim against the plaintiff. He then, as it seems to me, becomes plaintiff *quoad* this new claim, and why should he obtain security from the virtual defendant for the prosecution of his claim? The original plaintiff's right ought not to be prejudiced by reason of a benefit being allowed to the defendant. Where his claim is admitted by the defendant, who then sets up a distinct claim of his own independent of the cause of action admitted by him, he, the defendant, is really the litigant party. I therefore think that this order must be reversed, as I cannot apply the rule contended for by the defendant to this case, partly because no authority for my doing so has been shewn, and partly because I think it would be against justice so to do.

MELLOR, J.—I am of the same opinion. I confess that I thought that the construction which has been put upon the rule that where a foreign plaintiff sues, even if his claim be admitted, yet he must if litigation ensues give security for costs, involved this, namely, that the set-off was to be treated as part of the action. But we must remember that this benefit as to obtaining security is one conferred on the person against whom the action is brought. We must remember also, that it is optional with him whether he will set up his counter-claim or not; and when he does so, he becomes what I may call principal actor in the subsequent proceedings, if his claim is more important than the one made against him.

As the rule stands, therefore, applying to plaintiffs only, I do not feel justified in saying that it can be extended to a case

where a party has, for his own convenience, a choice given him whether he will include his claim in the pending action or bring another one. I am not sure that it would be right to extend it, and certainly there is no authority for our doing so. I think, therefore, the order was wrong and must be reversed.

Order appealed against reversed.

Solicitors—John Scott, agent for G. W. Hodge, Newcastle-on-Tyne, for plaintiff; Waterhouse & Winterbotham, agents for J. & R. S. Watson & Denby, Newcastle-on-Tyne, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE GUARDIANS OF THE PARISH
Jan. 24. { OF GREAT YARMOUTH (*appellants*) v. THE CLERK OF THE
PEACE OF THE CITY OF LONDON
(*respondent*).

Poor Law—Abolition of Derivative Settlements—39 & 40 Vict. c. 61. s. 35—*Criminal Lunatic—Husband and Wife*.

[For the report of the above case, see 47 Law J. Rep. M.C. 61.]

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE QUEEN v. THE JUSTICES OF
Jan. 31. { BRISTOL; AND PALMER (*appellant*) v. THATCHER (*respondent*).

Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 3, 73—*Wine Merchant—Wine Dealer's License*—Stat. 6 Geo. 4. c. 81. s. 2—*Grocer selling Wine off Premises without Justices' Certificate*.

[For the report of the above case, see 47 Law J. Rep. M.C. 54.]

[IN THE COMMON PLEAS DIVISION.]

1877.

Nov. 26, 27. }

PHILLIPS v. HENSON.

Landlord and Tenant—Lodger—Distress for Rent—Lodgers Goods Protection Act, 34 & 35 Vict. c. 79.

The mere fact of a person being an under-tenant is not sufficient to prevent his being a lodger within the meaning of the Lodgers Protection Act, 34 & 35 Vict. c. 79.

F., who was tenant of a house under a lease for a term of years, made an agreement in writing with the plaintiff, by which F. let to the plaintiff, as a quarterly tenant, and at a quarterly rent, certain specified rooms, being all the rooms in such house except three, in which F. resided:—Held, that such agreement was not inconsistent with the plaintiff being a lodger, and as such entitled to the protection given to lodgers by the 34 & 35 Vict. c. 79.

This was an action for wrongfully taking and selling the plaintiff's goods under a distress for rent under the following circumstances:—A Mrs. Jane Ffolkes was tenant to the defendant, under a lease for a term of years, of a house No. 3, Park Place, Clarence Gate, Regent's Park, and the rent, which was 105*l.* a year, being in arrear, the defendant caused a distress for the same to be levied on certain furniture and goods which were then on the premises, and which belonged to the plaintiff, who claimed the same as lodger under the Lodgers Goods Protection Act, 34 & 35 Vict. c. 79, and the material question was whether the plaintiff was a lodger within the meaning of that Act. It appeared that the plaintiff, who was brother-in-law to Mrs. Ffolkes, occupied all the rooms in the house but two or three, reserved for Mrs. Ffolkes under an agreement, of which the following is a copy:—

"Memorandum of agreement made this 18th day of December, 1875, between George Phillips, 3, Park Place, Clarence Gate, of the one part, and Jane Ffolkes, 3 Park Place, Clarence Gate, of the other part.

"The said Jane Ffolkes doth agree to

let unto the said George Phillips, and the said George Phillips doth agree to take, from the 25th day of December instant, for one quarter, and unless either of the said parties shall give to the other three months' notice to quit previous to the end of the said term, but not otherwise, from thence afterwards for another quarter year, and so on from quarter to quarter, while and until one of the said parties shall give to the other three months' notice to quit, all that kitchen, dining-rooms, drawing-rooms, second floor, and three rooms on third floor, together with the appurtenances, at and under the quarterly rent or sum of twenty seven pounds ten shillings, the same to be paid on the day of expiration of each quarter of a year during the term or terms aforesaid, and the first payment to commence on the 25th day of March, 1876 next, which said quarterly rent or sum of 27*l.* 10*s.* the said George Phillips doth agree to pay accordingly, free and clear of and from all deductions whatever; and the said Jane Ffolkes doth also agree to pay all taxes and assessments for the said premises, and keep the same in good and sufficient repair during the term or terms aforesaid, damage by fire or other inevitable accident only excepted. As witness," &c.

Previously to the plaintiff taking these rooms under the said agreement, the house had been stripped of all its furniture by the defendant, who had entered and sold the same under a bill of sale, and the plaintiff had applied to the defendant to take him as tenant, but the defendant had refused to accept him as such. Thereupon the plaintiff made the above agreement with Mrs. Ffolkes, and took possession of the said rooms, which he furnished with his own furniture. The distress for rent in respect of which this action was brought, was put in by the defendant on the 29th of March, 1876, after the plaintiff had paid the rent due to Mrs. Ffolkes under the said agreement up to the 25th of that month.

At the trial, which took place before Manisty, J., at the Middlesex Easter Sessions, 1877, it was contended on behalf of the defendant that the said agreement between the plaintiff and Mrs. Ffolkes

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was a collusive one in order to defraud the defendant, and also that the plaintiff was not a lodger within the meaning of the 34 & 35 Vict. c. 79, but an under-tenant.

The jury found a verdict for the plaintiff, damages 300*l.*

A rule *nisi* was afterwards obtained by *Murphy*, for the defendant, to set aside such verdict, and to enter judgment for the defendant or for a new trial, on the ground, *inter alia*, of misdirection of the learned Judge in telling the jury that the plaintiff was a lodger within the meaning of the said Act, and in not telling them to find for the defendant if they thought the agreement of December, 1875, was entered into collusively for the purpose of depriving the defendant of his rent, and not with the intention of creating a real relation of landlord and lodger.

Against this rule

Kemp and *Gibbons* shewed cause.—It was a question for the jury whether the agreement between the plaintiff and Mrs. Ffolkes was *bona fide* or not. That was left to the jury by the learned Judge, and the jury have in effect found that it was not a sham but a *bona fide* one. Then the plaintiff was a lodger within the meaning of the 34 & 35 Vict. c. 79 (1),

(1) The following are the principal sections of the 34 & 35 Vict. c. 79, viz.,—Section 1: "If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods or chattels, of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels, so distrained or threatened to be distrained upon, and that such furniture, goods or chattels, are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and that such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture," &c. And section 2: "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inven-

and entitled to the protection given by that Act. No definition of a lodger is given by the Act, nor is it easy to give one. In Dr. Johnson's Dictionary "lodger" is defined to be "one who lives in rooms hired in the house of another." Bovill, C.J., in *Thompson v. Ward* (2) says: "Generally speaking, a lodger is a person whose occupation is of part of a house, and subordinate to and in some degree under the control of a landlord or his representative, who either resides in or retains the possession of or a dominion over the house generally, or over the outer door, and under such circumstances as that the possession of any particular part of the house held by the lodger does not prevent the house generally being in the possession of the landlord." Every element there described exists here. The landlady, Mrs. Ffolkes, resided in the house, and the plaintiff was clearly a lodger within the meaning of the Act.

Murphy and *Shaw*, in support of the rule.—The agreement, even assuming it to be *bona fide*, did not make the plaintiff a lodger. It is an absolute demise of a certain part of the house, which comprised indeed the whole house, with the exception only of a few rooms. It made the plaintiff an under-tenant, and gave him a legal estate in the premises demised to him, which distinguished him from a lodger. A lodger has only the use and enjoyment of the rooms he occupies, and has no legal estate therein which would enable him to bring trespass. In *Com. Dig. Trespass B. 1* it is said, "*Trespass quare domum or clausum fregit* lies by

tory, and after the lodger shall have paid or tendered to such superior landlord, bailiff or other person, the rent, if any, which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress on the furniture, goods or chattels, of the lodger, such superior landlord, bailiff or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice for an order for the restoration to him of such goods; and such application shall be heard," &c.; "and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

(2) 40 Law J. Rep. C.P. 169; s. c. Law Rep. 6 C.P. 327.

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him who has the possession of an estate of freehold or inheritance, or by lease for years or at will." The plaintiff therefore, by virtue of this letting to him by Mrs. Ffolkes, could have maintained trespass. He could not have done so had he been only a lodger. A man cannot be "described as being in possession of a dwelling-house where he is a mere lodger," per Parke, B., in *Monks v. Dykes* (3). In *Allan v. The Overseers of Liverpool* (4), Blackburn, J., after stating that the person to be rateable in that case must be one who is the exclusive occupier, so as to be able to maintain trespass, says: "A lodger in a house, although he has the exclusive use of rooms in the house in the sense that nobody else is allowed to be there, and though his goods are stowed there, is not yet in the exclusive occupation in the sense I have already mentioned, because the landlord is there for the purpose of being able, as landlords usually are in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the legal occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring *trespass quare clausum fregit*." (They also cited—*Fludier v. Lombe* (5), *The Queen v. St. George's Union Assessment Committee* (6), *Barnes v. Peters* (7), *Smith v. The Overseers of St. Michael* (8), *Toms v. Luckett* (9), and *Smith v. Lancaster* (10).)

[LINDLEY, J.—An under-tenant may also lodge, and there is no doubt an under-tenant may bring trespass. Why may not he be both an under-tenant and lodger?]

He is not a lodger within the meaning

of this Act of Parliament if he can bring trespass. The Act intended only to give relief to a limited class of persons, viz., lodgers in the strict sense of the word, and not to persons who were lessees or under-tenants.

GROVE, J.—This was a case in which a landlord had distrained for rent, and in which the complaint was that the furniture which had been so distrained on was the furniture of a lodger within the meaning of the Lodgers Protection Act, 34 & 35 Vict. c. 79. The facts were shortly these:—A Mrs. Ffolkes was tenant to the defendant of a house for a term of years, and she let a large part of it to her brother-in-law, the plaintiff, by a written agreement, which was as follows—[The learned Judge here read the agreement of the 18th December, 1875]. It was contended before the learned Judge at the trial, and also before us, that this agreement created an under-tenancy, and was not applicable to the relationship of a lodger between the parties. It is not necessary to decide whether it created an under-tenancy or not, as the plaintiff might be an under-tenant and yet a lodger within the meaning of the Act. Now the plaintiff was in the house, and under circumstances under which he might be regarded as a lodger, and the question is not whether the agreement was such as might create a tenancy, but whether it was such as would be inconsistent with the plaintiff being a lodger within the meaning of the Act.

The Act gives no definition of a lodger, and I think the term "lodger" must vary according to circumstances and the purposes for which it is used. We had a few days ago, in the case of *Langdon v. Broadbent* (11), to consider what con-

(3) 4 Mee. & W. 667; s. c. 8 Law J. Rep. Exch. 73.

(4) 43 Law J. Rep. M.C. 69; s. c. Law Rep. 9 Q.B. 180.

(5) Cas. Temp. Hard. 307.

(6) 41 Law J. Rep. M.C. 30; s. c. Law Rep. 7 Q.B. 90.

(7) 38 Law J. Rep. C.P. 266; s. c. Law Rep. 4 C.P. 539.

(8) 3 E. & E. 383; s. c. 30 Law J. Rep. M.C. 74.

(9) 5 Com. B. Rep. 23; s. c. 17 Law J. Rep. C.P. 27.

(10) 39 Law J. Rep. C.P. 33; s. c. Law Rep. 6 C.P. 246.

(11) A magistrates' case decided in the Common Pleas Nov. 23, 1877, in which Grove, J., and Lindley, J., without defining "a common lodging-house," held a house, to which the police were in the habit of directing persons applying to them for a night's lodging, and in which hawkers, bone-gatherers, chair menders, and other persons of an itinerant character, were habitually received at the rate of 6d. a night, eating their meals at a common table in the kitchen, to be a common lodging-house within ss. 76-89 of the Public Health Act, 1875.

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stituted the keeper of a common lodging-house, in which the term "lodger" might be very different from what it is in the present case. The object of the Common Lodging-Houses Acts, and of the statute governing the present case, are very different, and the term "lodger" must be read in each case with reference to the object of the particular statute. Here the object is to protect persons who are in the house under contract subordinate to that of the tenant, and who are in no direct relation to the landlord of the premises. The Act is to protect the goods of persons who do not owe rent to the landlord, and between whom and such landlord there is no privity, but who having goods on the premises which might be taken under distress for the landlord's rent, are enabled by the Act to get their goods returned to them, they paying only such rent, if any, as may be due from them to their immediate landlord. I am therefore of opinion, without deciding what is the tenancy under this agreement, and whether it would enable the plaintiff to maintain an action of trespass, that the agreement is not inconsistent with the plaintiff being a lodger within the meaning of the Act. [The learned Judge then gave his reasons why the rule should not be made absolute on the other grounds on which it had been obtained, but which need not be stated for the purpose of this report.]

LINDLEY, J.—I am of the same opinion. As to whether the plaintiff was a lodger or not, I must confess that there is considerable difficulty in determining who is a lodger within the meaning of the Act. It is to be observed that the Act uses the term "lodger," and "lodger" only, without defining what is a lodger to which such term refers. One must therefore look at what is the true object of the Act, and it is to protect all such persons as fairly come within the meaning of lodgers, and I am not prepared to say that an under-tenant who lodges in the house with his landlord is not also a lodger. One can see why an under-tenant is not the person contemplated by the Act, because an under-tenant may not be a lodger at all, but still the mere fact of his being an under-tenant is not, I think,

sufficient to prevent his being a lodger within the meaning of the Act. I think the question whether this agreement was a breach of a covenant by Mrs. Ffolkes not to underlet is not the test, and that the plaintiff was a lodger within the meaning of the Act.

Rule discharged (12).

Solicitors—G. H. Finch, for plaintiff; J. C. Tomkins, for defendant.

[IN THE EXCHEQUER DIVISION.]

1877. June 28.	{	TOOMER AND OTHERS <i>v.</i> THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY AND THE SOUTH - EASTERN RAILWAY COMPANY.
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Railway—Jurisdiction of Railway Commissioners—Order on Two Companies to do Joint Acts for giving Facilities—Prohibition—17 & 18 Vict. c. 31. ss. 2, 3 (Railway and Canal Traffic Act)—36 & 37 Vict. c. 48. ss. 11, 26 (Regulation of Railways Act, 1873).

The Railway Commissioners have no power to make an order on two railway companies to afford to the public facilities for conveyance by doing jointly acts which neither company could do separately.

Where such an order was made, the High Court of Justice prohibited the Commissioners from enforcing it.

PROHIBITION.

The London, Chatham and Dover Railway (hereinafter called the Chatham Railway) joins the South-Eastern Railway at Strood Junction, and there the two railways form a continuous line of communication. A branch line, seventeen chains in length, diverges from the Chatham Railway, and connects with the Strood station, on the North Kent

(12) The Court were of opinion that the damages were excessive, and the rule was therefore only discharged on the plaintiff consenting to reduce the damages to 150*l.*

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line of the South-Eastern Railway. This branch was part of the main line of the East Kent (now the Chatham) Railway until that company obtained access to London by a route independent of the North Kent line, when this portion of line ceased altogether to be used for passenger traffic. By use of the branch it would be practicable for "through" traffic to be interchanged by the two railway companies without break of railway.

In December, 1876, Toomer and certain other residents in Strood and the neighbourhood, wishing to use the lines of the two companies as a continuous line, made a complaint under the Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48. s. 6, to the Railway Commissioners, against the two companies for not establishing a proper through service, *via* Strood junction, for traffic requiring to pass over a portion of each company's railway, and for not availing themselves of the junction for the interchange of passenger traffic. The applicants complained of having to walk or drive between the Strood station of the South-Eastern Railway and the Chatham station of the Chatham Company, and of having also to rebook at those stations; and further, they complained of the unreasonable delay attending through journeys from the trains not being run to suit each other, and their times therefore not corresponding, and found fault with the mode of carrying through goods traffic. It did not appear that, except by arrangement, the South-Eastern Company could run to Chatham or upon the line branching off from Strood station, but the East Kent Railway Act, 1853, gives, by section 39, the Chatham Company power to use the Strood station of the South-Eastern Company as fully as if it were their own. The Commissioners entertained no doubt that the particular accommodation sought for—namely, the working of a train service to connect the railways, was one which the companies were obliged to provide, and on the 6th of January, 1877, the Commissioners made the following order:—

"We do order and enjoin the Chatham and the South-Eastern Companies to

make arrangements and afford all due facilities and conveniences for the Strood station of the South-Eastern Company on and from the 1st day of February next, being the place where through traffic of any description may be transferred to and from the North Kent Railway from and to the Chatham Railway, and the Chatham Company to convey without delay all such traffic by railway between Chatham and Strood station.

"Provided always, that if at any time the two companies prefer that the Chatham station of the Chatham Company shall be the place where such traffic shall be transferred or exchanged, and shall make all suitable and convenient arrangements, as well with regard to transfer at the Chatham station as to conveyance by rail between the Chatham and Strood stations, such arrangement may be put in operation in lieu of those to be made pursuant to this part of our order, and in such case from and after the date of their coming into operation, and during their continuance, this part of our order, so far as such arrangements may differ from it as regards the Chatham Company being the particular company to convey between Chatham and Strood, and as regards Strood station being the place of exchange between the two companies, shall, to that extent, be in abeyance.

"And we order and enjoin the South-Eastern and the Chatham Companies so to arrange the arrival and departure of their respective trains as that for up through journeys each day there shall be four departures of trains from Strood within half-an-hour of the arrivals of trains at Chatham, and for down through journeys four departures of trains from Chatham within half-an-hour of the arrivals of trains at Strood; and we order the Chatham Company to convey by railway between Chatham and Strood stations passengers and luggage travelling by any of such trains at times to fit the arrivals and departures of four other up and four other down trains run on the North Kent line by the South-Eastern Company."

The time for compliance with the order was subsequently extended to the 1st of March, but the companies having failed

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to obey the order application was made to the Commissioners, who on the 14th of March made an order as follows:—

"We decide that the Chatham Company and the South-Eastern Company have respectively failed to obey our orders of the 6th day of January and the 9th day of February, 1877, and that no sufficient reason has been shewn by the Chatham Company or the South-Eastern Company for such failure to obey our orders. And we do order the Chatham Company to pay into Court, to abide our ultimate decision in the matter of this application, the sum of 60*l.* for every day after the 31st day of March instant that the Chatham Company shall fail to obey our orders dated the 6th day of January and the 9th day of February, 1877; and we do order the South-Eastern Company to pay into Court, to abide our ultimate decision in this matter, the sum of 15*l.* for every day after the 31st day of March that the South-Eastern Company fail to obey our orders of the 6th day of January and 9th day of February, 1877."

A rule having been obtained by the London, Chatham and Dover Railway Company calling on Toomer and the other applicants to shew cause why a writ of prohibition should not issue to prevent the Railway Commissioners from enforcing the two orders made by them on the 6th of January and the 14th of March, and from taking any further proceedings to compel the Chatham Company to run trains between Strood and Chatham—

A. Thesiger and Willis (Jeune with them), shewed cause.—The orders were valid. It is said as to the first order that the Commissioners had no power to direct that a certain number of trains should run, nor to order facilities beyond the point of junction on the lines of the two companies.

[CLEASBY, B.—If they make an order in excess of their jurisdiction it is simply illegal, and therefore prohibition would be unnecessary.]

And the companies should be left to their action of trespass when the penalties are levied, or to declare in prohibition. It was competent to the Commissioners

to declare what facilities the public ought to have—17 & 18 Vict. c. 31. ss. 2, 3 (1). Wide powers are conferred on them by that Act and by the Regulation of Railways Act, 36 & 37 Vict. c. 48. They may hear and determine whether the companies have violated the statutes and may declare what shall be done. The other side rely on *The Oatcrham Railway Company v. The Brighton and South-Eastern Railway Company* (2), but, as

(1) By 17 & 18 Vict. c. 31 (the Railway and Canal Traffic Act, 1854), sec. 2, every railway company shall, "according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively," . . . and every railway company having or working railways which form part of a continuous line of railway communication, or which have the terminus or station of the one near the terminus or station of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways by the other, without any unreasonable delay . . . "and so that no distinction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may by means of the railways . . . of the several companies be at all times afforded to the public in that behalf." Section 3 enabled any company or person complaining against any such companies of anything done, or of any omission made in violation or contravention of this Act, to apply in a summary way, by motion or summons, to the Court of Common Pleas, and empowered the Court to hear and determine the matter of such complaint, and to issue a writ of injunction restraining such company or companies from further continuing such violation or contravention of the Act, and enjoining obedience to the same, and to enforce obedience by attachment, and order directing payment of a sum not exceeding 200*l.* for every day that the company should fail to obey such injunction.

By 36 & 37 Vict. c. 48 (Regulation of Railways Act, 1873), railway commissioners were appointed, and section 6 transfers to them the jurisdiction of the Court of Common Pleas under 17 & 18 Vict. c. 31. s. 30, empowering them to hear and determine complaints under that Act, and to "make orders of like nature with the writs and orders authorised to be issued and made by the said Courts and Judges" therein mentioned, "and the said Courts and Judges shall, except for the purpose of enforcing any decision or order of the Commissioners, cease to exercise the jurisdiction conferred on them by section 2 of the Railway and Canal Traffic Act."

(2) 1 Com. B. Rep. N.S. 410; s. c. 26 Law J. Rep. C.P. 161.

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Cresswell, J. there points out, no case for greater facilities was established. The Commissioners exercised their powers in *Innes v. The London, Brighton and South Coast Railway Company and The London and South-Western Railway Company* (3), by ordering a roof to a station, and have equal power to direct the reasonable facilities demanded in this case to be afforded.

Secondly, the Commissioners had power to make their second order. By the Regulation of Railways Act all the jurisdiction of the Court of Common Pleas is vested in the Commissioners, only leaving in that Court the machinery—using the word in its most narrow sense—for carrying out the decrees of the Commissioners. “Except for the purpose of enforcing any decision or order of the Commissioners,” the jurisdiction of the Court of Common Pleas has ceased. The Commissioners may make “orders of like nature with the writs and orders authorised to be issued and made by the Common Pleas. The only “orders” are orders for attachment and payment of penalties, and the only “writ,” the writ of injunction mentioned in 17 & 18 Vict. c. 51. s. 3. So the order imposing a penalty was therefore within the jurisdiction of the Commissioners, although the officers of the Common Pleas may have to enforce it.

Balfour Browne appeared for the Commissioners, who desired all the facts to be brought before the Court.

[PER CURIAM.—You have no *locus standi*.]

Pope and W. G. Harrison (Moulton with them), in support of the rule.—Prohibition may be directed to any Courts “where they concern themselves with any matter not within their jurisdiction.” . . . Or if in the handling of matters clearly within their cognisance they transgress the bounds prescribed to them by the laws of England—4 *Blk. Com.* book 5. c. 12. The question originally raised before the Commissioners may be conceded to have been within their jurisdiction, but in *handling* of the matter they have transgressed the bounds of the law. The Legislature did not intend

to entrust the whole management of all the railways in the kingdom to Commissioners from whom there is no appeal. Yet the argument for the applicants would seem to suggest that Parliament meant to give such unlimited powers to the new tribunal. The earlier order commands the London, Chatham and Dover Company to give facilities to the public off their own line. It is an order for the compulsory exercise of running powers.

[CLEASBY, B.—The order is on both companies.]

It also orders the London, Chatham and Dover Railway Company to carry all traffic between Chatham and Strood.

[CLEASBY, B. — After arrangement made.]

But an order to make arrangements might be applied to any possible kind of scheme. In *The Powell Duffryn Steam Coal Company v. The Taff Vale Railway Company* (4), where a railway company having refused to allow the plaintiffs to run engines and carriages over part of their line under the powers of the Railways Clauses Act, 1845, section 92, the plaintiffs filed a bill in Chancery for an injunction to restrain the company from preventing their exercise of the right, James, L.J., said, “I doubt whether this Court can give effect to the rights conferred by section 92. As far as my experience goes, the Court has never ordered anything which involves doing something from day to day for an indefinite period,” and Mellish, L.J., expressed the same doubt.

[PER CURIAM.—Can the two lines be ordered to make an agreement?]

No. The whole scope of the Commissioners’ power in this case is to keep open the points of junction between the two railways and to prevent undue preferences.

Secondly, as to the enforcement of the orders, the power of the Commissioners was exhausted in making the first order, and all powers of enforcement are in the hands of the Superior Court. Section 6 empowers them to hear and determine complaints, and make orders of like na-

(3) 2 Nev. & Mac. 155.

(4) 43 Law J. Rep. Chanc. 575; s. c. Law Rep. 9 Chanc. 331.

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ture with the writs and orders authorised to be issued and made by the Courts and Judges, whose jurisdiction, *save for the purpose of enforcing* any decision or order of the Commissioners, is transferred to them. What is the meaning of that exception or the use of section 26 if the Commissioners have such an extensive power of enforcement as is suggested? They cannot order penalties, and their order of the 14th of March is invalid.

Willis replied.

The judgment of the Court (5) was (on June 28) delivered by

CLEASBY, B.—In this case a question of some difficulty has been brought before us in the form of an application for a prohibition to the Railway Commissioners restraining them from taking further proceedings to enforce certain orders made by them. The Railway Commissioners now exercise by virtue of 36 & 37 Vict. c. 48, the jurisdiction possessed by the Court of Common Pleas under the Railway and Canal Traffic Act, 1854. The exercise of this jurisdiction was from the beginning considered as attended with much difficulty—see Mr. Justice Cresswell's remarks in *Ransom v. The Great Eastern Railway Company* (6), and the difficulty is not diminished when we have to consider the extent to which it ought to be, and legally can be, exercised. There must be some limit to its exercise, and as there is no absolute right to an appeal (for section 26 of the Act only gives a right to a case upon questions which in the opinion of the Commissioners are questions of law), the proceeding by prohibition seems to be the proper mode of calling in question the legality of an order. It is contended by the Chatham Company (a name by which we will for convenience call the London Chatham and Dover Railway Company) that the Commissioners have gone beyond their jurisdiction in making two orders upon them and the South-Eastern Company, of the 6th of January, 1877, and

the 14th of March, 1877. The principal question arises upon the order of the 6th of January [His Lordship read it]. Then there follows a further order upon the South-Eastern Company and the Chatham Company to arrange the arrivals and departures of their trains at Strood in a particular manner, and an order upon the Chatham Company to convey by railway between Chatham station and Strood certain passengers. A further question is also raised upon the order of the 14th of March, namely, the authority of the Commissioners under the 6th section of the Act to enforce orders made by them, which is undoubtedly a proper case for prohibition if any real question arises as to that authority. But the first question was that upon which the principal argument was addressed. It arises upon the 2nd and 3rd sections of the Railway and Canal Traffic Act, 1854. The 2nd section directs what railway companies shall do, and the 3rd section provides the means to be resorted to upon a complaint of default. Now we have nothing to do with the reasonableness of the conclusion arrived at by the Commissioners as to the default of either the Chatham or the South-Eastern Companies in not affording due facilities and obstructing the public on a continuous line of railway. The question brought before us was not the competency of the Commissioners to entertain those matters and form conclusions upon them which could not be questioned. The question brought before us was the competency of the Commissioners to entertain an application which resulted in the order of the 6th of January, and the question may be tested properly by considering whether, if the application had been in the terms of the order, it was one which the Commissioners could properly entertain, not being an application against the companies for each of them to give facilities, or to do something which it was in their power to do, but an application against the two companies to act jointly in doing what neither could do separately, as, for example, to enter into arrangements for making Strood a station for the transfer of traffic, and to make jointly a time-table of particular traffic. When the obligation to give facilities, &c., is enlarged in this

(5) Cleasby, B.; and Hawkins, J.

(6) 1 Com. B. Rep. N.S. 437; s. c. 26 Law J. Rep. C.P. 91.

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way, Mr. Justice Cresswell might well have said the question assumes a very complicated and difficult character. Considering the application in this way, both my brother Hawkins and myself think that it is one thing to call upon each company, according to its powers, to give certain facilities, and a different thing to call upon them to act jointly in any way. A little consideration will shew how different the two things are. The former can be done by each acting independently in the exercise of its powers. The latter is something which is not properly within the exercise of the powers of each acting independently, and the attempt to carry it into effect would lead to frequent disputes, and is not really as certain and final as an order ought to be professing to enjoin a particular thing. This is not intended as an objection to the order on a matter of form, but has reference to the application for such an order being in substance an application which the Commissioners cannot entertain. We had the advantage of a very full and very able argument upon the matter, and the conclusion at which we have arrived is, that in making the order of the 6th of January the Commissioners have exceeded their jurisdiction. We were called upon by the learned counsel who shewed cause against the rule, if our decision was in favour of a prohibition, only to order a declaration in prohibition, and formerly we should unquestionably have done so. But now that our order can be considered on appeal in the same manner as if the question were raised upon the record, we see no reason for doing this. It would lead to great delay, and with a penalty of 60*l.* a day running such delay ought to be prevented, unless some advantage is to be derived from it. We do not see how the question can be better raised than on the present application. We therefore feel bound to act upon the conclusion at which we have arrived, and to direct the prohibition to issue. The Queen's Bench Division has, we understand, acted upon this view, and declined to order a declaration in prohibition for the purpose of raising a question of difficulty and importance—*Sergeant v.*

Dale (7). The prohibition will be against taking any further proceedings to enforce the order of the 6th of January. This disposes of the case before us, and the other question, namely, the validity of the order of the 14th of March (on the supposition of the order of the 6th of January being legal), is not properly before us for decision, but the prohibition may go in the form asked by the rule, so far as regards the restraining the Commissioners from enforcing or taking further proceedings to enforce the orders of the 6th of January and the 14th of March, 1877, but not further to restrain them generally from compelling the Chatham Company to run trains between Chatham and Strood. We cannot decide beforehand that no order could, under any circumstances, be legally made directing such trains to run. As regards the costs of this application, we see no ground for saying that the application actually made to the Commissioners was an improper one, and as the Commissioners have made the order complained of, there is no sufficient reason for making the original applicants pay the costs of setting it aside. There will, therefore, be no order for costs.

Rule absolute.

Solicitors—Howard Russell, Gravesend, for applicants; White, Victoria Station, for London, Chatham and Dover Railway Company; W. R. Stevens, for South Eastern Railway Company.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } BENTHAM (*appellant*) v.
Jan. 24. } HOYLE (*respondent*).

Railway Company—Bye-Law under 8 & 9 Vict. c. 20—Offence—Passenger travelling without Ticket—No Intention to defraud.

[For the report of the above case, see 47 Law J. Rep. M.C. 51.]

(7) 46 Law J. Rep. Q.B. 78; s. c. 2 Q.B. Div. p. 568.

[IN THE COURT OF APPEAL]

1877. } SMITH v. WIDLAKE AND
Nov. 8, 12. } OTHERS.*

Conveyance subject to void Lease—Acceptance of nominal Rent reserved under void Lease—Vendor and Purchaser—Landlord and Tenant.

The plaintiff was owner in fee of certain cottages and land conveyed to him subject to an unexpired lease for sixty years. He received rent from the tenant under this lease at the nominal rate, reserved under the lease, of 6d. a year, and gave a receipt for it "for chief rent." The lease had been granted by a former tenant for life who had no leasing power, and contained a covenant for quiet enjoyment. In an action of ejectment by the plaintiff against the tenant in possession under this lease,—

Held, that as the void lease gave no action on the covenant for quiet enjoyment to the defendant against the plaintiff, it afforded no defence to this action; and the receipt of rent under the circumstances did not create a tenancy from year to year.

This was an action to recover possession of two cottages and land. The action was tried before Cockburn, L.C.J., at the Bristol Spring Assizes, 1877, without a jury. The learned Judge entered judgment for the defendants; and against this judgment the plaintiff now appealed.

The following were the facts material to the decision of the Court:—

The land upon which the cottages in question were built was in 1834 in the possession of John Harris as tenant for life without leasing power.

On the 29th of September, 1834, John Harris by deed leased the land to F. Mayne for sixty years, at the annual rent of 6d.

This lease contained a covenant by John Harris for quiet enjoyment.

F. Mayne built the cottages in question.

After the death of the tenant for life, the fee simple vested in James Harris on the 7th of June, 1866.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

James Harris accepted rent at the rate of 6d. a year from James Mayne, the son of F. Mayne.

By receipt of the 21st of July, 1872, James Harris acknowledged the receipt from James Mayne of "the sum of 2s. 6d. for chief rent" of the cottages and land.

The cottages and land were worth about 6l. a year.

On the 2nd of April, 1874, James Harris conveyed by deed to the plaintiff in fee the lands in question, "but subject as to the houses and garden mentioned in the schedule to a certain indenture of lease thereof for a term of sixty years, from the day of , 1834," and in the covenant against encumbrances by James Harris, there was an exception as to the lease.

No notice to quit had been given.

Oole and Pitt Lewis, for the plaintiff.—The lease was granted by the tenant for life, who had no leasing power; and it is therefore void as against the owner in fee. The objection that as James Harris has conveyed the land to the plaintiff, subject to the lease, the plaintiff, who claims under the grant, cannot recover possession till the term has expired, is disposed of by the case of *Doe d. Potter v. Archer* (1), which is directly in point. *Prettyman's Case* (2) is relied on by the other side; but the circumstances of the case do not appear in the report, which is only given in the course of another. The doctrine in *Sugden on Vendors and Purchasers*, ch. 23, sec. 2, paragraph 4, pp. 750-751 (14th ed.), has no application here. The acceptance of rent by James Harris is not conclusive—*James d. Aubrey v. Jenkins* (3).

Arthur Charles (Murch with him), for the defendants.—*Prettyman's Case* (2) is directly in point; and see *Dart's Vendors and Purchasers*, 5th ed. vol. ii. p. 885, and *Taylor v. Stibbert* (4). It is clear from these authorities that where a conveyance is taken expressly subject to a void lease, the purchaser is bound there-

(1) 1 Bos. & P. 531.

(2) Cited in *Walton v. Stamford*, 2 Vern. 279.

(3) Bull. N.P. 96.

(4) 2 Ves. jun. 437.

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by. Even if the plaintiff is not so bound, he has created a tenancy from year to year by accepting rent; and as he has not given notice to quit, he cannot succeed in this action—*Doe d. Martin v. Watts* (5).

Cole, in reply.

BRAMWELL, L.J.—I am of opinion that the judgment entered by the Lord Chief Justice for the defendant ought to be reversed.

It is urged on behalf of the plaintiff that the receipt of the 6d. rent by James Harris created a tenancy from year to year. But this is not so. Receipt of rent is evidence of such a tenancy, which can be rebutted by the surrounding circumstances. Here the inadequacy of the sum received, and the fact that it was paid and received under the name of "chief rent," negatives the presumption that it was paid in respect of a yearly tenancy of the premises. It was paid under a mistake; and it is clear that rent received under a mistake does not create a tenancy from year to year—it would be a discredit to our law if it were so. Of course it causes the occupation to be no longer that of a trespasser; the occupier is in the position of a tenant at will or by sufferance. Consequently Mr. Charles's first point fails him. See *Roe d. Brune v. Prideaux* (6), *Denn d. Brune v. Rawlins* (7).

The next point is, that as the conveyance was subject to the tenancy, no title to possession passed to the purchaser till the expiration of the tenancy. What had become of the title to possession meanwhile? Whether it was "in nubibus" or where, Mr. Charles was not able to say. But the conveyance gives to the purchaser all the rights which the vendor had with reference to that lease, and therefore gives a right to possession.

Then there is another point of a more recondite nature, which Mr. Charles said was founded upon a decision he cited, namely *Prettyman's Case* (2), where

there had been a lease granted without power in the grantor; and the grantee in effect went to the Court of Chancery to get the lease affirmed, and it was held that the grantee was entitled as against the assignee of the remainder. The lessee says in effect, "This is a breach of good faith—it was subject to that lease that you purchased the property." And the Court of Equity would hold that the assignee was bound by the lease purported to be granted by his vendor. But that case has only to be stated to shew that it is not this case; for in the present case the plaintiff claims under James Harris, against whom the defendant has no claim. The assignee of the lease may have a claim against the executors of the tenant for life; but they are not the grantors of the plaintiff, and no action for breach of covenant for quiet enjoyment will lie against James Harris. The case in *Vernon* (2) has, therefore, no bearing on the present case; and I am of opinion that the judgment must be reversed.

BRETT, L.J., concurred.

COTTON, L.J.—I think it clear that no tenancy from year to year was created. It has been argued that the plaintiff cannot recover possession of the cottages and garden until the expiration of sixty years from the 29th of September, 1834, because the conveyance to the plaintiff in the recital in the *habendum* and in the covenant against incumbrances recognises as valid the indenture of lease dated as of that day; and that the deed must therefore be construed as confirming the void lease, or creating a new lease for the remainder of the term of sixty years. In support of this argument, reliance has been placed upon *Prettyman's Case* (2). The facts of that case are very shortly stated. It is not reported, but merely referred to in the case of *Walton v. Stamford*. Probably the decision was on the ground that the intended grantee for life had a claim against the vendor, and therefore against the purchaser as taking with notice. But whatever may be the true explanation of that case, I cannot recognise it as an authority in favour of the defendants' contention as to the con-

(5) 7 Term Rep. 83.

(6) 10 East 158.

(7) 10 East 261.

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struction and effect of the conveyance to the plaintiff. In my opinion that conveyance on its true construction refers to the lease of 1834, merely for the purpose of excepting it from the covenant against incumbrances. It has also been argued that in equity, where a fee simple is granted subject to a void lease for years, the grantee will be restrained from taking any steps to put an end to the term, and will be compelled to confirm it; but upon reference to the authorities it will be found that in them the grantor of the hereditaments conveyed has contracted to create a term of years, or is liable to an action at the suit of the intended lessee if the latter is ejected from the land agreed to be demised to him, and the ground of the decisions is that the purchaser taking with notice is bound to complete the contract or to indemnify his vendor against the action, or, in other words, is bound to save him from being sued. The doctrine does not apply to the facts before us; James Harris, who conveyed to the plaintiff, is not exposed to any action at the suit of those representing the original lessee.

Judgment reversed.

Solicitors—Kennedy, Hughes & Kennedy, agents for R. I. Bencraft, Barnstaple, for plaintiff; Church, Sons & Clarke, agents for J. A. Thorne, Barnstaple, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1877. { EVERSHED v. THE LONDON AND
Nov. 29. { NORTH WESTERN RAILWAY
COMPANY.*

Railway Company—Undue Preference—Parties having Advantages afforded by rival Lines—8 & 9 Vict. c. 20. s. 90—17 & 18 Vict. c. 51. s. 2.

The plaintiff carried on business as a brewer at Burton, and employed the de-

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

endants to convey goods for him by their railway. The plaintiff's premises were not connected with the defendants' or any other line by sidings. The plaintiff was charged by the defendants a station to station rate for the carriage of goods to and from Burton (which rate also included a charge for station accommodation), and 1s. a ton for cartage to and from the station. Three other firms at Burton had premises connected with a rival line, belonging to the Midland Railway Company, by sidings, from which all goods forwarded or received were loaded and unloaded. The cost of cartage was thus saved, and, in addition, the Midland allowed a rebate of 9d. per ton—a sum which fairly represented the value of the station accommodation and other services which were, in consequence of the sidings, not required to be performed by the Midland. The defendants, solely with a view to attract the traffic of the three firms from the Midland, carted goods for them gratuitously and allowed a rebate of 9d. a ton off the station to station rate; the result being that the plaintiff had to pay 1s. 9d. a ton more than the three firms for goods carried under the same circumstances:—

Held, that the transaction amounted to a breach of section 90 of the Railways Clauses Consolidation Act, 1845, as being a reduction of charges in favour of the three firms, and of section 2 of the Railway and Canal Traffic Act, 1854, as being an undue preference of the three firms, and that the plaintiff was entitled to recover back the 1s. 9d. a ton from the defendants.

This was an appeal by the defendants from the judgment of the Queen's Bench Division in favour of the plaintiff. The decision below is reported 46 Law J. Rep. Q.B. 289, where the whole of the facts are set out. The facts are also stated in the above head-note.

Mellor and Dugdale, for the defendants.—The three firms who are said to have been preferred to the plaintiff have natural advantages that they are entitled to the benefit of, and the plaintiff has no right to complain because he has built his brewery on a spot which does not

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possess those advantages—*In re Ransome v. The Eastern Counties Railway Company* (1), *In re Nicholson v. The Great Western Railway Company* (2), *Strick v. The Swansea Canal Company* (3). The case of *In re Harris v. The Cockermouth and Workington Railway Company* (4) is distinguishable on the ground that the preference was there given to one who had no natural advantages, and that the case is not an authority against the defendants is shown by the subsequent case of *Garton v. The Bristol and Exeter Railway Company* (5). Supposing that there has been a reduction in favour of the three brewers or an undue preference of them, the plaintiff is not entitled to sue, for it is expressly found that he suffered no damage; and the only complaint he makes is, not that he has been charged too much, but that the three brewers have been charged too little. He may have grounds for going to the Railway Commissioners, but none to support an action—*Hoxier v. The Oaledonian Railway Company* (6).

[BRAMWELL, L.J.—If a passenger by train discovered that one of his fellow-passengers had a free pass, would he and all the others who had paid be entitled to recover back their fares?]

Clearly not.

[BRETT, L.J.—If this objection were a good one, would it not have been so held in the previous cases?]

Wills and Gould, for the plaintiff, cited—*In re Oxlade v. The North Eastern Railway Company* (7), *Bazendale v. The Great Northern Railway Company* (8),

(1) 4 Com. B. Rep. N.S. 135; s. c. 27 Law J. Rep. C.P. 166.

(2) 5 Com. B. Rep. N.S. 366; s. c. 28 Law J. Rep. C.P. 89.

(3) 16 Com. B. Rep. N.S. 245; s. c. 33 Law J. Rep. C.P. 240.

(4) 3 Com. B. Rep. N.S. 693; s. c. 27 Law J. Rep. C.P. 162.

(5) 6 Com. B. Rep. N.S. 639; s. c. 28 Law J. Rep. C.P. 306.

(6) 17 Sess. Cas. 2nd Series 302.

(7) 1 Com. B. Rep. N.S. 454; s. c. 26 Law J. Rep. C.P. 129.

(8) 5 Com. B. Rep. N.S. 336; s. c. 28 Law J. Rep. C.P. 81.

The Great Western Railway Company v. Sutton (9).

Mellor, in reply.

BRAMWELL, L.J.—I am of opinion that the judgment of the Queen's Bench Division should be affirmed. The principles upon which our decision turns seem to us very clear, and therefore, although the question before us is of importance, and although we desire to state our reasons with accuracy, so that they may be a guide in future cases of a like kind, we will proceed to deliver judgment at once.

I do not think that if the goods of the three firms were in point of substance carted gratuitously by the defendants, the sum of 1s. charged to the plaintiff for cartage would fall within the word "toll," as defined in section 3 and as used in section 90 of the Railways Clauses Consolidation Act, 1845. To my mind that word does not include a charge for cartage or collection; it only includes charges for receiving upon transit along, and delivery from the railway of the goods entrusted to the company. I am further of opinion that the 63rd section of the statute (9 & 10 Vict. c. cciv.) incorporating the defendants does not make the charge of 1s. a "toll," within the meaning of the Railways Clauses Consolidation Act, 1845. That section forbids the defendants to charge for the conveyance of goods more than certain rates, "including the tolls for the use of the railway, and waggons or trucks and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering and unloading of goods, and for delivery and collection and any other services incidental to the business or duty of a carrier." I do not think that the exception in this clause enables the company to make a charge for cartage, if they are not otherwise empowered so to do; it is merely inserted *ex abundanti cautela*. It has been argued that the collection of the goods is part of the defendants' business as carriers, and therefore that the remuneration for it

(9) 38 Law J. Rep. Exch. 177; s. c. Law Rep. 4 H.L. Cas. 226.

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must be a "toll;" and a further objection has been suggested that if it is not a toll, it is *ultra vires*, and therefore illegal in the defendants to take it.

I think it is not *ultra vires*; it is incidental to a business they may carry on. On this doctrine, first introduced in the common law Courts in *The East Anglian Railway Company v. The Eastern Counties Railway Company* (10), *Brice on Ultra Vires*, p. 434 (2nd ed.), may be read with advantage. But whether *ultra vires* or not, I think it beyond doubt that the charge for collection is not a "toll" within the Railways Clauses Consolidation Act, 1845, s. 90.

On the other hand, I am clearly of opinion that the sum of money charged to the three firms does include a charge for collecting and loading and unloading their goods. It is stated in the case that the defendants did the cartage for the three firms gratuitously; but we are empowered to draw inferences of fact, and I come to the conclusion that this statement is not strictly accurate. If the defendants had intended to prejudice the plaintiff by an unequal rate, they could not effect that object by making no charge to the three firms for a portion of the services rendered. The Railways Clauses Consolidation Act, 1845, s. 90, enacts that no reduction or advance "shall be made either directly or indirectly in favour of or against any particular company or person." The word "indirectly" may not of itself have much force, but it helps to shew the intention of the Legislature; and the legal maxim, *dolus circuitu non purgatur*, is in point. I have no doubt that the defendants intended to act *bona fide*, but I am satisfied that the charge made to the three firms for carrying their goods did include a charge for the cartage. Let me apply the following test: Suppose that the defendants' servants whilst employed in carting goods for one of the three firms lose or injure them, can it be doubted that the defendants will be liable as common carriers? and yet common carriers do not act gratuitously. In reality the defendants receive from

(10) 11 Com. B. Rep. 775; s. c. 21 Law J. Rep. C.P. 23.

the three firms one sum, which includes payment for carriage upon the railway and also payment for cartage. It is perfectly clear that the rebate or allowance of 9d. is a deduction from the "toll," as that word is interpreted in the Railways Clauses Consolidation Act, 1845, s. 3, and therefore as to it the question does not really arise which I have just disposed of, as to the charge of 1s. Therefore, as the total charge made by the defendants to the three firms for carrying their goods includes payment for the cartage, and as the sum of 9d. is likewise deducted therefrom, it is plain that the defendants charge the three firms less for "tolls"—that is, for conveying their goods on the railway—than they receive from the plaintiff for the same service. This amounts to a contravention of the 90th section of the Railways Clauses Consolidation Act, 1845, and the action is maintainable for breach of that section alone.

But, further, I am in favour of the plaintiff also as to the construction of section 2 of the Railway and Canal Traffic Act, 1854. Undoubtedly it seems a little hard at first sight that by deciding in favour of the plaintiff the defendants will probably lose the whole traffic of the three firms; but after further consideration it will be found that the hardship is scarcely real, for the defendants can keep a share in the traffic of the three firms provided they carry the plaintiff's goods at the same rate as those of the three firms.

Cases were cited to shew that a benefit may be given to one person which another has not in his dealings with a railway. That is true, but the principle of those cases does not apply. I am not going to attempt to lay down a precise rule, but, speaking generally and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets; a man is taken a daily journey for 1s., for which his neighbour who takes it once a month pays 5s. He is entitled to the same benefit, but it is

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one of which he cannot avail himself. So as to goods. If a million tons are carried for A. at a certain rate, B. may demand the same rate for the same quantity though he never will nor can, because his dealings are too small. It is reasonable this should be so; a large business can be done at a cheaper rate than small; nothing like that exists here. It was also urged that the three firms had something in the nature of a natural advantage to the benefit of which they were entitled in their dealing with the defendants. I am of opinion that is not so. They have indeed an advantage which enables them to put a pressure on the defendants, but if the defendants yield to it they must give an equal advantage to the plaintiff. If the three firms were a mile nearer than the plaintiff to the defendants' station, doubtless the defendants might charge the plaintiff a larger sum for carriage. But the only advantage here that the three firms have, is that they have easy access to another railway. So they might have to a canal, or ordinary highway. But these considerations, though a reason for the diminished charge, do not justify the extra charge to the plaintiff.

I feel sure that our decision carries into effect the intention of the legislature. It was manifest that railway companies would enjoy almost a monopoly of traffic, and it was thought right that all persons dealing with them should be put upon an equality. The plaintiff, therefore, has a right to complain that the goods of the three firms should be carried at a charge of 1s. 9d. less per ton than his. I think that in the words of the Railway and Canal Traffic Act, 1854, the defendants made and gave an "undue and unreasonable prejudice and advantage to and in favour of" the three firms, and subjected the plaintiff to an "undue and unreasonable prejudice and disadvantage." The language of this statute is relative, and although the charges made to the plaintiff may not in themselves be wrong, yet they become unlawful by reason of the lower charges made to the three firms; therefore the plaintiff is entitled to recover under either of the statutes upon which he relies.

I wish to say a few words as to the damages. Under the Railways Clauses Consolidation Act, 1845, section 90, the plaintiff is entitled to recover the wrongful charge of 1s. 9d. a ton as money received to his use. Under the Railway and Canal Traffic Act, 1854, section 2, the same conclusion is arrived at, although possibly by different means. If the plaintiff is to be considered as having suffered a tort at the hands of the defendants, the measure of damages will be the difference between the amount that he has actually paid and the amount which he ought to have paid: if he is to be deemed to have paid the sum of 1s. 9d. per ton without consideration, he is entitled to sue for money received for his use. In every point of view the result is the same.

The Queen's Bench Division have divided into four periods the time to which this action relates and have held that the plaintiff is entitled to recover as to two of those periods, and is not entitled to recover as to the other two. I think that in this respect also the decision of the Queen's Bench Division is perfectly correct, and I agree with the reasons which they have assigned.

BRETT, L.J.—I am also of opinion that the judgment of the Queen's Bench Division should be confirmed in every respect. It seems to me that the question here arises solely between the plaintiff and the London and North Western Railway, and the only circumstances which we can look at are those which arise between those parties. The relations between other brewers and the Midland Railway Company may have been the motive power in this case, but whether that be so or not is immaterial, as the only question we have to consider is whether the defendants made any improper distinction between the plaintiff and others.

Now it seems to me that the plaintiff and the other three brewers were, in their relations to the defendants, all under the same circumstances in every respect. In the various duties they performed in collecting, carting, conveying, &c., they acted in a precisely similar manner towards the plaintiff as to the others, and

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as far as the discussion of this case is concerned we may assume that the quantity of beer conveyed by them for the plaintiff did not differ from that conveyed for the others. But when we come to the charges made in respect of these similar services we find, as it seems to me, that they are wholly different in the two cases, and the question before the Court is whether the company in making this diversity of charge did not commit a breach of both the Acts we have been considering, namely, the Railways Clauses Consolidation Act, 1845, section 90, and the Railway and Canal Traffic Act, 1854, section 2. In my opinion the company have so done, and under such circumstances as to give to the plaintiff a right to sue them.

A distinction was suggested between the 9d. and the 1s. Unfortunately this was not suggested below, so that we have not the opinion of the learned Judges upon it, but as to the 9d., I cannot doubt it was part of the toll they were entitled to charge, was charged as such and paid as such. No part of this was returned to the plaintiff, and therefore, as far as the 9d. is concerned, there is I think a clear inequality. As to the 1s., I have great doubts whether that is not also a part of the toll. The company undertake not merely to carry goods, but they must receive and deliver them. They may or may not receive and deliver at the edge of their rails; but be that as it may, it seems to me that from the time they receive them they are carriers of them. Under certain circumstances they do not receive them at the edge of their rails, but before. Sometimes they collect at receiving houses, or sometimes, as at Burton, at the houses of the consignors, but, as has been held, from the moment of their receipt of them they are liable as common carriers, and that only, as it seems to me, because they are conveyors of the goods. If that be not so, in collecting the goods the company would be carrying on a business they are not authorised to carry on, but I do not doubt they are authorised, even if not specially empowered, by their Acts to do so, as such transaction is a necessary part of their business. It is true that the 1s. is

not charged in a different form from the rest of the toll, but I strongly think this is a part of it, and only doubt, after what has been said by Lord Justice Bramwell.

But whether that be so or not, I think that it is in the nature of one, and the demand and exaction of it from one person and not from another is such a preference of the latter as comes within section 90 of the Act of 1845.

But however that may be as to the Act of 1845, I cannot doubt that the defendants have infringed the Act of 1854, and I am of opinion that when in respect of the conveyance of articles under the same circumstances they do charge the others a lower rate they do give a preference, and an undue one, and therefore they have overcharged the plaintiff.

As to those overcharges which the plaintiff paid before he obtained knowledge of the terms on which the company was dealing with the other brewers, he is clearly entitled to recover them back. The same remark applies to those paid after protest, which were really paid under compulsion, but as to those paid by the plaintiff or his agent on a settlement of accounts, when he had knowledge of the circumstances, those he cannot recover, as such a settlement is final.

The judgment of the Queen's Bench Division must therefore be confirmed in every respect, and I think that the authorities entirely sanction that.

COTTON, L.J.—The first question in this case is the meaning of the proviso in section 90 of the Railways Clauses Consolidation Act, 1845. The words of that proviso are, "Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway, under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

Nor did the goods of the plaintiff and

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the three brewers pass over the same portion of the line under the same circumstances. At the very first sight it clearly appears that the circumstances referred to were only those of the passage of goods over the line, and not those in respect of other services, and that I think is the true construction of the statute, namely, in order that the tolls may differ there must be a difference of circumstances in respect of the passage of goods over the rails, and that is the construction put upon the words by the House of Lords in *Sutton v. The Great Western Railway* (9). Well, has there been any irregularity of toll here? I offer no opinion as to whether the 1s. or the 9d. are properly called "tolls," but it is clear that the intention of the proviso is that there should be no inequality of charge, and it is impossible to say that there has not been such an inequality, save, I think, that doing the cartage gratuitously, whether the charge for it can be called a "toll" or not, is a reduction.

I should mention that the argument that is founded on what is said to be the decision in several cases, namely, that parties ought not to be deprived of such natural advantages as they have, is founded on a misreading of those cases. The effect of them is that a party is not to be deprived of the natural advantages he possesses arising from his vicinity to the railway over which his goods are to be carried.

Then, when we come to section 2 of the Railway and Canal Traffic Act we see that there has been an undue preference within that section. The company are not bound to have receiving houses, but they do have them, and if they do they are bound not to shew any undue preference in the use of them. In my opinion the Act does prevent undue preference being given to some customers over others. Here there is a return of money paid for the doing of a duty. Is that undue? Certainly. If the same services are rendered to two persons, and a larger charge is made to one than the other, that is an undue preference of the latter. This is not like the cases in which a person sends large consignments, because it is cheaper on

the average for the company to carry large than small consignments.

It is clear that the plaintiff can recover such charges as he has in ignorance or under protest paid to the company in excess of what they were entitled to receive.

Judgment affirmed.

Solicitors—Geare & Son, agents for J. & W. J. Drewry, Burton-on-Trent, for plaintiff; R. F. Roberts, for defendants.

[IN THE EXCHEQUER DIVISION.]

1877. } BAKER v. THE MAYOR, &c.,
May 29. } OF PORTSMOUTH.

Local Government Act, 1858 (21 & 22 Vict. c. 98), section 34—Bye Laws, Power to demolish Buildings erected in Contravention of—"Streets."

By the Local Government Act, 1858 (21 & 22 Vict. c. 98), section 34, every local board may make bye-laws with respect to the construction of new streets, the structure of walls of new buildings, the sufficiency of space about buildings, and the drainage of buildings, &c., and "may further provide for the observance of the same by enacting therein such provisions as they may think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter or pull down any work begun or done in contravention of such bye-laws":—

Held, that bye-laws which enabled the local authority to pull down buildings erected in contravention of provisions thereof requiring notices and plans to be left with the local surveyor were valid.

Statement of claim by the plaintiff, a builder and lessee and occupier of land in Tipmoor Street, in the borough of Portsmouth, against the defendants, the mayor and corporation of the borough and urban sanitary authority for the same, stating as follows:—

In July, 1875, plans were duly depo-

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sited with the defendants in pursuance of a bye-law made by the defendants, as the urban sanitary authority for the borough, for the construction of a street or road over the land of the plaintiff. The plans were submitted to and duly approved by the defendants.

In August, 1875, the plaintiff commenced to build sixteen houses on the land, being eight on either side of the street or road, and continued to build them until the month of November, 1875, when eight of the houses were roofed in and the others were chamber-floor high with joists on. He admitted that he had not before commencing the houses deposited plans thereof, although he conscientiously believed that his surveyor had done so, and that the plans were in possession of the board before the houses were demolished, as hereinafter mentioned; but the defendants allowed the plaintiff to commence and to proceed with the erection of the houses, as hereinbefore mentioned, without complaint or interference down to the month of November, 1875; and the houses were in all respects constructed in accordance with the bye-laws of the defendants, the mayor and corporation, relating to the construction of buildings.

On the 22nd of November, 1875, the defendants charged the plaintiff before the magistrates for the borough with having built the houses without having first deposited plans for the same in accordance with the bye-laws of the defendants, the mayor and corporation. The plaintiff thereupon pleaded guilty, and was ordered to pay and paid a fine of 1*l.* and costs.

On the 9th of December, 1875, the defendants sent a large number of workmen to the place, and the workmen by their orders pulled down twelve of the houses, eight of which had then been roofed in, and totally demolished the same; and in doing so used so much violence that the materials thereof were rendered almost valueless for use at any future time for building or any other purpose.

Notice of this action was on the 24th of March, 1876, given to the defendants.

Defence.—1. The defendants denied

the allegations of the claim, save in so far as the plaintiff therein admitted that he had not before commencing the houses deposited plans thereof, and they alleged that

2. Certain bye-laws had been duly made by the defendants, as the urban sanitary authority of the borough under and by virtue of the statutes in such case made and provided.

3. By 3rd of the bye-laws it was provided that no building should be erected by the side of any new street or proposed new street, or to which any new street will form the only carriage approach, until such street has been constructed to the approval of the urban sanitary authority.

4. By the 32nd of the bye-laws it was provided that every person who should intend to erect any new building should give twenty-one days' notice to the urban sanitary authority of such intention, to be delivered to the local surveyor, or left at his office, and should at the same time leave or cause to be left at the said office, for the use of the urban sanitary authority, detail plans and section, and a block plan of such intended new building and its appurtenances, and a description of the materials of which the building was proposed to be constructed, of the intended mode of drainage and means of water supply.

5. Bye-law 37 was as follows:—

"The urban sanitary authority shall, by resolution or order, approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices thereof; but if the owner or person intending to lay out any new street, or construct any new building, fail to give the notices herein required, or if any owner or person shall construct or cause to be constructed any works or buildings, or do any act or omit to do any act, or comply with any requirement of the urban sanitary authority contrary to the provisions of any or either of the hereinbefore contained bye-laws, he shall be liable for each offence to a penalty not exceeding 40*s.* for each and every day during which any such works and buildings shall con-

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tinue or remain, contrary to the said provisions; and the urban sanitary authority may, if they shall think fit, at any time after the expiration of forty-eight hours from the time of the service of a notice in writing addressed to such owner or person, signed by the local surveyor or the clerk to the urban sanitary authority, expressing their intention so to do, in default of such owner or person shewing good cause to the contrary in the meantime, cause any work begun or done in contravention of any or either of such bye-laws, to be removed, altered or pulled down, as the case may require, and the expense incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by 'The Public Health Act, 1848;' and any such notice may be served either personally or by leaving the same with some person either at the usual or last known place of abode or business of such owner or person, or at or upon the works or buildings referred to therein."

6. The plaintiff erected the houses in contravention of bye-laws 3 and 32. The street was a new street, and the houses were erected before the street had been constructed according to the approval of the defendants, as such urban sanitary authority as aforesaid. The plaintiff did not first give to the defendants, as such urban sanitary authority, such notice as by the 32nd bye-law is required to be given, and did not leave or cause to be left at the office of the defendants, as such urban authority, for their use, any detail, plans or sections, or any block plans of the houses, or any description of the materials of which the houses were proposed to be constructed, or of the intended mode of drainage or means of water supply.

7, 8. The defendants gave notice under bye-law 37; and on the plaintiff failing to shew good cause why the houses should not be pulled down, as being erected in contravention of the bye-laws, the defendants pulled the houses down without unnecessary violence, or rendering the materials almost valueless thereby.

Reply.—1. Issue on the defence.

2. Demurrer to paragraphs 2, 3, 4, 5, 6, 7, and 8, on the ground that the defendants had no power to make bye-laws, authorising them to pull down buildings, except in cases where such buildings are erected in contravention of some bye-laws relating to mode of construction.

Petheram (Cole and Kingdon with him), for the plaintiff.—The bye-laws are *ultra vires*. There is no power in the Act enabling the board to pull down buildings because of the breach of a bye-law other than a bye-law as to construction—*Brown v. The Local Board of Holyhead* (1); *Young v. Edwards* (2); *Hattersley v. Burr* (3); although a bye-law imposing a penalty might have been valid—*Hall v. Nixon* (4).

Thesiger and A. Charles, for the defendants.—The Local Government Act, 1858, 21 & 22 Vict. c. 98, empowers the board to make bye-laws with respect to the level, width and construction of new streets, the structure of walls, sufficiency of space round buildings, drainage, &c., and may "further provide for the observance of the same"—that is, for the subject matters above specified. How? By enacting *therein*—namely, in the bye-laws, "such provisions as they think necessary as to the giving of notices, deposit of plans by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter or pull down any work begun or done in contravention of such bye-laws." Now whether "new streets" may mean streets with houses, or a mere roadway, the bye-law prescribing that, before building, plans shall be deposited, and, if not deposited, a building erected in contravention may be pulled down, is valid. The decisions seem to shew that the word "street" is used in a popular

(1) 1 Hurl. & C. 601; s. c. 32 Law J. Rep. Exch. 25.

(2) 33 Law J. Rep. M.C. 227.

(3) 4 Hurl. & C. 523.

(4) 44 Law J. Rep. M.C. 51; s. c. Law Rep. 10 Q.B. 152.

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sense. Section 4 of the Local Government Act, 1858, says that the words used in this Act shall be interpreted in the sense assigned to them in the Public Health Act, 1848, and section 2 of the latter Act gives a definition of "street." As was said by Lord Chelmsford in the House of Lords, "The word 'street' does not mean the mere roadway, but . . . a thoroughfare with houses on both sides"—*Galloway v. The Mayor, &c., of London* (5). And in *Pound v. The Plumstead Board of Works* (6), Blackburn, J., delivering judgment upon a question as to the construction of the words, "new street," used in the Metropolis Management Acts (18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102), of which the latter by section 77 provides that where a vestry shall have paved any new street, the owners of land bounding it shall contribute to the expense, says, "I think it plain the Legislature are here using the word 'street' in its ordinary popular and natural sense, and mean a place with continuous houses on each side." The authorities cited for the plaintiff do not govern the present case. In *Brown v. The Local Board of Holyhead* (1), the Act gave powers to make bye-laws only as regards future buildings, and the *ratio decidendi* of the Court was that the bye-law was bad, because it dealt with existing buildings. *Hattersley v. Burr* (3), and *Young v. Edwards* (2), were overruled by *Hall v. Nixon* (4), but indeed are rather favourable to the defendants; for the Courts thought in each that the local authorities might make bye-laws, and the only question was whether the particular bye-law was good.

Kingdon replied.

POLLOCK, B.—The question is whether the bye-law under which the defendants justify is good, or is bad as being beyond the power given to them by statute.

These bye-laws originate in Acts of Parliament passed by the Legislature giving to local boards the highest authority to provide for the health of mankind, in dif-

ferent localities—The Public Health Act of 1842, followed by the Local Government Act, 1858, and by taking those two together the full scope of the legislation as to the sanitary conditions, character and proper construction of houses in the different districts over which local boards have jurisdiction may be ascertained. The bye-laws before us were made under the Local Government Act, 1858, and commence by reciting the only power under which they could be made, namely, section 1 of that Act, by which it is provided that the local board may from time to time make bye-laws for all or any of the purposes following (that is to say)—
 "1. With respect to the level, width and construction of new streets, and the provisions for the sewerage thereof. 2. With respect to the structure of walls of new buildings for securing stability and the prevention of fires. 3. With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings. 4. With respect to the drainage of buildings, to water-closets, privies, ashpits and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation and to prohibition of their use for such habitation. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board and as to the power of the local board to remove, alter or pull down, any work begun or done in contravention of such bye-laws." It is quite clear that the local board, acting on that, assumed two things, which the defendants have to establish—First, that when they made their bye-laws as to the construction of "new streets" they were not limiting it merely to a "road," namely, as to "width,"—the carriage way, footway, drainage under, &c.,—but clearly supposed they were entitled, in dealing with new streets, to take the word street in a popular sense as meaning *not only the roadway, but the houses on both sides*

(5) 35 Law J. Rep. Chanc. 477.

(6) 41 Law J. Rep. M.C. 51; s.c. Law Rep. 7 Q.B. p. 194.

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thereof. And there is much to be said in favour of that construction, for otherwise a street might be limited to forty feet, and the buildings on either side be raised so high as to render the street as bad as those of London before the great fire. There have been a number of cases of this kind under the Metropolitan Building Act, most of them unreported, but we have the highest authority in *Gal- loway's Case* (5), where the Lord Chancellor puts on these words that construction which I have adopted. Secondly, as regards the houses themselves, the board assumed that not only were they entitled to deal with houses finished or partially finished, but with that part of the Local Government Act of 1858 requiring the deposit of plans and sections, and that as to that the local board had power of making bye-laws. No doubt that is very different from the building itself. The argument for the plaintiff is logical enough, namely, that it is one thing to say, "You must build in a particular way," and another to say, "You must deposit particular plans."

But there is another most reasonable construction, namely, to say, "Before you build you shall deposit plans," much more reasonable than to say, "A building shall be made, and if then it does not fall in with the requirements of the local board it shall be destroyed." Therefore, as far as the spirit and intent of the Act go, the charge against the plaintiff, "You have not deposited plans which ought to have been deposited before building," comes within it. But does it come within the strict words? The power to make such provisions in the 4th section of the Local Government Act, 1858, declaring that "they may further provide for the observance of the bye-laws by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections," amounts to a power to make bye-laws, and the section goes on to apply the same power to the making of bye-laws with respect to pulling down work begun or done in contravention of the bye-laws. There is power therefore to make bye-laws to enable them to pull

down any building which is contrary to the bye-laws, whether as to structural requirements or as to previously deposited plans, and practically that is for the benefit of the builder, and in accordance with that power bye-law 37 was made, and for the reasons I have given I think it a perfectly good one.

I believe the rules of construction are the same whether in construing a will, conveyance, Act or bye-law, and here we ought to look at the general spirit and intention of the bye-laws as an Act of Parliament, and to give a proper and reasonable effect to them, and without being guided by an argument founded on hardship. None of the authorities, neither *Young v. Edwards* (2) or *Hattersley v. Brown* (3), hamper us in arriving at our decision, and if they did, we have the subsequent case of *Hall v. Nixon* (4), in which the cases were fully considered, and I should adopt every word of the judgment therein. It seems to me that the 37th bye-law was properly made within the board's power, and that as far as regards the proper procedure the board were acting within the power that bye-law gave them.

HUDDLESTON, B.—The defendants, by paragraph 8 of their defence, say, "We did the acts complained of after taking the measures required by the 37th bye-law, and by virtue of our powers derived from it, and did no more damage than was necessary." It is said that the houses were built in contravention of the 3rd and 32nd bye-laws [His Lordship read them], and were therefore pulled down. So the question is—Had the corporation power to make those bye-laws? Their only power to make them must be found in the Public Health Act, 1848, and the Local Government Act, 1858, and the Local Government Amendment Act, 1872; and section 34 of the Local Government Act, 1858, is that which more immediately confers it. The plaintiff has contended that the powers thus given are only as to the roadway, external construction of buildings, sufficiency of space around them and works under ground, and have no reference to the

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construction of the buildings themselves, and that therefore the 3rd bye-law, which deals with the erection of buildings in a street, and the 32nd, dealing with plans for those buildings, are *ultra vires*. The whole question turns upon the construction of the words "new streets" in section 34. Is the word "street" by narrow interpretation to be confined merely to roadways, or are we to give it the popular meaning of the word "street," namely, a roadway with houses on each side? We must look at the interpretation clause. There is none to the Act of 1858, but that incorporates the Act of 1848, which contains one in section 2, declaring that "the word 'street' shall apply to and include any highway (not being a turnpike road) and any road," &c. What meaning is to be put on the words "apply to and include," unless "street" means something more than roadway, i.e., "street," shall be lines of houses, and shall include the roadway? Cases have been cited in which "street" was held to include the houses on each side the roadway, and that seems to me the reasonable and proper interpretation. The object of the Act is to secure proper roads, ventilation, means of transit and comfort, and I think also *comeliness* of buildings in a town. By section 38 of the Local Government Act, 1858, "Every local board may make bye-laws with respect to the structure of walls, space around buildings, drainage, &c." Having that power to make bye-laws, they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of *plans and sections*—it is much more natural to apply those words to buildings than to the construction of a roadway—by persons intending to lay out streets or to construct buildings, as to inspection by the local board and as to the power of the local board to remove, alter or pull down, any work begun or done in contravention of such bye-laws. I may add that the proviso that "no such bye-law shall affect any building erected before the date of the constitution of the district" rather suggests the inference that they may deal with all works in the

future. I think the corporation had power to make the bye-laws, and have therefore shewn in the 6th, 7th and 8th paragraphs of the defence a justification of the acts complained of.

Judgment for the defendants.

Solicitors—Saunders, Hawksford & Bennett, for plaintiff; Gregory, Rowcliffes & Co., agents for J. Howard, Portsmouth, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1878. } TURNBULL v. ROBERTSON; BLACK-
Feb. 1. } BURN (*garnishee*).

Debtor and Creditor—Garnishee—Payment under Compulsion of Law—Protection from Payment a second Time.

The plaintiff having recovered judgment against the defendant for 18l., and the defendant having recovered judgment against B. for 44l., the plaintiff obtained an order, attaching B.'s debt, together with a summons, calling on B. to shew cause why he should not pay to the plaintiff 18l. of the amount of the debt due to the defendant. Afterwards, and before the return of the summons, the defendant taxed his costs as against B., and the same day issued a *fi. fa.* under which the sheriff took possession of the goods of B. B. gave notice to the sheriff of the summons, and offered to pay the sheriff the debt due to the defendant, less the amount due to the plaintiff. This the sheriff refused to accept, and insisted on being paid the whole amount for which execution was levied. Whereupon B. paid the whole amount under protest:—

Held, that B. having been compelled by process of law to pay the debt to the sheriff, could not be called upon to pay it a second time to the plaintiff.

CASE stated on appeal from the County Court of Northumberland, holden at North Shields.

On the 6th of February, 1877, the plaintiff recovered judgment in the County Court of Northumberland holden at

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North Shields, against the defendant for 18*l.* 2*s.* 2*d.* debt and costs.

On the 2nd of July, 1877, at the Summer Assizes of Newcastle-upon-Tyne the defendant recovered judgment against Blackburn for 44*l.* 3*s.* 4*d.*

On the 5th of July, 1877, the plaintiff having lodged with the registrar of the County Court the affidavit required by the County Court rules, 1875, Order XXV., entered a plaint in the said County Court to obtain payment to himself from Blackburn to the extent of 18*l.* 2*s.* 2*d.* of the amount of the debt due to the defendant from Blackburn. A summons to shew cause why an order for the payment of the amount of the judgment of the 6th of February was thereupon issued, and the same day was served on Blackburn, together with a notice that the debt due to the defendant from Blackburn was attached to answer the said judgment.

On the 7th of July, 1877, the defendant taxed his costs as against Blackburn at 99*l.* 12*s.* 2*d.*, and on the same day a writ of *fieri facias* was issued on behalf of the defendant for the amount of the said debt and costs, under which the sheriff on the same day took possession of the goods of Blackburn.

On the 9th of July Blackburn gave notice to the sheriff of the said summons, and offered to pay the amount of the debt and costs levied for, less the sum of 18*l.* 2*s.* 2*d.*, but this the sheriff refused to accept, and insisted on being paid the whole amount levied for. Thereupon Blackburn paid the whole amount to the sheriff, under protest, and the same day wrote and sent to the sheriff a written notice of the attachment order.

On the 9th of August the said summons came on for hearing when the sheriff, the plaintiff, the defendant, and the garnishee, attended. The Judge ultimately refused to make any order, and dismissed the summons on the ground that the garnishee, Blackburn, having been compelled by process of law to pay the debt to the sheriff, he ought not to be called upon to pay it over again to the plaintiff.

The questions for the opinion of the Court were, was the learned Judge wrong in dismissing the summons and making

no order thereon? If so, what order should he have made upon the facts stated?

Horne-Payne, for the plaintiff, in support of the appeal.—The County Court Judge should have ordered the garnishee to pay the plaintiff. *Wood v. Dunn* (1) is distinguishable. There the plaintiffs sued for a debt payable to them as trustees for the benefit of one Stap, under a deed registered under the Bankruptcy Act, 1861, and the defendant set up as a discharge that the debt was paid to a judgment creditor of Stap, under the pressure of a garnishee order; the payment being made after the registration of the deed. The Court gave judgment for the defendant, holding that, although the money was paid after registration of the deed, yet that it was paid without notice of the deed, or, if with notice, under such circumstances that the defendant was unable to get the order set aside before he was compelled to pay to save execution being actually levied. That case decides that the garnishee is not liable if he has done everything, and it would be an authority in favour of the garnishee in the present case if it could be shewn he had done everything to avoid payment; he might have applied for and obtained a stay of execution, and so have avoided payment to the sheriff. *Emmanuel v. Bridger* (2), and *Lowe v. Blackmore* (3) were also referred to.

Gainsford Bruce, contra, was not called upon (4).

GROVE, J.—Irrespective of the case of *Wood v. Dunn* (1) I should have no

(1) 35 Law J. Rep. Q.B. 11, on appeal 36 Law J. Rep. Q.B. 27; s. c. Law Rep. 1 Q.B. 77; on appeal Law Rep. 2 Q.B. 73.

(2) 43 Law J. Rep. Q.B. 96; s. c. Law Rep. 9 Q.B. 286.

(3) 44 Law J. Rep. Q.B. 155; s. c. Law Rep. 10 Q.B. 485.

(4) The principle under which a person compelled by process of law to pay a sum of money is absolved from payment a second time, is to be found in *Allen v. Dundas*, 3 Term Rep. 125, where Grose, J., in giving judgment, says, "The law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time, which he has once paid under the sanction of a Court having competent jurisdiction."

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doubt that Blackburn cannot be compelled to pay the amount due to the plaintiff a second time.

The defendant is debtor to the plaintiff and Blackburn to the defendant, whereupon the plaintiff attaches Blackburn's debt. Two days after the defendant levies on Blackburn's goods for the whole amount. Blackburn consequently is in a difficulty; he does all that he can, he offers to pay the sheriff less the amount due to the plaintiff, but the sheriff declines this offer. Then what is Blackburn to do? It is said that between the 5th of July and the execution, Blackburn could have applied for an order to stay the execution; but he did not know any execution would issue; is he to take steps to arrest a theoretical execution at great expense in order that he may retain in his hands money which has been attached, and which he is called upon to hold for the plaintiff? In my opinion, that would be an extravagant proposition. The law seizes Blackburn's goods, and he is thus by compulsion of law compelled to pay. It seems that he could not well have done anything else. *Wood v. Dunn* (1) is an authority in support of such payment being a protection to the garnishee, and, indeed, is an *a fortiori* case, because in the present case there was no time wherein Blackburn could have applied to set aside the execution, whereas in *Wood v. Dunn* (1) there was time in which the garnishee could have applied for a stay of execution.

LINDLEY, J.—I am of the same opinion. I cannot see any substantial difference between the payment of the execution creditor to the sheriff with a protest, and a payment into Court, and I am unable to see on what principle of law or fairness Blackburn can be said to have done wrong. In my judgment Blackburn has done what is right, and it would be harsh and oppressive to make him pay again.

LOPES, J., concurred.

Appeal dismissed with costs.

Solicitors—Williamson, Hill & Co., agents for Robert Kild, North Shields, for plaintiff; Pattison, Wigg & Co., agents for J. & D. M. MacDonald, Newcastle-on-Tyne, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1878. { TURNER v. THE HEDNESFORD GAS
Jan. 30. { COMPANY; AND THE HEDNES-
FORD GAS COMPANY v. TURNER
AND ROUND, by counter-claim.*

Practice — Pleading — Counter-claim raising Questions between the Defendant and the Plaintiff along with any other Person—Who may be made a Defendant to—Judicature Act, 1873, sec. 24, sub-sec. 3—Rules of Court, 1875, Order XXII. rules 5, 8, 9.

A defendant may bring in as defendants to his counter-claim, in addition to the plaintiff, all such persons as he could, if he had sued the plaintiff in a cross-action, have joined with the plaintiff as defendants to such action, that is to say, all persons against whom he could claim relief along with the plaintiff, whether jointly, severally or in the alternative.

To an action for breach of contract the defendants alleged that, as the plaintiff had not executed the contract as specified by the agreement, they had thereby become entitled to put an end to the contract, and they sought, by way of counter-claim, to recover damages from the plaintiff for the expenses caused by his default. They also made R., who, as surety for the due execution of the contract by the plaintiff, had entered into a bond with the defendants, a defendant to the counter-claim, and they sought to recover the amount of his bond as damages. R. applied to have so much of the counter-claim as related to him struck out:—

Held (reversing the decision of the Exchequer Division), that the whole of the counter-claim must be allowed as it raised a question between the defendants and the plaintiff, along with R. the surety, and that R. was properly served with the counter-claim.

This was an appeal from a decision of the Exchequer Division which rescinded an order of Pollock, B., refusing to strike out a counter-claim delivered by the defendants to one Round.

The statement of claim alleged that the

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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defendants had refused to allow the plaintiff to complete certain works which he had commenced, pursuant to a contract made between him and them, and claimed damages for such refusal.

The defence alleged that the defendants were entitled by the provisions of the contract to take the works out of the hands of the plaintiff, if he should fail to construct them to the approval of their engineer, that the plaintiff had so made default, and that they had, therefore, taken the works into their own hands.

The defendants, by way of counter-claim, sought to recover from the plaintiff the expenses incurred by them owing to his default in not duly constructing the works pursuant to the contract, and in other paragraphs of the counter-claim they claimed to recover 200*l.* from one Round (whom they made a party to the counter-claim), on a bond given by Round to the defendants, by which he had bound himself to be answerable to the defendants to the extent of 200*l.*, as surety for the proper execution by the plaintiff of the contract made between the plaintiff and the defendants, to the satisfaction of the engineer of the defendants for the time being. The defendants alleged the default of the plaintiff in not duly constructing the works as already mentioned, and claimed in consequence to recover damages from Round. They accordingly duly served Round with the defence and counter-claim, pursuant to the provisions of Order XXII. rules 5, 6 and 7 (1). Round took out a summons under rule 9 of the same Order (1),

(1) Rules of Court, 1875, Order XVI. rule 3, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative."

Order XXII. rule 5, "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of complaint setting forth the names of all the persons, who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

Rules 6 and 7 provide for service on and appearance by the third party.

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to exclude so much of the counter-claim as related to him, on the ground that it did not raise a question between the defendants and the plaintiff along with him. The Master excluded it; but Pollock, B., restored it, and on appeal to the Exchequer Division, the Court (Cleasby, B., and Hawkins, J.), rescinded the order of Pollock, B., and excluded that portion of the counter-claim. From this decision the defendants appealed.

Henry Matthews (C. Anderson with him), for the appellant.—The defendants are entitled to bring in Round as a defendant to their counter-claim, for, although he was not a party to the original contract between the plaintiff and the defendants, yet the relief which the defendants seek against him is "connected with the original subject of the cause," inasmuch as his liability arises on a bond which he gave as surety for the due performance of the contract by the plaintiff, so that he is clearly within the provisions of section 24, sub-section 3 of the Judicature Act, 1873. (2). The defendants could have joined him with the present plaintiff as a defendant to an action under Order XVI. rule 3 (1) for the relief claimed against two defendants may be alternative and need not even be consistent—*Child v. Stenning* (3). In the present case, however, one

Rule 9. "Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may, at any time before reply, apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just."

(2) Judicature Act, 1873, section 24, sub-section 3, enacts that, "The said Courts respectively, and every Judge thereof, shall have power to grant to any defendant . . . all such relief relating to or connected with the original subject of the cause or matter, and . . . claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim . . . as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose."

(3) 46 Law J. Rep. Chanc. 523; s. c. 5 Chanc. Div. 695.

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and the same fact, viz., the default of the plaintiff, renders both the plaintiff and Round liable in damages to the defendants. The plaintiff and Round, therefore, are the persons who, if this counter-claim "were to be enforced by cross-action, would be defendants to such action," and they are thus the very persons pointed out by Order XXII. rule 5 (1). The way in which the plaintiff and Round are liable differs; but they are liable severally to the defendants, and there is a question between the plaintiff and the defendants "along with," though not jointly with, Round as a third party, and therefore, on the authority of *Dear v. Swarder* (4), Round is properly served with this counter-claim.

McIntyre (*Moulton* with him), for Round.—This counter-claim is really a distinct and separate action, founded on a different cause of action, and on one which does not give the defendants any right of action against the plaintiff, for if the defendants sued Round on his bond the plaintiff would not be a party to the action, as the contract between the defendants and the plaintiff is quite distinct from that under which Round can be made liable to the defendants, and the damages in each case would be different and should be separately assessed. The part of this counter-claim which relates to Round is not within the meaning of Order XXII. rule 5 (1), as it does not raise a claim against Round jointly with the plaintiff, and it does not shew a common interest between them, and therefore it is not a good counter-claim—*Furness v. Booth* (5). The mere fact that one and the same matter gives rise to two separate rights of action against two persons does not enable the defendants to bring in one of those persons as a defendant to their counter-claim. The defendants seek here to obtain relief against a third party, and to do that they must bring a separate action, per *Mellish*, L.J., in *Treleven v. Bray* (6), or they must

bring in such third party by giving him notice under Order XVI. rule 18.

BRAMWELL, L.J.—I am of opinion that this appeal must be allowed. I think that it is reasonable and right that a person who is made a defendant to an action should be enabled to state that he has a claim against some third person which is connected with the transaction out of which the original cause of action arose. I do not think that a defendant in such a position ought to be compelled to pay over money which he will be entitled to recover again from the person who is liable to him, for it appears to me that a defendant should, in such circumstances, be in as good a position with respect to the enforcing his right against the third party by means of a counter-claim, as though he had himself been the plaintiff in an action against the person who is thus liable to him. Now, it seems to me that the Judicature Act and the rules to which we have been referred do effect that the defendants in the action of *Turner v. The Hednesford Gas Company* have a right to deliver this counter-claim to Round, and that on the true construction of these rules a defendant has power to add as defendants to his counter-claim all such persons as he could have made defendants to a cross-action brought by himself as plaintiff. The words of rule 5 of Order XXII. (1) are that the defendant shall add the names of all such persons "who, if such counter-claim were to be enforced by cross-action would be defendants to such cross-action," and to prevent any injustice power is given by rule 9 (1) of the same order to exclude a counterclaim, if it appear that the claim therein raised ought not to be disposed of by way of counter-claim. These rules, moreover, were made in pursuance of the Judicature Act, 1873, and the 3rd subsection of section 24 (2) of that Act speaks of "relief relating to or connected with the original subject of the cause or matter." It is, therefore, in my opinion, clear that a defendant may bring in as defendants to a counter-claim delivered by him all persons who would rightly have been made defendants to an action instituted by him as plaintiff. The question then

(4) 46 Law J. Rep. Chanc. 100; s. c. 4 Chanc. Div. 476.

(5) 46 Law J. Rep. Chanc. 112; s. c. Law Rep. 4 Chanc. Div. 586.

(6) 45 Law J. Rep. Chanc. 113.

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arises whether the defendants here could have made Round a defendant along with the plaintiff to an action brought by them against Turner. I think that they could have sued Turner for the breach of the contract, and they could also have sued Round for the sum for which he had made himself liable as a surety. The defendants by their counter-claim claim relief against Turner, in the form of damages for the non-performance of his contract, and they further claim damages from Round on his bond; they thus seek to recover damages both from Turner and from Round as his surety, and this is one of the cases provided for by rule 3 of Order XVI (1), for if the defendant had brought his action against Turner and Round he would have sued them as "defendants against whom the right to relief is alleged to exist," not jointly indeed but severally. If one joint bond had been given by Turner and Round then they would have been liable jointly; but as each of them is liable on his own contract or bond, therefore they are not liable jointly on a joint contract, but severally on several contracts arising out of the same subject-matter, which raises questions between the defendants and the plaintiff along with the surety Round, and as they could be joined as co-defendants to a cross-action by the now defendants, so I am of opinion that these defendants can bring in Round as a defendant to a counter-claim to be delivered along with their defence to the statement of claim. The judgment of the Exchequer Division must be reversed and the counter-claim must be restored.

BRETT, L.J.—I am also of opinion that the decision of the Exchequer Division cannot be sustained, and that this appeal must be allowed. Rule 5 of Order XXII. (1) does not say that the cause of action must raise questions against the plaintiff along with others, but that where the counter-claim raises questions between the defendant and the plaintiff along with any other person, the defendant may bring in such persons by counter-claim, that is to say, that where a counter-claim raises a question which, if the counter-claim had been an original action

could have been enforced against the plaintiff and any other person, then that such other person can be made a party to the suit by the delivery to that person, by the defendant, of his defence and counter-claim within the time and in the manner specified by the rules of Court. It is undoubtedly quite true as was said by Blackburn, J., in *Treleven v. Bray* (6), that there cannot be a counter-claim against a third party between whom and the plaintiff no relation exists; but it is also true and indeed expressly provided that, wherever by reason of some legal or equitable relation between the parties certain facts are disclosed which raise a question between the plaintiff and the defendant, and where these facts, if true, form the ground of a good counter-claim by the defendant against the plaintiff, then if these same facts also raise a question between the defendant and a third person, that third person may be made a defendant to the counter-claim delivered by the defendant to the original suit, and this too even though the third person could not have been made a party to the action as originally brought by the plaintiff.

Now, in this counter-claim the defendants have raised a question which gives them a good answer to the claim of the plaintiff, and it further shews that they have a right to relief against Round—a right which arises out of the same facts as those which form the foundation of the contention between them and the plaintiff. There is, therefore, a question in litigation between the plaintiff and the defendants, which would also be a question between the defendants and Round. The bond indeed on which the defendants claim to recover from Round is not one to which the plaintiff is a party; but there is an equitable relation between all the three, for Round is surety for the plaintiff, and is thereby liable to a certain extent to the defendants for the performance by the plaintiff of his agreement. The same question, therefore, interests all these parties. The surety, Round, is not liable until the plaintiff breaks the contract, and that which gives the defendants a right to counter-claim against the plaintiff is the breach by the plaintiff of

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his contract, so that there is a relation between the parties of sufficiently intimate a character to enable Round to be made a party to this suit. Where the litigation is really common litigation, arising out of a subject common to all the parties attempted to be brought into the suit, I am of opinion that we should construe these rules of Court in no restricted sense, but that we should give them full and free operation in order that the intention of the statute may prevail, and that one litigation may include and conclude all those parties between whom there is really one and the same question in issue.

COTTON, L.J.—I agree that the appeal must be allowed, for the question between the defendants and Turner, and the defendants and Round is the same in substance. I will add that the case of *Furness v. Booth* (5) only decided that in that particular case there was no counter-claim at all. No general rule was there laid down as to the persons who might be included in a counter-claim. The point in that case was whether there was a matter at issue between two co-defendants, and it is, therefore, no authority on the case now before us. I do not think that Round will be in any way injured by being made a party to this action, as the question of costs is in the discretion of the Court or the Judge.

Judgment of the Exchequer Division reversed.

Solicitors—Norris, Allens & Carter, agents for J. P. Gardner, Cannock, for appellants; Duignan & Smiles, agents for Duignan, Lewis & Co., Walsall, for respondent.

[IN THE COURT OF APPEAL]

(*Appeal from the Queen's Bench Division.*)

1878. }
Jan. 12, 15. } ATWOOD v. CHICHESTER.*

Practice—Judgment by Default—Setting aside Judgment—Delay.

Where judgment has been suffered by default, lapse of time is not in itself a valid objection to an application to set such judgment aside as irregular, if the defendant has acted bona fide, and the lateness of the application has done no irreparable injury to the plaintiff.

This was an appeal from a judgment of the Queen's Bench Division refusing to set aside a judgment entered by default against the defendant.

The defendant was a married woman, with a separate estate. Her husband induced her to sign and give to him a cheque and a promissory note in blank, which he filled up for the amount of 635*l.*, and on the security of the documents borrowed a sum of 400*l.* from the plaintiff. The debt being unpaid, the plaintiff brought this action on the cheque. The writ was issued against the defendant alone, and served upon her personally. She handed it to her husband, who said he would attend to it. No appearance was entered, and on the 19th of October, 1876, judgment was signed. On the 30th of July, 1877, a summons was taken out to set aside the judgment, but was dismissed by the Master, against whose decision no appeal was made.

On the 3rd of August, 1877, an order was made by Field, J., that the defendant should pay the debt by instalments, and on the 9th of November a summons was taken out to commit the defendant for non-payment of the instalments.

Thereupon the defendant took advice, and on the 26th of November took out a summons to set aside the judgment in the action as irregular, and to admit the defendant to defend the action, supporting the application by an affidavit that no part of the proceedings except the

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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writ had come to the defendant's knowledge, or had been explained to her. The summons was dismissed by Pollock, B., on the ground that the application was too late. The Queen's Bench Division upheld the decision of the learned Baron, and the defendant appealed.

W. G. Harrison, for the defendant.—The judgment in this case is irregular, and should be set aside. It is a judgment "*in personam*" against a married woman, against whom no action will lie except "*in rem*," and even then the husband should be joined—*Daniell's Chancery Practice*, p. 169; *Aylett v. Ashton* (1); *Francis v. Wigzell* (2). As to the application being too late, it is in the discretion of the Court to grant or refuse it, but the evidence shews that the defendant had no real opportunity of resisting the judgment.

A. L. Smith, for the plaintiff.—The evidence shews that the defendant might have defended the action if she chose, but she elected not to do so. It is now too late to set the judgment aside. In *Dillon v. Cunningham* (3) an order under the Debtors Act, 1869, was made on a married woman, and *Poole v. Canning* (4) shews the effect of a married woman taking a judgment on herself.

Our. adv. vult.

Judgment was delivered on the 15th of January:—

BRAMWELL, L.J.—It seems to me plain that had the defendant made an early application to have the judgment set aside, if such application had been made *bona fide*, she ought to succeed, although she missed her opportunity of defending in the first instance. The defence is substantial and not merely technical, for by law a married woman has no power to contract, except in equity, so as to bind her separate estate.

Now what is the objection taken to this application? It is said the defendant

comes late to seek relief, and that is true. It is an objection I have often heard, and I think the rule in respect to it is this:—Where by coming late the applicant has done some irreparable injury to the other side, as one of the two parties must suffer, it must be the one who did not come in time; but where the mischief is not irreparable the mere fact that the application is late should have no weight.

Here, as no harm has been done to the plaintiff, the objection cannot prevail. The action could not be maintained, and the plaintiff knew this. Then, is the conduct of the defendant *bona fide*? Is she late through no fault of her own, or did she intentionally allow the action to go on against her and take the chance of the consequences?

A case of the same kind might be supposed where a man is sued as acceptor on a bill, the acceptance being a forgery. Suppose he took the writ to the drawer, knowing that he had forged the acceptance, and told him that he must attend to it, and the drawer failed to enter an appearance. In such a case it might be inferred that it was the intention of the defendant to take no steps in order to screen the drawer, and he ought not to be let in afterwards to defend.

But if the person sued as acceptor had handed the writ to his solicitor, with instructions to enter an appearance, not knowing who had forged the acceptance, which in fact the solicitor himself had forged, and the solicitor failed to enter an appearance to the action, then the defendant could come to the Court and claim relief.

We are bound, in the absence of any reason to the contrary, to believe the defendant on her oath. She swore that her husband asked her to sign the cheque, and she signed it believing it to be a mere form, and not knowing what the consequences to herself would be. She says she gave the cheque to her husband, and I think it is highly probable that this is true, especially as it was drawn for his benefit. My conclusion is that she has acted *bona fide*. No doubt a married woman may by her conduct shut herself out from defending an action which she might at first have defended. But I can-

(1) 1 Myl. & Cr. 105.

(2) 1 Mad. 258.

(3) 42 Law J. Rep. Exch. 11; s. c. Law Rep. 8 Exch. 23.

(4) 36 Law J. Rep. C.P. 166; s. c. Law Rep. 2 C.P. 241.

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not see that she has done so here. She has a good defence, and the plaintiff has known all along that the action is not maintainable. Under these circumstances I do not think this application is too late. I have gone into the matter at some length because I thought it right to lay down a general principle, and also because we ought not to reverse the decision of the learned Judges in the Court below without fully stating our reasons.

BRETT, L.J.—I am of opinion that this judgment should be set aside. I think that the defendant had no fair opportunity to consider what course she should take, and the plaintiff has been in no way misled or deceived or damnified by what has taken place. The facts, as I take them to have been proved by affidavit, are these:—The defendant is a married woman, with separate property of her own, settled on her without power of anticipation.

Her husband brought her two promissory notes and a cheque in blank, which she signed, and which were afterwards filled up without her knowledge to the amount of 600*l.*, and the action is brought against the defendant on the cheque. Now the plaintiff knew that the defendant was a married woman. And knowing that she was a married woman, when the cheque became due he did not sue her as endeavouring to realize his debt by proceedings against her property and joining her husband with her in the action, but deliberately, and by the advice of those who understood the effect of what they were doing, he sued the husband on the joint and several promissory notes, and herself separately on the cheque—on her own personal liability, and the writ was served upon her.

Then she swears that, not understanding the nature and consequences of it, she handed it to her husband, who took it and said that it should be attended to. Then the question is—Did she understand it? I think she did not; at all events, she did not understand that if the action was not defended judgment would go by default, and that the consequence would be an execution upon her property, and possibly a further consequence that she should be actually committed to prison.

She never had a fair opportunity of seeing any of the orders that were made in the cause, and she was put in the position in which she is placed by the improper conduct of her husband. The plaintiff knowingly took a course which was obviously wrong and could have done him no good if the defendant had been properly advised. The writ was the only document which was really served upon her. This action was allowed to go by default, and the next step was a summons in bankruptcy, an idle and vexatious proceeding in this case, and for the purpose of forcing a settlement.

If, when the writ was served upon the defendant the object of it had been fully explained to her, and the consequences which were to follow upon it, and then she had deliberately allowed the action to go by default, I agree that she could not afterwards be allowed to set up a plea of coverture. But mere delay, however long, does not prevent a defendant from being admitted to defend an action where he has had no fair opportunity of doing so, unless such a course would do the plaintiff irreparable mischief in his cause. Is that the case here? I think not, for what has occurred is the result of the plaintiff deliberately taking an improper course. If he had thought she had property of her own, with power of anticipation, it might have been otherwise. But here he sued the defendant alone, with the deliberate intention of getting a judgment to which he had no right. No mischief therefore is done to him by admitting the defendant to defend the action, for in this form of action he had no right to succeed. I am therefore of opinion that the order of the Court below should be rescinded and the judgment set aside.

COTTON, L.J.—I also am of opinion that the judgment in this case should be set aside, and that the defendant should be at liberty to defend the action.

The judgment has been obtained on a claim which it is hardly necessary to say could not be made at law, and which is equally bad in equity. For though in equity the defendant had power to bind her separate estate, any judgment obtained in consequence should be against

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her estate, and not against the defendant personally, and this judgment is one which neither law nor equity will allow to be made against a married woman.

The question then arises—Does the defendant come here to make this application labouring under any particular objection? For if, in my opinion, she intentionally lay by and put in no appearance, in order to let a judgment go against her which could not stand, the law does not allow a married woman to commit a fraud, and she must take the consequences of her act. But I think she must be taken, on the evidence before us, not to have been a party to these proceedings, nor to have laid by, but to have been injured by those who ought to have protected her. I am therefore of opinion that she has not forfeited her right to be relieved, provided the position of the plaintiff is such that she can be held to be entitled to relief against him. Now what is his case? I understand that when he made the advance he knew the position of the lady, for he had obtained a joint and several promissory note of the husband and wife for the purpose of recovering such judgment as he could get. Then he brought two actions; one against the husband on the promissory note, the other against the wife as *feme sole* on the cheque, knowing that she was a married woman. This he ought not to have done, and even if he endeavoured to obtain a judgment against her separate estate he ought to have joined the husband, for in equity the wife cannot be sued without joining the husband, in order that the settled property may be attached.

But the plaintiff pursued his course with his eyes open, knowing that he could only get judgment by some negligence or culpable omission on the part of the defendant's advisers. I am therefore of opinion that the plaintiff cannot complain if he suffers, inasmuch as he has chosen to go on with a wrong form of action, and the judgment must be set aside.

Solicitors—Plows, Irvine & Hodges, for plaintiff;
T. R. Apps, for defendant.

[IN THE HOUSE OF LORDS.]

1877. } THE METROPOLITAN RAILWAY
Nov. 15. } COMPANY (*appellants*) v.
Dec. 13. } JACKSON (*respondent*).

Railway Company—Negligence—Evidence—Question for Jury.

While respondent was travelling on the appellants' railway in a carriage, all the seats of which were occupied, three more persons got in and remained standing until the train arrived at the next station, where there was a crowd of persons, some of whom tried to enter the carriage just as the train was starting; respondent rose from his seat and tried to prevent any more passengers from getting in; after the train had started respondent fell forward, and put his hand on one of the hinges of the door to save himself; at the same moment a porter pushed away the persons who were trying to get in, and slammed the door, crushing the thumb of respondent, who brought an action for the injury so caused:—Held, reversing the decision of the Court of Appeal, that there was no evidence of negligence proper to be left to the jury.

In actions for negligence the rule is that from any given state of facts the Judge must say whether negligence can legitimately be inferred, and the jury must say whether it ought to be inferred: The case of Bridges v. The North London Railway Company (43 Law J. Rep. Q.B. 151; s. c. Law Rep. 7 E. & I. App. 213) lays down no new principle of law on the subject.

This was an appeal from a decision of the Court of Appeal, reported in 46 Law J. Rep. C.P. 376; s. c. Law Rep. 2 C.P. Div. 125, affirming a decision of the Court of Common Pleas in favour of the respondent, the plaintiff in the action, reported in 44 Law J. Rep. C.P. 83; s. c. Law Rep. 10 C.P. 49.

The action was brought for negligence in not safely and securely carrying the respondent, who had become a passenger on the appellants' line of railway, and injuring his thumb by the act of the appellants' servant in suddenly and negligently closing the door of the carriage in which the respondent was travelling.

Metropolitan Rail. Co. v. Jackson, H.L.

The following are the facts of the case:—

The respondent, on the 18th of July, 1872, was travelling from Moorgate Street to Westbourne Park in a third-class compartment, which was gradually filled up as the train proceeded, and when it left the King's Cross Station all the seats were occupied. At Gower Street station three more persons got in, and were obliged to stand up. There was no evidence to shew that the attention of the company's servants was drawn to the fact of the extra number being in the compartment, but there was evidence that the plaintiff remonstrated with the persons who got in, and it was stated that no guard or porter was seen at Gower Street.

At Portland Road the door of the compartment was opened and then shut, but there was no evidence to shew by whom, and just after the train started there was a rush, and the door of the compartment in which the respondent was seated was opened a second time by persons trying to get in. The respondent partly rose and held up his hand to prevent them from entering. After the train had started a porter pushed away the people who were trying to get in, and slammed the door just as the train was entering the tunnel. At the same moment the respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself, and at this moment, by the door being slammed to, the respondent's thumb was caught and injured.

The cause was tried before Brett, J., and a special jury on the 10th of December, 1873. The learned Judge ruled that there was evidence of negligence for the jury, who found a verdict for the respondent, with 50*l.* damages.

On the 14th of January, 1874, a rule *nisi* was obtained, calling upon the respondent to shew cause why the verdict should not be set aside, and instead thereof a nonsuit or a verdict be entered for the appellants, on the ground that there was no evidence of negligence proper to be left to the jury, or why a new trial should not be had between the parties, on the

ground that the verdict was against the weight of evidence.

The rule came on for argument on the 13th of November, 1874, in the Court of Common Pleas, who considered that they were bound by the decision of the House of Lords in *Bridges v. The North London Railway Company* (1), and discharged the rule.

From this judgment the appellants appealed, and the Court of Appeal, on the 17th of February, 1877, delivered judgment, and were equally divided in opinion, and therefore confirmed the judgment of the Court of Common Pleas. Against this decision the present appeal was brought.

Mr. McIntyre and *Mr. Kemp*, for the appellants, contended that there was no evidence of any negligent act either of omission or commission on the part of the appellants or their servants to be submitted to the jury. The fact that three passengers got in after the compartment was full does not amount to such evidence, nor does the fact that others endeavoured to get in at the Portland Road Station. The case of *Bridges v. The North London Railway Company* (1) laid down no principle of law, but turned on the facts of that case and is not applicable to the present case. In the cases of *Foy v. The London, Brighton and South Coast Railway Company* (2) and *Siner v. The Great Western Railway Company* (3) it was held that it was for the Court to determine whether or not there was evidence of negligence proper to be left to the jury.

But even if there was evidence of any negligence, it was not shewn that such negligence was in any way the cause of the accident which happened to the respondent. That accident was caused by the shutting of the door by the porter as it was his duty to do. This was not an act of negligence; on the contrary, it

(1) 43 Law J. Rep. Q.B. 151; *s. c.* Law Rep. 7 E. & I. App. 213.

(2) 18 Com. B. Rep. N.S. 225.

(3) 38 Law J. Rep. Exch. 67; *s. c.* Law Rep. 4 Exch. 117.

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would have been an act of negligence to leave it open.

Mr. Mellor and Mr. Macrae Moir (Mr. Lewis Glyn with them), for the respondent, contended that a railway company were bound to have a sufficient staff of porters at their stations to protect their passengers from accidents arising from the rushes of crowds. If a railway company puts passengers into a position of danger and injury ensues, the company are liable. The respondent was, by the fault of the company in not having a sufficient staff of porters, placed in a position of danger and left without assistance. What is the protection or assistance which the company can be reasonably called upon to give, is a question for the jury—*Bridges v. The North London Railway Company* (1) and *Robson v. The North-Eastern Railway Company* (4). It is said that the porter had no time to give warning to the respondent, or to remove the extra passengers, but if there had been a sufficient number of porters some one or other of them would have had time; and moreover, it was an act of negligence on the part of the company to allow so little time to see in what state the train was. But for the pressure of the extra passengers the accident would not have happened. There was evidence to go to the jury, and it was for them to deal with the matter as a whole. They also cited *Richardson v. The Metropolitan Railway Company* (5), *Rose v. The North-Eastern Railway Company* (6), and *Cockle v. The South-Eastern Railway Company* (7).

Mr. McIntyre, in reply.

Cur. adv. vult.

THE LORD CHANCELLOR.—In this case an action was brought by the respondent against the Metropolitan Railway Company for negligence in not carrying him

safely as a passenger on the railway, and for injuring his thumb by the act of the company's servants in suddenly and violently closing the door of the railway carriage. The question is, was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord Coleridge, C.J.; Brett, J.; and Grove, J.; were of opinion that there was such evidence. The Court of Appeal was equally divided, Cockburn, L.C.J., and Amphlett, L.J., holding that there was evidence, and Kelly, C.B., and Bramwell, L.J., holding that there was not.

[His Lordship then stated the facts of the case, and continued as follows]:—

There was not at your Lordships' bar any serious controversy as to the principles applicable to a case of this description. The Judge has a certain duty to discharge, and the jury has another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jury has to say whether from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that those separate functions should be maintained distinct. It would be a serious inroad on the province of a jury if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that in his opinion negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jury a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies, a company might be unpopular, unpunctual and irregular in its service, badly equipped as to its staff, unaccommodating to the public, notorious, perhaps, for accidents occurring on the line, and when an action was brought for the consequences of an accident, a jury, if left to themselves, might upon evidence of general carelessness, find a verdict against evidence; but it is to be observed

(4) 46 Law J. Rep. Q.B. 50; s. c. Law Rep. 2 Q.B. Div. 85.

(5) 37 Law J. Rep. C.P. 300.

(6) 46 Law J. Rep. Exch. 374; s. c. Law Rep. 2 Exch. Div. 248.

(7) 41 Law J. Rep. C.P. 140; s. c. Law Rep. 7 C.P. 321.

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that such an application, even if successful, would only result in a new trial, and on a second trial, and even on subsequent trials, the same thing might happen again.

In the present case I am bound to say that I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuriæ*. In the present case there was, no doubt, negligence in the railway company in allowing more passengers than the proper number to get in at the Gower Street station, and it may also have been negligence, if they saw these supernumerary passengers, or if they ought to have seen them at Portland Road, not to have them removed; but there is nothing, in my opinion, in this negligence which connects itself with the accident. If, when the train was leaving Portland Road, the overcrowding had any effect on the movements of the respondent, if it had any effect on the particular portion of the carriage where he was sitting; if it had made him less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence, but no evidence of the kind was given. As regards what occurred at Portland Road, I am equally unable to see any evidence of negligence connected with the accident, or indeed of any negligence whatever. The company cannot, in my opinion, be bound to prevent intending passengers on the platform from opening a carriage door with a view of looking or getting into the carriage. They are bound to have a staff which would be able to prevent such persons from getting in when the carriage was already full, and this staff they had, for the case finds that the porter pushed away the persons who were attempting to get in. So also with regard to shutting the door. These persons had opened the door, and thereupon it was not only proper but necessary that the door should be shut by the porter, and as the train was on the point of

passing into a tunnel he could not shut it otherwise than quickly, or in this sense, violently.

I have looked with some anxiety in order to discover what was considered by the learned Judges in the Courts below to be the evidence from which negligence might be inferred in this case. Lord Coleridge mentions two points of negligence—first, that there was no attempt made to remove the extra and inconvenient number of passengers from the carriage in which the respondent was seated when the company had an opportunity of doing so at the station; and secondly, that there was an uncontrolled action on the part of a number of persons on the platform, which action was not controlled, and could not be controlled, by reason of the want of sufficient servants of the company, who were, to a reasonable extent, bound to control it. As to the first of these grounds, I have already said that, admitting the negligence, it appears to me to be in no way connected with the accident. As to the second, I do not think there was an uncontrolled action on the part of the persons on the platform, for the case finds that the porter of the company did, in a way which seems to be both natural and proper, control the action of those who wished to get into the carriage. Brett, J., in substance, concurs with Lord Coleridge, and I do not know that there is any substantial difference in the view taken by Grove, J. In the Court of Appeal, however, Amphlett, L.J., founded himself at the outset on the case of *Bridges v. The North London Railway Company* (1) in this House. He says, "It is now settled by that case, though previously doubted by many eminent Judges, that the question whether in cases of this sort negligence can be inferred from a given state of facts is itself a question of fact for the jury, and not a question of law for the presiding Judge." And in like manner the Lord Chief Justice states at the conclusion of his judgment, "All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the plaintiff with such negligence as its cause, or as natu-

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rally contributing thereto. I cannot doubt, especially after the decision of the House of Lords in *Bridges v. The North London Railway Company* (1), that this was a matter of which the jury were the proper Judges, and which it was incumbent on the presiding Judge to leave to their decision." These expressions of the learned Judges appear to me to be of great importance, for I infer from them that if they had not considered the case of *Bridges v. The North London Railway Company* (1) to have the effect which they attribute to it their decision in the present case might have been different.

Now I am bound to say that I cannot look at the case of *Bridges* (1) as in any degree establishing the proposition which it appeared to Lord Justice Amphlett to establish, namely, that whether in cases of this sort negligence can be inferred from any given state of facts is itself a question of fact for the jury; or as establishing the proposition which it appeared to the Lord Chief Justice to establish, namely, that the jury are the proper judges whether, if once any negligence is proved, the accident which has occurred is to be connected with such negligence as its cause or as materially contributing thereto. Your Lordships in the case of *Bridges* (1) did not lay down, and I am satisfied, did not intend to lay down, any new rule on this subject. It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the Judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred. In the case of *Bridges* (1) there was a series of facts from which your Lordships, advised as you were by several of the learned Judges, thought that negligence might very reasonably have been inferred. There was the stopping of the train on a dark night in a tunnel badly lighted and filled with steam; a heap of hard rubbish and no platform opposite to the carriage; the name of the station called out from the platform, and after a short interval a second cry of "Keep your seats," when the train moved on, but not before some passengers had got out, including one heard to groan, and found lying with his

legs across the rails. In addressing your Lordships I myself stated that if it had fallen to me to review a verdict of a jury given against a company in these circumstances without any evidence to explain the facts, I should have been of opinion that the jury had come to a natural and proper conclusion, but that the only question which your Lordships had to deal with was—was there evidence of negligence to go to the jury? And I further stated that I trusted the case might be found useful in future as negating the idea that in circumstances such as described a case was to be withdrawn from the jury.

In the present case, on the other hand, I can find no such evidence, and therefore I feel obliged to move your Lordships that the judgment given for the plaintiff in the Court below should be reversed and a nonsuit entered, the respondent, according to what is usual in such cases, paying the costs of the appeal, along with the costs below.

LORD O'HAGAN.—In this case, as it has been presented to your Lordships, the single question is—Was there any evidence which ought to have been submitted to the jury?

I shall first advert to the judgment in *Bridges v. The North London Railway Company* (1), which, in the interpretation given to it by some of the learned Judges in the Court below, would be decisive against the appellants. I was not a party to that judgment, and I did not hear the statements of opinion addressed to this House by the noble and learned Lords who then advised it, but I have read with great attention the report of those statements, and I quite agree with my noble and learned friend that they establish no new principle. They left the law as it was, and as it ought to be. They dealt with the particular circumstances in evidence, and merely decided that as those circumstances plainly justified the imputation of negligence to the company, they should not have been withheld from the consideration of the jury. That case does not seem to me in any way to take from the Judge the duty and responsibility of determining as to the existence or non-

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existence of evidence fit to be considered. It merely affirms a proposition which no one can dispute, that when such evidence exists the jury must be allowed to decide as to its weight and value. Your Lordships have never held that when negligence is alleged any state of facts assumed to bear upon the issue can be made the subject of inference by jurors although not really connected with the issue before them. The consequences of such a doctrine would be disastrous, and it is of high importance that the authority of the Judge should restrain a latitude of decision which might often in the result be very inconsistent with reason and justice. I concur therefore with the concluding observations of the Lord Chancellor, that the authority of *Bridges' Case* (1) does not affect and cannot govern the case before your Lordships. I have felt it necessary to say so much of that case in the first instance because it appears materially to have affected the judgment of the Court below, and because I think it ought not, when properly understood, to embarrass your Lordships in considering the evidence, to which I shall now briefly address myself.

The complaint of the respondent is very succinctly put in his declaration. It is confined to this, that "by the negligence of one of the servants of the defendants one of the doors of the carriage in which he was travelling was suddenly and violently closed, and thereby one of the thumbs of the plaintiff was smashed and injured." That is the complaint. It was for the Judge to see if anything in the proofs sustained it, and the same obligation is now cast upon your Lordships. The material facts are few and undisputed, and considering them with care I am unable to come to the conclusion that they establish negligence against the company. The respondent does not rely upon any single act in proof of negligence. A series of events is taken consecutively, and from the whole it is argued that the jury had ground for inferring it.

I find it a little difficult to ascertain the precise ground of the judgments we are considering. One of the learned Judges is of opinion that the entrance of the three extra passengers furnishes no

evidence of negligence, and the two others seem to have held that none was furnished by the fact that the porter slammed the door at the time and in the manner at and in which it was closed. Grove, J., seems to me to have put the matter fairly when he said that it must be considered whether the alleged conduct of the company or its servants can be fairly said to have been the cause of the accident, and I agree with him that it is not necessary to establish negligence that it should, so to speak, consist of one act or one negligence only. You may put other things together which are reasonably proximate to the accident, and come sufficiently near to be the cause in the not very remote sense of the word. And you are not obliged to rely on a single thing and to say that single thing must be enough to establish negligence. I quite concur in this, but I will add that to make them available for that purpose the several things relied on, or some of them, must be connected with the accident as having more or less contributed to produce it.

Now take this transaction in its several stages. I do not go so far as Bramwell, L.J., and say that the company were blameless in permitting the intrusion of extra passengers at the Gower Street station. I think it is conceivable that they might have prevented that intrusion without incurring unreasonable expense or inconvenience by a rapid inspection of the carriages, and the removal of those whom there was not space comfortably to accommodate. It is not necessary to give an opinion upon this point, but I am not prepared to say that if the overcrowding had been connected with the accident in any way as its cause the company might not have been liable. But because I fail to find any such connection demonstrated by proof I cannot say that the liability has arisen. *Ex concessis* the overcrowding *per se* would have given the respondent no ground for this action, and the subsequent events do not appear to me to make it more effective for that purpose. The same observation applies to the continuance of the extra passengers in the carriage at the Portland Road station. It ought not to have been permitted, and again I can conceive cir-

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circumstances in which it might found or aggravate a claim against the company. But, like the original overcrowding, I do not think it has been connected with the injury of the respondent as having caused it or contributed to it, and therefore it was not fit to be presented to the jury as a ground for inferring liability. The overcrowding and continuance together may well perhaps be taken to impeach the administration of the company and give reason for complaint of its arrangements, although even as to this I note that some of the learned Judges are of opinion that there was no cause of blame, and we are not required to decide as to the correctness of their views in that respect.

But it may not unfairly be conceived that when the case was left at large to the jury, they were not indisposed to take into account what they might have considered on public grounds culpable mismanagement, and attached to the company a responsibility which at least in this action they were not required to answer. I am sure that your Lordships would be very slow to limit the legitimate authority of juries in relation to railway cases, for it furnishes in its honest and vigorous exercise the best, and sometimes the only protection which the general public possesses against the default, shortcoming or mismanagement of companies. They are potent monopolies, comparatively little subject to the various forms of control which law and opinion exercise upon individuals, and but for the action of juries in preventing negligence and disregard of the general comfort and safety, the want of that control would be a great mischief to society. It is essential, however, to the maintenance and efficiency of their wholesome influence that it should be confined within its fitting sphere and prevented from operating without proper cause, or on insufficient evidence. I think there is nothing in evidence which leads to the conclusion that, if at Gower Street Station the three passengers had been kept from entering the carriage, or if at Portland Road Station they had been excluded from it, the respondent would have escaped the mischief which unfortunately befel him.

All that occurred subsequently was this: Some one opened the door of the carriage and closed it; the train got into motion, and a rush was made, and the door was opened. Who made the rush, whether many or few, does not appear; but the single porter was adequate to put away those who made it; and in slamming the door as the train entered the tunnel, he surely did nothing but his duty. He did what was right and reasonable, and if he had failed to do it, and evil had resulted from the swinging of the open door in the tunnel, there would have been real ground for making his employers answerable in damages. I do not find that any of the learned Judges censure him, and yet his act seems the only one, for which, as having caused the injury, the respondent in his pleading seeks redress against the company, and the only one for which, if for anything in this action, they appear to me to be responsible. Can it be said that they were culpable because some one on the platform opened the door and closed it when he saw that the carriage was full? Can they be held to be so because there was a rush of persons hurrying to get into the moving train, from which they were kept by the porter after they had opened the door? Is it possible, dealing with the case reasonably and in the light of our everyday experience, that we can discover negligence in either of these things? There is nothing in the case to shew, as was suggested in the Courts below, that there was a large crowd on the platform, or that the staff upon it was insufficient for ordinary purposes. On the contrary, the porter found no difficulty in pushing away the people who had opened the door, and so exercising all the control which apparently was needful under the circumstances.

What more is there in the case? The respondent, as I have said, who had not objected to the entrance of the extra passengers, and had not required their removal, rose from his seat, and held up his hand to prevent the intrusion of others. His own action, which was natural and reasonable, in combination with the perfectly innocent proceeding of the porter, accomplished the injury, and I wholly

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fail to see that the overcrowding had anything to do with it. The same occurrence with the same result might have taken place if the proper number of passengers had been in the carriage. The opening of the door, the intervention of the porter, the quick slamming, all might have occurred in exactly the same way if the intruders had never entered or had been removed, and the respondent might equally have risen from his seat, and held up his hand, as he would have been warranted in doing, to prevent the entry of persons for whom there was no room. Can we speculate as to the amount of added motive to such a course from the greater inconvenience of the greater overcrowding? I think it would be difficult and dangerous to attempt it, and then we have no proof of the relative position of the respondent and the other passengers in the carriage, and how far the presence of those who ought not to have been there may have been useful or detrimental to him. It is quite conceivable that one or other of those persons may have been so placed between him and the door as to render the danger less than it otherwise might have been. Again, we cannot speculate, in the absence of proof, on what might have happened if things had been ordered otherwise. Putting the matter at its lowest, I think your Lordships will be safe in adopting the view of Bramwell, L.J., when he says: "Supposing the evidence to be consistent with negligence, namely, that negligence may have caused the matters complained of, it is equally consistent with no negligence, namely, that the matters proved may have been caused otherwise than by negligence, and it is an elementary rule that when the evidence is consistent as much with one state of facts as with another, it proves neither."

On these grounds I am of opinion that the respondent has failed to establish his claim, or to offer any evidence in support of it which should have been submitted to the jury, and that, therefore, the appeal should be allowed, and a nonsuit entered.

LORD BLACKBURN.—I also am of opinion that in this case the judgment should be reversed, and a nonsuit entered.

On a trial by a jury, it is, I conceive, undoubted that the facts are for the jury, and the law for the Judge. It is not, however, in many cases practicable completely to sever the law from the facts. But I think it has always been considered a question of law to be determined by the Judge, subject of course to review, whether there is evidence which, if it is believed, and the counter evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether, and how far, the evidence is to be believed. And if the facts as to which evidence is given are such that from them a further inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review as a matter of law, whether from those facts that further inference may legitimately be drawn. In delivering the considered judgment of the Exchequer Chamber in *Ryder v. Wombwell* (8) Willes, J., said: "Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject, no doubt, to the control of the Court, who may set aside its verdict and submit the question to the decision of another jury; but there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant."

It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the Judge, subject, of course, to review, is, as is stated by Maule, J., in *Jewell v. Parr* (9) "not where there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that

(8) 37 Law J. Rep. Exch. 8; s. c. Law Rep. 4 Exch. 32.

(9) 13 Com. B. Rep. 916; s. c. 22 Law J. Rep. C.P. 253.

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the fact sought to be proved is established." He afterwards observes, very truly in my opinion, "There is no doubt a possibility, in all cases where the Judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the Judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the Court below on such a point is reserved the majority must have been so, either in the Court above or in the Court below. This is an infirmity which must affect all tribunals." I quite agree that this is so, and that it is an evil. But I think it a far slighter evil than it would be to leave in the hands of a jury a power which might be exercised in the most arbitrary manner. On this I perfectly agree with the remarks already made by the Lord Chancellor. In all cases of actions against railway companies to recover damages for a personal injury the plaintiff has to prove, first, that there was on the part of the company a neglect of the duty cast upon them under the circumstances; and, secondly, that the damage he has sustained was the consequence of that neglect of duty.

A third question, viz., whether the plaintiff is himself to blame, comes more properly by way of defence. Now, in applying the rule of law laid down in *Ryder v. Wombwell* (8) to such cases, there had been much difference of opinion among the Judges. In some of the cases it was imputed to the Judges, who had decided in favour of the companies that they had acted as if a Judge, whenever he thought a verdict for the plaintiff would be unsatisfactory, was entitled to withdraw the case from the jury. I do not pause to enquire whether this imputation was just or not. If they did so act, I agree that it was a wrong principle, and I agree also that *Bridges v. The North London Railway Company* (1) is an authority, if one were wanted, to shew that it is a wrong principle.

But since the decision of your Lordship's House in that case it has been more than once said in the Courts below that your Lordships had not, perhaps, overruled the law laid down in *Ryder v. Wombwell* (8), but at least laid down

this exception to it, that in cases of railway accidents the jury were to decide. In *Robson v. The North Eastern Railway Company* (10) Brett, L.J., says, "The House of Lords held that, as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury ought to decide." I quite agree that this consideration ought never to be lost sight of, but I cannot think it decisive. Amphlett, L.J., in the present case says: In considering the question we must bear in mind that it is now settled by the case of *Bridges v. The North London Railway Company* (1), though previously doubted by many eminent Judges, that the question whether in cases of this sort negligence can be inferred from a given state of facts is itself a question of fact for the jury, and not a question of law for the Judge; and Cockburn, L.C.J., and Lord Coleridge, C.J., both indicate, I think, at least, a partial agreement in this view of that decision. If that were the decision of your Lordships' House, there would be an end of this case; for I apprehend that, after a position of law has been laid down judicially in this House, it is no more competent for your Lordships to depart from it than it would be for an inferior Court to do so. But I am myself unable to see anything in *Bridges v. The North London Railway Company* (1) which justifies the conclusion that your Lordships either laid down, or meant to lay down, any new rule on the subject. I think the utmost extent to which your Lordships' decision in that case can fairly be pressed is, that in such cases the Judges should be cautious before they say that the jury could not legitimately draw the inference, which, in fact, they did draw, and to this I agree.

As to the facts of the present case I have little to say. I think that the plaintiff was entitled to be carried in a carriage with reasonable accommodation, and there is evidence that at Gower Street, either from their being too few officials, or from these officials neglecting their duty, too many passengers were put in the same carriage with him, and for any damage resulting therefrom he had a case to go to

(10) 46 Law J. Rep. Q.B. 50; s. c. Law Rep. 2 Q.B. Div. 85.

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the jury. But I can see no evidence from which the inference could legitimately be drawn that the plaintiff's thumb was crushed at Portland Road because of this neglect of duty at Gower Street. The reasoning by which it is sought to say that the jury might legitimately connect the fact that the plaintiff's thumb was in the hinge of the door at Portland Road with the negligence at Gower Street, seems to me a good example of what Lord Bacon means in his maxims, when he says: "It were infinite for the law to consider the causes of causes, and their impulsion one of the other."

Nor do I see any evidence of negligence at Portland Road. The company, I think, ought to take reasonable steps to prevent people from getting into carriages already full, and this the defendants' porter did; but it would be going much further than I think is reasonable, to say that the duty of the company was to prevent anyone from opening the door in order to look into the carriage, and see if there was room. The company's servant did quite right in preventing the persons who did this from entering, and in shutting the door the misfortune was, that at the moment he did so, the plaintiff's thumb was in the hinge of the door, but that the porter could not anticipate.

LORD GORDON.—The facts of this case are very simple, and have been very distinctly stated by your Lordships who have preceded me, and it is not necessary that I should repeat them.

The duty of a Judge in such a case is an exceedingly delicate one, as the line of division between what is proper should be submitted to the jury as necessary to support a charge of negligence in point of law, and what may be submitted to the jury as sufficient to support a charge of negligence in point of fact, is often a very narrow one. But I agree with what was said by Willes, J., in the case of *Ryder v. Wombwell* (8), which has been quoted by Lord Blackburn; and in *Bridges' Case* (1), which has also been referred to, Pollock, B., one of the consulted Judges, after referring to what had been quoted from Willes, J., says, and I concur with him: "This is a clear exposition of the

rule, and it has been generally acquiesced in and acted upon, and it follows from it that, although the question of negligence is one of pure fact, and therefore for the jury, it is the duty of the Judge to keep in view a distinct legal definition of negligence as applicable to the particular case, and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them or inference drawn from them by the jurors, present a hypothesis which comes within that legal definition, then to withdraw them from their consideration."

In the present case, I must say that during the argument, I felt much inclined to agree with the view taken of the decision of this House in *Bridges' Case* (1) by Cockburn, L.C.J., and Amphlett, L.J., and to hold that it had been settled by that case that the question whether negligence can be inferred from a given state of facts is itself a question of fact for the jury, and not a question of law for the presiding Judge.

But having considered that case more maturely, with the assistance which your Lordships have received from the noble and learned lord on the woolsack, who took part in that decision in this House, I am now satisfied that the view taken by those learned Judges was not the right one, and that no fixed or general rule, such as was supposed by them, was laid down by that case. I concur with the noble and learned lord on the woolsack in thinking that it is impossible to lay down any rule, except that from any given state of facts, the Judge must say whether negligence can be legitimately inferred, and if the Judge is of that opinion, then it is for the jury to say whether it ought to be inferred.

On the facts before the House in the present case, I come to the conclusion that no negligence connected with, or conducing to, the accident was proved on the part of the appellants, and that the Judge who tried the case, ought to have so ruled. I think the overcrowding of the carriage was not the cause of the accident, and the respondent does not so allege in his declaration. The people who were overcrowding were inside the carriage, and did not require to open the

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door at Portland Road, where the accident happened. The door was opened there by people on the outside, who tried to get in. The porter prevented them, and, I think, did so rightly. The respondent, who had a seat, rose, or partly rose, to push the people back who were trying to enter. The train happened to move off, the respondent was jerked forward, and put his hand on the hinge of the carriage door at the very moment the door was being shut by the porter, and the respondent's thumb was injured. It was the duty of the porter to shut the door, and it is not proved that he saw the respondent fall forward, or could have prevented the jamming of his thumb.

I think there is no evidence of negligence in what took place at Portland Road, and that what happened was a pure accident, for which the appellants were not responsible, and that the Judge who tried the case should have so ruled.

I therefore concur in thinking that the judgment given for the respondent in the Court below should be reversed.

Order appealed from reversed, and a nonsuit to be entered. The respondent to pay to the appellants the costs of the appeal and the costs in the Courts below.

Solicitors—Burchells, for appellants; Tillyard & Gribble, for respondent.

[IN THE COURT OF APPEAL.]

1877. }
Nov. 22. } GOODHEW v. WILLIAMS.*

Election of Vestrymen—Absence of Qualification—Penalty—"Rated or Assessed"—Claim to be rated—Tender of Rate—Finality of Decision of Inspectors—Metropolis Management Acts.

The defendant occupied jointly with his father premises in the metropolitan parish of R. of sufficient value to qualify him to

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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act as a vestryman. Up to and including April, 1876, the rates in respect of the premises had been made on the father alone. Shortly after the rate was made, in April, 1876, the defendant applied to the churchwardens and overseers of R. to place his name on the rate-book as partner with his father in the firm of Williams & Son, but no step was taken by the authorities in the matter. In May the defendant was elected vestryman by poll, and the inspectors appointed under ss. 16, 17, 18, 19, 22, of the Metropolis Management Act, 1855, declared that he was duly elected. Subsequently in the same month the demand for the rate was made on the father alone. In June the defendant voted as a vestryman. In July he required the note demanding the rate to be altered by the addition of the words "and Son." It was so altered, and the rate was paid by Williams & Son.

An action having been brought against the defendant under the Metropolis Management Act, 1855, s. 54, to recover a penalty for his acting as vestryman without qualification,—

Held, that as the defendant was not "rated or assessed" within sec. 54 of the same Act he was liable to the penalty; that the decision of the inspectors as to the qualification of the candidates is not final; that section 4 of the Metropolis Amendment Act, 1856, is not retrospective in its operation so as to exempt from the penalty one who pays the rate subsequently to his acting as vestryman.

This was an appeal from the judgment of Manisty, J., at the trial of this action without a jury.

It was agreed that the facts as set forth by the learned Judge in his judgment were the only ones material, and that the judgment of the Court of Appeal should proceed on that statement of facts (1). The judgment of Mr. Justice Manisty was as follows:—

(1) The material sections of the Acts of Parliament referred to are as follows:—
18 & 19 Vict. c. 120.

Section 6, "The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum; and no person shall be capable of acting, or being elected, as one of such

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MANISTR, J.—The facts of this case are shortly these:—It is an action founded upon the 54th section of the Metropolis

vestry, for any person, unless he be the occupier of a house, lands, tenements or hereditaments, in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish. Provided always, that in any parish in which the number of poor-rate assessments at 40*l.* or upwards, does not exceed one sixth of the whole number of such assessments, it shall not be necessary, in order to qualify a person to be a vestryman, that the amount of rental upon which he is rated or assessed as aforesaid, exceed 25*l.* Provided, also, that the joint occupation of any such premises as aforesaid, and a joint rating in respect thereof, shall be sufficient to qualify each joint occupier, in case the amount of rental on which all such occupiers are jointly rated, will, when divided by the number of occupiers, give for each such occupier a sum not less than the amount hereinbefore required."

Section 15. "The rate collectors, or persons appointed by them, shall attend the churchwardens and persons presiding at elections under this Act, and inspector of votes, to assist in ascertaining that the persons presenting themselves to vote, are parishioners rated to the relief of the poor in the parish, or the respective wards thereof, and duly qualified to vote at the election."

Section 16. "On the day of election of vestrymen and auditors in any parish under this Act the parishioners then rated to the relief of the poor in the parish, or, where the parish is divided into wards under this Act, in the wards thereof for which the election is holden, and who are desirous of voting, shall meet at the place appointed for such election, and shall then and there nominate two ratepayers of the parish; or (if the parish be divided into wards), of the ward for which the election is holden, as fit and proper persons to be inspectors of votes; and the churchwardens, or, in the case of a ward election, such one of the churchwardens as is present thereat, or, where one of the churchwardens is not present, the person appointed by them to preside thereat, shall immediately after such nomination as aforesaid by the parishioners nominate two other such ratepayers to be such inspectors; and, after such nominations, the said parishioners shall elect such persons duly qualified as may be there for the offices of vestrymen and auditors or auditor; and the chairman at such meeting shall declare the names of the parishioners who have been elected by a majority of votes at such meeting."

Section 17. "Provided always that any five ratepayers may then and there, in writing or otherwise, demand a poll, which shall be taken by ballot."

Section 18. "The inspectors for the parish or ward (as the case may be) shall forthwith meet together, and proceed to examine the said votes; and, if necessary, shall continue the examination by adjournments from day to day, not exceeding

Local Management Act, 18 & 19 Vict. c. 120, (and my attention is drawn to section 6,) in which a penalty of 50*l.* is imposed upon a person for acting in the capacity of a vestryman contrary to the

two days (Sunday excepted), until they have decided upon the persons duly qualified, according to the provisions of this Act, who may have been chosen to fill the aforesaid offices."

Section 19. "In case an equality of votes appear to the aforesaid inspectors to be given for any two or more persons to fill either of the said offices, the inspectors shall decide by lot upon the person to be chosen."

Section 22. "The inspectors shall, immediately after they have decided upon whom the aforesaid elections have fallen, deliver to the churchwardens, or to one of them, or other the person presiding at the election, a list of the persons chosen by the parishioners to act as vestrymen . . . and the said list, or a copy thereof, shall be published in the parish as herein provided."

Section 54. "Any person who acts as a member of any such vestry as aforesaid, without being qualified by rating and occupation as required by this Act, shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the superior Courts of law, with full costs of suit . . ."

19 & 20 Vict. c. 112 (an Act to amend the last-mentioned Act), section 4:—

"It shall be lawful for any person occupying any tenement within any parish to claim to be rated to the relief of the poor, in respect thereof in the rate for the time being, and in all rates to be thereafter made in respect of such tenement, whether the landlord be, or be not, liable to be rated to the relief of the poor in respect thereof; and upon such occupier so claiming by notice in writing left at the office or place of residence of the overseers of the poor of the parish, or one of them, and actually paying or tendering at such office or place of residence the full amount of the last made rate then payable in respect of such premises, such overseers are hereby required to put the name of such occupier on the rate for the time being, and also, without further claim, to put his name upon every subsequent rate made during the time such occupier continues in the occupation of the same premises; and, in case the said overseers neglect or refuse to do so, such occupier shall nevertheless, for the purposes of the said Act, be deemed to have been rated to the said rate in respect of such premises from the period at which the rate for the time being in respect of which he so claimed to be rated aforesaid was made, and thenceforth so long as he continues in the occupation of the same premises, provided always that every person so claiming as aforesaid, shall, in respect of every rate for the relief of the poor made after such claim as aforesaid, while he continues to occupy the same premises, be liable to the same extent, and in the same manner, as if his name had been put on such rate."

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provisions of the Act. Now, it seems that in 1874 the defendant and his father, and his brother, J. T. Williams, became the occupiers of certain railway arches, which are of the value sufficient to qualify each of them to be elected as vestrymen, because in this parish (Rotherhithe) 25*l.* is the qualification, and that from 1874 down to the time of the election in question, for the purposes of making the rates the name of the father only was entered in rating books as the occupier. He was "rated or assessed" as the occupier of tenements of the value of not less than 25*l.* per annum. The father being rated in 1874 and 1875, it seems that he carried on business and occupied these premises jointly with his son in the name of Williams & Son. Nevertheless, the rate was made upon the father only, and from time to time Williams & Son paid the rates. I do not think that can have any effect whatever upon this case; the fact merely of paying the rates seems to me to be a matter immaterial to the issue. But on the 11th of April, 1876, the rate in question was made, and under the head of "occupier" in the rating-book, the name of Reuben Henry Williams was inserted. Of course that means *prima facie* Reuben Henry Williams, the father of the defendant.

The father was rated upon, and the father voted on the strength of these tenements. That being the way in which the rate was made on the 11th of April, it appears that afterwards the defendant wrote to the churchwardens and overseers of the parish of Rotherhithe, requesting that his name should be placed upon the rate-book as partner in the firm of Reuben Henry Williams & Son. It is a somewhat vague notice. It is to be assumed for the purposes of this case that the letter was sent, but it was not acted upon, and the rate stood as before. It seems to me that that matter also is quite immaterial in strengthening this case for the defendant. In the following month, that is in May, on the 16th, the election for vestrymen of the parish of Rotherhithe took place. There were nine vacancies, and the result was that the defendant was returned along with the others. The defendant was objected to,

and the inspectors appointed under the 18th section of the Act declared that the defendant was duly qualified and that he was elected; besides that, there was a return made declaring that he was elected upon that occasion. That declaration was made on the 17th of May, and so matters remained until the rate was demanded, and it was demanded of the father of defendant in the same month. The words "and Son" do not appear on the demand note, so that you have a rate upon the father, and the demand for it made upon the father. I think that is not at all material. Some letters pass after that time, and in the month of July, on the 5th, a letter is sent by the defendant to the churchwardens, and another on the 26th of July, requiring the demand note to be altered. It was altered, and the words "and Son" were added, and the rate was paid by "Williams & Son." But it seems to me, although that rate was paid, the question which must be decided is, whether or not the defendant was rated within the meaning of the 6th section of the Act in the month of April, 1876, because no alteration was made until after defendant had sat and voted in the vestry on the 6th of June. The rate was paid by Williams & Son jointly in October, but we must come back at last to the question whether or not the defendant, at the time when he had voted at the vestry, was qualified to sit there. That matter is decided by the 6th section of the Act. Several cases on the point were cited, but I shall not take up time by going into them at length, because it seems to me that they cannot be distinguished from the case of *Moss v. The Overseers of St. Michael, Lichfield* (2), which was an action brought under the 2 Will. 4. c. 45. s. 27. The facts of the case are very similar to the present one, and I do not see that there is any distinction that can be made out between the qualification in that and in this case. In that case J. B. Moss was the occupier, and he claimed a vote; but it was proved that he occupied jointly with his father William Moss, with whom

(2) 7 M. & G. 72; s. c. 14 Law J. Rep. C.P. 56.

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he had occupied the premises jointly for more than twelve months. The claimant paid the rate with his own hand. It is true the rate was paid by him, his father being the person whose name was entered on the rate-book. They were joint occupiers, and as we have already seen, the rate was paid by the claimant. That was held not to be a qualification. The 6 & 7 Vict. c. 18, only applies to cases of inaccurate or insufficient descriptions in the rating-book, and the case instanced by counsel as coming under that Act, really embraced the point in this case. In this case the father was rated and voted. If the son had been summoned, the father would have been compelled to pay the rate. In other words, the son was not rated. Is there anything in this case which will admit of cases of larger scope being cited? In the case of *Ex parte Ross* (3) it was said that the inspectors had been consulted, and determined that the plaintiff had been duly elected, and it was contended that that decision was final. But upon referring to that case I find it is a different one to the present altogether. That was an application for a mandamus to compel the inspectors to disqualify a vestryman, or rather a candidate for that office. It seems to have been admitted that the party seeking to be returned was not duly qualified. He had a larger number of votes than the other vestrymen who were returned, but it was held that it was the duty of the inspectors to ascertain whether or not the party was qualified; that, in fact, they were to decide upon whether a person was duly qualified to act as a vestryman or not. The application to the Court was for a mandamus to compel the inspectors to return the man who was not duly qualified. The Court held that the inspectors had properly returned the vestrymen who were qualified, but that they could not return a vestryman who was not properly qualified. If the inspectors can return an unqualified person, that person is exempt from penalties under the Act, so it was held in this case, but such a thing seems to me beside the

intention and meaning of the Act. A person must be assessed and rated (I consider the terms the same), and he must pay the rate before he is duly qualified. In the present case the party intended to be rated was the father, and it seems to me that there is no ground for the argument that this case might justify me in holding that the son was really included in the rating. I think he is not qualified, and that the plaintiff is entitled to recover the penalty. I have tried to find whether it was possible to discover that the defendant can be duly qualified, for there can be no doubt that he had the qualification, but his name was not on the rate-book. The Act relating to small tenancies (32 & 33 Vict. c. 41. sec. 19), does seem at the first view to secure the defendant in this case, for it states that any occupier whose name has been omitted from the rate-book, shall be entitled to qualification in the same way as if his name had been entered. But this it turns out, upon the authority of the case of *Cross v. Alsop* (4), merely refers to the third and fourth sections. However, that question and *Alsop's Case* may be discussed in a higher Court.

Philbrick and J. R. Wright.—The defendant was assessed within section 6 of the Act 18 & 19 Vict. c. 120, and was therefore qualified. That section makes a distinction between "rated" and "assessed," and it is enough if the defendant has either qualification. Even if the defendant was not qualified, his subsequent payment put him in the same position as if he was actually qualified—19 & 20 Vict. c. 112. s. 4. Moreover the inspectors appointed under sections 15, 16, 17, 18, 19 and 22 of 18 & 19 Vict. c. 120, decided that the defendant was qualified, and their decision is final. They referred to *The Queen v. Hulme* (5); *Moss v. The Overseers of St. Michael's, Lichfield* (2); *Ex parte Ross* (3).

J. Brown, contra.—If the argument on the other side be correct the penalty

(3) 26 Law J. Rep. Q.B. 312, *nom. Regina v. St. Pancras*, 7 E. & B. 954.

(4) 40 Law J. Rep. C.P. 53; s. c. Law Rep. 6 C.P. 315.

(5) 4 Q.B. Rep. 535; s. c. 12 Law J. Rep. M.C. 100.

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clause has no operation as it can always be avoided by payment.

Philbrick in reply.

BRAMWELL, L.J.—I think that this judgment must be affirmed. The defendant was neither rated nor assessed when he acted, and was therefore not capable of acting or being elected. I do not think that there is any difference between rating or assessing, but the point is an immaterial one. It is odd that the penalty clause says, "anyone who *acts* without qualification;" it does not say anything about election. That would apparently lead to the conclusion that as long as the person who acts is qualified, &c., he might act with impunity though not elected.

Then it is said that by section 4 of 19 & 20 Vict. c. 112, if the events there specified took place after the person is elected and acted without qualification, and after action, even while the summing up is proceeding, he might procure for himself a pardon. That I think would be outrageous.

Supposing, then, that the overseers do enter the name in the rate-book, no consequence ensues curiously enough; therefore, unless you find the overseers could benefit him by so doing, he would be in the same position if they omitted his name as if they put it on, and, therefore, from the date of the neglect or refusal, whatever he did would be justified as if he was on the rate, and a subsequent entry would be retrospective. But to my mind the section is not retrospective as to pardoning past offences, but only enabling for the future, *i. e.*, from the date of the application and refusal.

There is another point. It was contended that the decision of the inspectors was final. I cannot think that it was. I express no opinion as to whether they have any jurisdiction to enquire into the qualification of candidates or not, but I am satisfied that their decision is not final. Their jurisdiction, it is somewhat remarkable, only comes into play if there is a demand for a poll. If there is no poll, but the candidates are elected by a shew of hands, in that case it is clear there is no judgment that cannot be

appealed against, and it would be the oddest thing in the world if the inspectors, who are only chosen when there is a poll, should have no power in the other case. There is, moreover, no means of knowing how the inspectors are to deal with the matter. Supposing *quo warranto* would not lie here—I do not know whether it would or not—then you would have a man getting on without qualification, and, if no appeal, no means of ousting him. If the proper interpretation were that the decision of the inspectors was to be final, one would have expected to find in the penalty clause words exempting such persons as have been found qualified by the inspectors.

BRETT, L.J.—The principal question here is as to the construction of section 54 of 18 & 19 Vict. c. 120. I think the proper construction is that if anyone acts without being qualified at the time he acts he is liable to the penalty. Now, it is said that the defendant was qualified because he, it is said, had been assessed though not rated; that depends on whether there is any difference between "assessed" and "rated." In section 6, I think that as the word "assessed" is left out in section 54, the two words probably mean the same thing; but if not the defendant was neither assessed nor rated, so the point is immaterial. I agree that a man must be assessed before he is rated, but the only persons who can assess are the overseers, and his name was never before them, therefore he was not assessed.

But it is said that he may be deemed qualified in consequence of section 4 of 19 & 20 Vict. c. 112. Now, I should be sorry to doubt that if a person claim to be put on the register, and afterwards does really tender or pay the amount of the rate, that that would not bring him within the section. I think it would be too strict to say that he must pay at the time he claims. But, assuming that to be so, still he cannot be said to be rated with respect to any acts before the 31st of July, the day appointed by the Registration Acts as the day of qualification. The enquiry usually takes place in September and October, but it has never been sug-

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gested that payment after the 31st of July would shew that the claimant was properly qualified, and here I cannot think that the defendant is properly qualified within section 54.

There then comes the question, supposing that to be so, is not the decision of the inspectors final? I have the greatest doubt whether the inspectors have any power at all to enquire into the qualifications of the candidate, and whether their duty is not merely to enquire into the formalities of the papers and lists; but, even if they have the greater duty, there is nothing to shew that there is anything to make their decision final. I think, therefore, that the judgment must be affirmed.

COTTON, L.J., concurred.

Judgment affirmed.

Solicitors — Bridger & Collins, for plaintiff;
R. G. Chipperfield, for defendant.

[IN THE COURT OF APPEAL.]

1877.	}	BERGHEIM v. THE GREAT EASTERN RAILWAY COMPANY.*
Nov. 22.		
1878.		
Jan. 14.		

Carrier — Liability of Railway Company as Insurers — Passenger's Luggage taken in Carriage — Negligence.

Railway companies are not insurers of that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he travels or is about to travel; but they are liable for loss or injury to it caused by their negligence.

Appeal from the judgment given at the trial before Manisty, J., and a common jury at the London sittings.

The plaintiff took a ticket at the Shore-ditch station of the defendants for Yarmouth. He arrived early at the station, and wishing to have some refreshment

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

before starting, he proceeded to the carriage, and after seeing his bag put on his seat by a porter, and enquiring of him whether it would be safe, to which the porter replied in the affirmative, he left the carriage and went to the refreshment room. On returning to the carriage the bag was missing. The jury found that there had been no negligence on the part of the plaintiff or the defendants, and the learned Judge gave judgment for the defendants, against which judgment the plaintiff now appealed.

Grantham and R. E. Webster, for the plaintiff, cited *Cohen v. The South Eastern Railway Company* (1), *Richards v. The London, Brighton and South Coast Railway* (2), *Butcher v. The London and South Western Railway Company* (3), *Le Conteur v. The London and South Western Railway Company* (4), *Macrow v. The Great Western Railway Company* (5), *Robinson v. Dunmore* (6), *Talley v. The Great Western Railway Company* (7), and *Gatliffe v. Bourne* (8).

Metcalfe and Lindsell, contra, cited *Midleton v. Fowler* (9), *Upshare v. Aidee* (10), and *Hodges on Railways*, p. 614.

Grantham, in reply.

Cur. adv. vult.

The judgment of the Court was delivered by

COTTON, L.J.—His Lordship, after stating the facts, proceeded to read the written judgment of the Court, as follows:—

It has been found that neither the company nor the plaintiff was guilty of

(1) 45 Law J. Rep. Exch. 298; s. c. Law Rep. 1 Ex. Div. 217; on appeal, 46 Law J. Rep. Exch. 417; s. c. Law Rep. 2 Ex. Div. 253.

(2) 7 Com. B. Rep. 839; s. c. 18 Law J. Rep. C.P. 281.

(3) 16 Com. B. Rep. 13; s. c. 24 Law J. Rep. C.P. 137.

(4) 35 Law J. Rep. Q.B. 40; s. c. Law Rep. 1 Q.B. 54.

(5) 40 Law J. Rep. Q.B. 300; s. c. Law Rep. 6 Q.B. 612.

(6) 3 Bos. & P. 416.

(7) 40 Law J. Rep. C.P. 9; s. c. Law Rep. 6 C.P. 44.

(8) 4 Bing. N.C. 314.

(9) 1 Salk. 282.

(10) 1 Comyn 25.

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negligence. The company, therefore, cannot be held liable unless they are to be held to have undertaken the liability of common carriers in respect of the bag the loss of which is the cause of complaint in this action.

The liability of a common carrier is, as compared with that of other bailees, exceptional. He is answerable for the loss of goods intrusted to him as such, though the loss be in no way caused by any default on his part. He is considered as having contracted to insure—that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies excepted), the goods of which he, as common carrier, is bailee. The reason why the law implied that this is his contract was that the carrier had by himself or his servants during the bailment, at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner, and that the law considered it necessary, in order to prevent frauds, to impose on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety. The rule and the reason given are thus stated by Lord Chief Justice Holt in *Coggs v. Bernard* (11)—“The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.” This rule, though stringent, was apparently founded on good sense. But if this implication had been applied to goods of which, in consequence

of the act of the owner, the carrier had not, during their carriage, the exclusive or absolute control or care, it would, in our opinion, have been unreasonable. So to apply it would have been to extend a contract of insurance which the law had originally implied because the carrier had the exclusive or at least absolute control and care of the goods, to goods as to which his position was entirely different. When the reason for raising an implied contract does not exist, the implication ought not to be made, and in none of the earlier cases which dealt with and established the common carrier's liability was a contract of insurance implied in respect of goods over which he had not absolute control. In our opinion, as regards goods in such a position, no such contract ought to be implied.

The next question, then, is whether it can be said that goods which, at the request of a passenger, are put into the carriage in which he travels, are under the control and care of the company to such an extent that a contract of insurance on the part of the company can be implied. They are put into that carriage because they may be required by the passenger during the journey; or because he wishes to take special care of them, and to have them under his eye; or because he desires to take them away with him as soon as the train stops. At all events, they are put in that carriage at the request or with the consent of the passenger in order that he may have, or in such a manner that he has, some control over them during the transit. While the train is in motion the company can exercise no control over the goods as distinct from the control they have over the train. There may be in the same carriage with the owner of the goods other persons who, by reason of the passenger's own negligence, may be tempted or enabled to injure the goods or to deprive the owner of them. If the company are in respect of the goods liable as common carriers, though this loss may happen by no default of theirs, they must, nevertheless, make good the loss; and even if the loss happens by reason of the passenger's negligence the company will be liable unless they can fulfil the difficult burden of proving that the negligence

(11) *Ld. Raym.* 909.

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of the passenger occasioned the loss. This would not, in our opinion, be reasonable.

But it was urged that, at least when the owner is reasonably absent from the carriage at stations during the journey, the company must be liable as common carriers for the goods of the passenger, and that the contract of the company may be considered as a contract of insurance, with an exception that while the train is in motion, and the owner in the carriage with some charge of the goods, there should be a different liability. But this would be implying a new form of contract entirely different from the contract of insurance implied in the case of a common carrier.

Again, it is said that the company have been held to be common carriers of passengers' luggage, which is put into the van or other place appropriated for the purpose, and from this it is argued that the company, being common carriers of some passengers' luggage carried in a passenger train, are so of all such luggage carried in the train. But the real question is whether, as regards the particular goods, there is an implied contract of insurance. This must depend on the circumstances under which these goods are carried, and though the company do receive some passengers' luggage carried by a passenger train under circumstances from which a contract of insurance can be implied, it does not follow that this is the case as regards articles which, though carried by the same train, are received and carried under different circumstances. As regards that portion of a passenger's luggage which is at his request or with his consent placed in the same carriage in which he is to travel, we think, for the reasons given above, that there is no sufficient ground upon which a Court can properly make a presumption that the company carry them under a liability or implied contract to carry them safely at all hazards, the act of God and of the Queen's enemies alone excepted.

But, then, it is urged that, if the company is not liable to the extent insisted on, it is not in any way liable for the luggage of a passenger placed at his request and with their assent in the car-

riage in which he is to travel, and that such an entire absence of liability is unreasonable, and therefore the only reasonable conclusion is to imply a common carrier's liability. But, in our opinion, it cannot properly be said that the company, if not liable as common carriers, incur no liability. The company undertake to carry the passenger; they equally undertake to carry his goods which, with their consent, are placed with him in the carriage in which he is. And they are not gratuitous bailees of those goods, as they receive them into their carriages in consideration of the passenger paying his fare. The company, therefore, must, according to ordinary principles, be held liable for loss or injury caused by their negligence in respect of those goods as bailees for hire, and contractors to carry. The company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself.

This is our view on principle; it remains for us to consider the decisions bearing on this question. *Cohen v. The South Eastern Railway Company* (1) is the only case cited which came before a Court of Error. The question in that case was not as to luggage carried by the passenger in the carriage with him; and all that the Court decided was that the company were liable for the loss of passengers' luggage carried in the same train, but not in the same carriage with him, when occasioned by the negligence of the servants of the company.

The plaintiff also relies on *Robinson v. Dunmore* (6). The decision in that case is not in point; for the defendant had expressly contracted that the goods should be safely carried, and the Court held that he was not relieved from this contract by the fact of the plaintiff sending his servant with the defendant. It is true that Mr. Justice Chambre, in giving judgment, stated that it had been held that a coach proprietor is liable as a common carrier for a passenger's luggage, though placed under the eye of the passenger. But in such a case it is obvious that the servants of the coach proprietors did, although the passenger was on the coach, retain an absolute control over the goods in ques-

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tion just as much as if the passenger had not been there.

The cases of *Le Conteur v. The London and South Western Railway Company* (4), *Butcher v. The London and South Western Railway Company* (3) and *Richards v. The London, Brighton and South Coast Railway Company* (2), may, with more reason, be relied on for the plaintiff. These were all cases where the claim against the company was for the loss of articles placed by or at the wish of a passenger in the carriage in which he travelled or intended to travel. In the first case, though Judges to whose opinion great weight is due expressed themselves in terms which favour the contention that the company are liable, the decision was on other grounds in favour of the company, and the opinion expressed by the Judges may be explained as suggested by Mr. Justice Willes in *Talley v. The Great Western Railway Company* (7). In the other cases of *Butcher v. The London and South Western Railway Company* (3) and *Richards v. The London, Brighton and South Coast Railway Company* (2), the judgments were against the defendants, and were certainly, as it would seem, based on the view that the company in each case were liable as common carriers. In *Butcher v. The London and South Western Railway Company* (3), however, there was some evidence of negligence on the part of the company. And neither of these cases was before a Court of Error. Moreover, in the later case of *Talley v. The Great Western Railway Company* (7), the Court of Common Pleas decided that the defendant company were not liable for the loss of a portmanteau placed at the passenger's request in the same carriage with him. In that case the jury had found the plaintiff guilty of negligence, but it was apparently only in neglecting to get back into the carriage into which his portmanteau had been placed. In that case Mr. Justice Willes, who delivered the judgment of the Court, pointed out the distinctions of fact which exist between luggage carried in the ordinary luggage van under the immediate control of the company, and articles placed by the passenger or at his request in the carriage wherein he is to travel, and shewed that

his opinion was that the company are not liable as absolute insurers of articles so placed, but are only liable in the event of negligence in some part of the duty which pertained to them.

Under these circumstances we are of opinion that this Court is not bound by the authorities to decide that the company are liable, if, in our opinion, the company cannot on principle be held to have undertaken the liability of common carriers in respect of the plaintiff's bag, that is, to have contracted to become insurers of it.

For the reasons above stated we are of opinion that they did not so contract, and that the judgment in favour of the company should be affirmed.

Appeal dismissed.

Solicitors—William A. Crump & Son, for plaintiff;
Shaw, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1878. } BROCKLEBANK v. THE KING'S
Feb. 28. } LYNN STEAMSHIP COMPANY.

*Security for Costs—Insolvent Plaintiff—
Past as well as Future Costs.*

After an action had been set down for trial the plaintiff became insolvent and filed a petition for liquidation:—Held, that he was rightly ordered to give security for past as well as future costs.

Harvey v. Jacob (1 B. & Ald. 159) followed. *Oxenden v. Cropper* (4 Dowl. P.C. 574) not followed. *The Republic of Costa Rica v. Erlanger* (45 Law J. Rep. Chanc. 743) distinguished.

This was an opposed motion.

The action was brought for breach of a charter-party. After the defence had been delivered and the action had been set down for trial, the plaintiff filed a petition for liquidation of his affairs. A summons was issued by the defendant calling on the plaintiff to shew cause why he should not give security for costs of the trial. The summons came on to be heard before the Master, who ordered the plaintiff to give

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security for future costs, the amount being fixed at 50*l*. On appeal, it was ordered by Field, J., at Chambers, that the matter be referred back to the Master to settle the amount of security to be given by the plaintiff, on the principle of covering past as well as future costs. Against this order the plaintiff now appealed.

Henry Kisch, for the plaintiff.—In *Harvey v. Jacobs* (1), security for costs, retrospective as well as prospective, was ordered, but there the plaintiff had been convicted of felony, and was actually on his way to transportation; in *Mason v. Polhill* (2), a similar order seems to have been made, but in the subsequent case of *Oxenden v. Cropper* (3), Patteson, J., refused to order security for costs, on the ground that the costs for which security was asked had been already incurred. Under the Judicature Act, 1873, s. 25. sub-sec. 11, the rule in equity is to prevail. The old rule in equity limited the security to the amount of 100*l*. Order LV. of the Judicature Act (4) extending the old rule came under consideration in *The Republic of Costa Rica v. Erlanger* (5), where James, L.J., says: "For the 1,000*l*., costs already incurred, no security can be given within the meaning of this rule."

Anstie, for the defendant.—In *Oxenden v. Cropper* (3), the plaintiff had been confined two years previously in the Fleet, and after his liberation had gone abroad, and the defendants ought to have applied earlier and so obtained security for the costs which they were then seeking to obtain retrospectively. This application has been made as early as possible, and it is always the practice to order an insolvent plaintiff to give

security for costs—*Malcolm v. Hodgkinson* (6). In *Harvey v. Jacobs* (1), where the Court ordered security for past as well as future costs, Lord Ellenborough, C.J., says: "If the attorney has sufficient interest in this action to go on with it, he may find the security. If the defendant proceeds without such security, he will be in as bad a situation as if the plaintiff had been an uncertificated bankrupt."

[He was here stopped by the Court.]

DENMAN, J.—In my judgment, *Harvey v. Jacobs* (1) governs this case, for, although the plaintiff had there been convicted of felony, yet the principle of the decision—which, as I gather it, is, that as soon as such an event takes place as renders it probable that the plaintiff will be carrying on a suit without the prospect of being able to pay any costs, then the defendant is entitled to security—covers the present application. *Harvey v. Jacobs* (1) decides that the plaintiff in such a case is entitled to security for past as well as future costs; and there, moreover, is the dictum of Lord Ellenborough, which is expressly in point with the present case.

The case of *The Republic of Costa Rica v. Erlanger* (5) is not a decisive authority against the plaintiff's application. In that case the application was properly refused on the ground that the difficulty of obtaining costs from the plaintiffs and the doubt of their ability to pay the costs existed to the knowledge of the defendant from the very beginning, and consequently he ought to have applied earlier—an argument that does not apply to the present case. In my opinion, therefore, that case is distinguishable, and *Harvey v. Jacobs* (1) is in point.

LINDLEY, J.—I am of the same opinion. The present application, to my mind, turns on a question of principle, and is untouched by the Judicature Act, 1873, s. 25. (sub-sec. 11). *Oxenden v. Cropper* (3) is in favour of the plaintiff's application, but it is opposed to *Harvey v. Jacobs* (1) and *Mason v. Polhill* (2), both of which appear to have been

(6) Law Rep. 8 Q.B. 209.

(1) 1 B. & Ald. 159.

(2) 2 Dowl. P.C. 61; s. c. 2 Law J. Rep. Exch. 233.

(3) 4 Dowl. P.C. 574.

(4) By Order LV. of the Rules of Court, February, 1876, in any cause or matter in which security for costs is required, the security shall be of such amount and be given at such time or times and in such manner and form as the Court or Judge shall direct.

(5) 45 Law J. Rep. Chanc. 743; s. c. Law Rep. 3 Chanc. Div. 62.

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argued before the full Court, and therefore it does not appear to us to be a case on which we should act.

The practice in Chancery is well settled:—"If the plaintiff, after filing a bill, leave the kingdom for the purpose of settling in foreign parts, it is, at any stage of the cause, ground that he shall give security for costs—*Wylie v. Ellice* (7), *Kennaway v. Tripp* (8); but the application must be made as early as possible after the defendant has become apprised of the fact"—1 *Daniel's Chanc. Practice*, 32, 5th ed. In *The Republic of Costa Rica v. Erlanger* (5) it is obvious why the observation referred to was made by James, L.J. The plaintiffs resided without the jurisdiction, and the defendant, who was well aware of this, did not think it worth while to apply before. Two years after the bill was filed he for the first time asks for security for costs; then when the point is argued and it is asked what security is he entitled to, James, L.J., says, "No security for costs previously incurred can be given." That case is not opposed to the view we are now taking, and our judgment will be for the defendant.

Judgment for the defendant.

Solicitors—Kisch, Son & Hanbury, for plaintiff;
Flux & Leadbitter, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878.	{	USILL v. HALES.
Jan. 29, 30.		USILL v. BREARLEY.
		USILL v. CLARKE.

Libel—Privilege—Report of Ex parte Proceedings before a Magistrate in a Police Court—Jurisdiction.

The rule that the publication of a fair and correct report of proceedings taking place in a public Court of Justice is privi-

(7) 11 Beav. 99; s. c. 17 Law J. Rep. Chanc. 378.

(8) 11 Beav. 588; s. c. 18 Law J. Rep. Chanc. 298.

leged, extends to proceedings taking place publicly before a magistrate, though such proceedings consist of an ex parte application for a criminal summons, terminating in the refusal by the magistrate to proceed with the charge on the ground that on the facts stated he had no jurisdiction.

Three men who had been employed by the plaintiff, a civil engineer, in the construction of a railway, applied to a magistrate in open Court for criminal process against the plaintiff, alleging, that as they had not been paid their wages, while the plaintiff had been paid, they considered he had been guilty of a criminal offence in withholding their money. The magistrate refused the summons, considering that he had no jurisdiction. The defendants afterwards published a report of the proceedings which the jury found was a fair and correct report of what occurred:—Held, that the report was privileged.

Curry v. Walter (1 Bos. & P. 525; s. c. 1 Esp. 456; and *Lewis v. Levy* (E. B. & E. 537; s. c. 27 Law J. Rep. Q.B. 282) followed.

These were actions for libel brought by the plaintiff against the three defendants as printers and publishers of three daily papers, viz., the *Daily News*, the *Standard*, and the *Morning Advertiser*, to recover damages on account of alleged libels contained in those newspapers.

The alleged libel was the following report, which was published by the defendants in their respective newspapers:—

"WESTMINSTER.—Three gentlemen, civil engineers, were among the applicants to Mr. Woolrych yesterday, and they applied for criminal process against Mr. Usill, a civil engineer, of Great Queen Street, Westminster.

"The spokesman stated that they had been engaged on the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account, and as the person complained of had been paid, they considered he had been guilty of a criminal offence in withholding their money.

"Mr. Woolrych said it was a matter of contract between the parties, and al-

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though on the face of the application they had been badly treated, he must refer them to the County Court.

"The applicant said he could not afford to go through so expensive a process. Would the magistrate grant them process under the Employers and Workmen Act?"

"Mr. Woolrich, after consideration, said the Act clearly defined the class of workmen that could recover in a police court, and the applicants did not come under any of those definitions. The expense of the County Court proceeding would not be very much."

At the trial the jury found the report to be a fair and correct report of what occurred before the magistrate, and the learned Judge (Cockburn, L.C.J.) ruled the report to be privileged, giving the plaintiff leave to move to set this ruling aside. The plaintiff having obtained a rule accordingly—

The Solicitor-General (Sir H. Giffard) and Bremner, for the defendant *Hales*. *The Solicitor-General and Yelverton*, for the defendant *Brearley*. *The Solicitor-General and Barnard*, for the defendant *Clarke*, shewed cause (on Jan. 29, 30) against the above rule.—There is no difference between the reports of proceedings in superior Courts and inferior Courts—*Lewis v. Levy* (1); therefore the question depends on the broad proposition that a report of the proceedings of a Court of Justice is privileged if substantially fair and correct; this principle was settled in *Curry v. Walter* (2), a case which was afterwards referred to with approbation by Lawrence, J., in *The King v. Wright* (3).

[LORD COLERIDGE, C.J.—Have you any authority in point in which an application was made to an inferior Court which had not jurisdiction?]

In *Bulkley v. Wood* (4) it is laid down that if a man charges another with felony or of piracy, in a bill in the Star

Chamber, whereof the Court has no jurisdiction, an action lies; but in *Lake v. King* (5) on the same page, the Court said, that notwithstanding what is reported in 4 Rep. 146 in *Buckley's Case*, it was held that want of jurisdiction will not make a libel. In the present case the magistrate had jurisdiction. There was no comment and the report has been found by the jury to have been fair. *Lewis v. Levy* (1), *Popham v. Pickburn* (6), *Ryalls v. Leader* (7), and *Wason v. Walter* (8), were also referred to.

Serjeant Ballantyne and Shortt, for the plaintiff, in support of the rule.—*Curry v. Walter* (2) was not fully discussed, it differs also in being an account of a proceeding in a superior Court, and in *Duncan v. Thwaites* (9), Abbott, C.J., referring to that case, says, "It has not, however, received the sanction of subsequent Judges." In *Duncan v. Thwaites* (9), the report of the proceedings before the magistrate was held to be not privileged; but in the present case there was not a judicial proceeding within any of the cases cited, for the magistrate had no jurisdiction. In *Lewis v. Levy* (1), it is said that "if magistrates, while occupying the bench from which magisterial business is usually administered, they, under pretence of giving advice, publicly hear slanderous complaints, over which they have no jurisdiction, although their names may be in the commission of the peace, reports of what pass before them are as little privileged as if they were illiterate mechanics assembled at an ale-house." That case, which extends the privilege further than any previous case, only lays down this proposition, that a report of proceedings before a magistrate who is competent to enquire into the charge is privileged, and even then the proceeding would have to be one where both parties were present; but here the magis-

(5) 1 Vin. Abr. 389.

(6) 7 Hurl. & N. 891; s. c. 31 Law J. Rep. Exch. 133.

(7) 35 Law J. Rep. Exch. 185; s. c. Law Rep. 1 Exch. 296.

(8) 38 Law J. Rep. Q.B. 34; s. c. Law Rep. 4 Q.B. 73.

(9) 3 B. & C. 556.

(1) E. B. & E. 537; s. c. 27 Law J. Rep. Q.B. 282.

(2) 1 Bos. & P. 525; reported at *Nisi Prius* 1 Esp. 456.

(3) 8 Term Rep. 293.

(4) 4 Rep. 14b; s. c. 1 Vin. Abr. 389.

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trate was not competent to enquire into the matter, for he had no jurisdiction.

[LORD COLERIDGE, C.J.—It is the nature of the charge, and not the facts, which found the jurisdiction.]

Here, however, the magistrate says, "I have no jurisdiction," then the report cannot be privileged—*McGregor v. Thwaites* (10). These applications are usually made in private; if the magistrate chooses to use his Court as a private room he does not make the proceedings public. There was here no judicial proceeding, only a defamatory statement behind the back of the plaintiff, and the proceeding differs from those where something was begun before the magistrate, as here there was no commencement or ending. *Ab initio* the magistrate declines to investigate whether the charge is true or false as having no jurisdiction to do so. Moreover it was an *ex parte* statement, and therefore not privileged—*The Queen v. Lee* (11), *The Queen v. Fisher* (12); see also *The King v. Fleet* (13), *Duncan v. Thwaites* (9); and in *Hoare v. Silverlock* (14), Maule, J., in giving judgment expressly excepts reports of *ex parte* proceedings in Courts of Justice from privilege; see also per Coleridge, J., and Wightman, J., in *Davidson v. Duncan* (15).

Reports of speeches of counsel as part of the proceedings in a case were privileged for the reason given in *The King v. Brice* (16), where a prosecutor on an indictment claimed as a right to address the jury, it was held that in a criminal prosecution, instituted in the interests of the public, in the name of the king, and not to gratify the objects of an individual, a prosecutor had no right to address the jury. "Counsel," it was said in the judgment of the Court (who are in some measure under the control of the Court), "have this

privilege allowed them; because from their professional education and habits of business, it is to be expected that they will not state to the jury anything but what is fit to hear." See also *Millisch v. Lloyd* (17). But a report of a case merely "as stated by counsel," and not giving the evidence, has been held not privileged—*Saunders v. Mills* (18). Ought a privilege denied in such a case be accorded to the report of a speech made by the person himself who is aggrieved or fancies himself so? Applications for criminal informations can only be made by counsel, whereas a summons may be applied for by the prosecutor. Moreover these applications by counsel have always to be made on affidavits, whereas a prosecutor is hampered by none, and not being under any control can make any defamatory statement they choose before a magistrate, with a view to obtaining a report in the public newspapers, and thus great injury might be done to an individual without the general advantage to the country in having these proceedings made public, which in the words of Lawrence, J., in *The King v. Wright* (3), "more than counterbalances inconvenience to the private persons whose conduct may be the subject of such proceedings."

It is not necessary for the plaintiff to contend that where a magistrate entertains an application and proceeds to investigate a charge in a case where he really has no jurisdiction, a report of what takes place would not be privileged. All that it is contended for is that where a magistrate refuses to enter upon any investigation of the truth or falsity of the charge made on the ground openly expressed by him that he has no jurisdiction to do so, and sends the applicant to some other Court where the truth or falsity of the charge can be investigated and determined, then the newspapers should not publish what is and must remain—till investigated by the proper tribunal—mere defamatory matter uttered behind the back of the persons attacked. No public interest requires such a publi-

(10) 3 B. & C. 24.

(11) 5 Esp. 123.

(12) 2 Campb. 563.

(13) 1 B. & Ald. 379.

(14) 9 Com. B. Rep. 20; s. c. 19 Law J. Rep. C.P. 215.

(15) 7 E. & B. 229; s. c. 26 Law J. Rep. Q.B. 104.

(16) 2 B. & Ald. 606.

(17) 13 Cox C.C. 575.

(18) 6 Bing. 213; s. c. 8 Law J. Rep. C.P. 24.

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cation, whilst irreparable private injury may be done by means of it.

LORD COLEBRIDGE, C.J.—I am of opinion that the rule should be discharged. One case only has been argued, and as it has been agreed that the judgment in one case shall bind the other two, the three rules will be discharged.

This was an action against a newspaper for a *bona fide* and fair report of a proceeding before a magistrate. Three persons who had been employed by a civil engineer upon an Irish railway, and who had heard that this civil engineer had been paid whilst they themselves had not, went before a police magistrate in London and applied to him for a summons—which, for the purposes of my judgment, I must take it was applied for under the Employers and Workmens Act—to compel the engineer, who was the plaintiff in this action, to pay over to them the money he was alleged to have received. If there had been materials upon which the magistrate thought the case had been made out he would have had jurisdiction to issue this summons; or, in other words, supposing the complainants had substantiated their complaint, he would have had jurisdiction to issue an order under the Employers and Workmens Act. In the result the facts shewed the magistrate he had no power to issue a summons or order under the Employers and Workmens Act, and therefore in a certain sense the application was made to him with regard to a matter in which he had no jurisdiction. But it has long been held, and properly held, that it is not the result, but the nature of the application made to a magistrate which founds his jurisdiction; and that whenever there is an application made to a magistrate on a matter over which he has jurisdiction, he has then jurisdiction for the purpose of ascertaining whether the facts make out a case for the exercise of that jurisdiction; the distinction between the cases where there is an inherent want of jurisdiction on account of the nature of the complaint, and what may be called want of jurisdiction, because the facts do not make out the charge, is very well explained in *The*

Queen v. Bolton (19), founded on the case of *Brittain v. Kinnaird* (20), which has come to be the *locus classicus* of Sir J. Richardson.

Therefore, in this matter I must take it that the magistrate had jurisdiction to enter upon the enquiry. What was then done can only be described as a judicial proceeding, for it was a proceeding before a Judge who, as far as the jurisdiction went, had jurisdiction to conduct it. This seems clear upon principle and upon authority.

If so, this is *prima facie* a privileged publication, and it is too late now to enquire whether the rule of privilege does or does not extend to the publication of such proceedings; for it has been laid down again and again in broad terms that the publication of proceedings in a Court of justice is privileged if the report of such proceedings be fair and honest; and the report in this case has been found so to be.

An attempt, however, has been made to distinguish this case by bringing it within a qualification that has been undoubtedly grafted upon the general proposition—viz., that this is an *ex parte* or preliminary proceeding. No doubt the term has been frequently used by Judges of great eminence, sometimes affirmatively in saying that an *ex parte* proceeding is not privileged, and sometimes negatively in saying, "This being a proceeding not *ex parte*, is privileged;" and I do not doubt that if the argument of the plaintiff's counsel had been addressed to the Court sixty or seventy years ago it might have met with a different result than that which it is about

(19) 1 Q.B. Rep. 66.

(20) 1 B. & B. 432. *Brittain v. Kinnaird* was the case of a conviction under the Bumboat Act, "for unlawful possession of certain stores in a certain boat." The boat in question, which was in consequence seized, was a decked vessel of thirteen tons, and it being asked shall the magistrate, by calling a seventy-four ship a boat, give himself jurisdiction and preclude enquiry?

Richardson, J., commenced his judgment thus: "Whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction."

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to meet with to-day. In such a case as *The King v. Fleet* (13), and also in other cases cited in *Starkie on Libel* (21), the judgments of the great Judges who there speak lay down the rule that an *ex parte* or preliminary proceeding is not privileged upon the ground, good or bad, that it is very hard on an individual to have a matter stated against him behind his back and reported in the public papers with no means of answering it; and there are strong observations in *Duncan v. Thwaites* (9) which go far to maintain that proposition. There is also a *dictum* of one of the greatest authorities—namely, Lord Eldon, than whom there are few greater lawyers, “That he recollected the time when it would have been matter of surprise to every lawyer in Westminster Hall to learn that the publication of *ex parte* proceedings was legal”—*Starkie on Libel* (22).

But we are not now living within the shadow of those cases, and it is idle to deny that in cases decided since that time learned Judges have come to conclusions which it is not for me to say are inconsistent, but which at best appear to my mind irreconcilable with those cases. I find excellent good sense in the judgment of the Court of Queen’s Bench in the case of *Wason v. Walter* (8), and there is a passage in it which I should desire to adopt:—

“Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage—that its elasticity enables those who administer it to adapt it to the varying conditions of society and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only

in very recent times been recognised. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on Judges and other public functionaries are now made every day which half a century ago would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of Courts of justice has been of modern growth. Till a comparatively recent period the sanction of the Judges was thought necessary for the publication of the decisions of the Courts upon points of law. Even in quite recent days Judges, in holding publication of the proceedings of Courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court—as, for instance, on applications for criminal informations—are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected” (23).

To the principle and line of argument of that passage and to the accuracy of that last statement I entirely adhere, and true it is that in important cases *ex parte* proceedings are reported—for instance, in the course of enquiries before coroners

(21) 4th ed. p. 190.

(22) 4th ed. p. 191 note (9).

(23) 38 Law J. Rep. Q.B. at p. 44; s. c. Law Rep. 4 Q.B. at pp. 93, 94.

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cases are reported from day to day in the newspapers which in early times would have been excepted from privilege, but it is unheard of that persons affected by such reports, if *bona fide*, may bring an action.

This element, then, seems to be introduced into the determination of these cases—that there is a certain elasticity (development is perhaps the more correct word) to be applied to questions of privilege, and Courts have from time to time to apply what they consider is the good sense of the rules which exist to cases which have not been positively decided to have come within them.

If there had been a case in point with the present in which the jury had found that the report of the proceedings was *bona fide*, honest and fair, and a Court of co-ordinate jurisdiction had held the publication to have been not privileged, I would gladly have acted upon it; for I do not disguise that my own judgment is not at all satisfied with the enormous advantage to the public which is represented as resulting from the practice of reporting abortive proceedings which arise from petty and personal disputes. But, nevertheless, the duty of the Judge is not to declare the law as he thinks it ought to be, but as it is; and if he finds a rule established and laid down it is his duty to apply it, and not to fitter it away. I come, therefore, to the consideration of this case, feeling that the general tendency of the law has of late years been to hold such publications as these to be within the protection of privilege.

There is one case which appears to me to cover this case, and from which I am unable to distinguish it. It is the case of *Lewis v. Levy* (1), to which much reference has been made. I there find the rule that the publication of a fair and correct report of proceedings taking place in a public Court of justice is privileged extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge by the magistrate of the party charged. I am perfectly aware that there may be a subtle distinction between

the case before us and the case of *Lewis v. Levy* (1), but the argument by which the Court of Queen's Bench was there led, and the *ratio decidendi* upon which they acted, in effect cover the present case; for this is a case in which, as I have already explained, there was a judicial proceeding, and though not terminating in the discharge of the party discharged because he was not before the magistrate, but in the refusal to proceed with the charge, I am nevertheless unable to distinguish it. I adopt what was decided in the great case of *Curry v. Walter* (2). That case, whatever intermediate cases and doubts of eminent Judges occurred, was adopted rehabilitated by the Queen's Bench in *Lewis v. Levy* (1), in 1858. I am content to rest my judgment upon the principles there laid down, and to say that upon principle and upon authority this rule must be discharged.

LOPES, J.—In this case three men who believed themselves aggrieved by the conduct of the plaintiff in respect of the payment of their wages applied to a magistrate in open Court for a summons under the Employers and Workmens Act. The magistrate refused the application, considering it a matter for a civil, and not a criminal, Court. The defendants afterwards published a report, which the jury have found was a fair report of what occurred.

On principles of public convenience the ordinary rule is that no action can be maintained in respect of a fair and impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals.

It was urged that the matter in respect of which the application was made was not within the jurisdiction of the magistrate; but the cases are clear to shew that want of jurisdiction will not take away the privilege if it is maintainable on other grounds. Nor do I think the privilege is confined to the superior Courts. It is not the tribunal, but the nature of the alleged judicial proceedings which must be looked at.

The point mainly relied on by the defendants was that the application to

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the magistrate was *ex parte*, and as such could not be privileged. Had the matter before the magistrate been in the nature of a preliminary enquiry, and if the ultimate judicial determination was to remain in abeyance until a further investigation, I should have thought there was authority at any rate for the defendants' contention, though how far these authorities might be followed in the present day I think doubtful; but the matter of the application was finally disposed of by the magistrate, and I can find no case where a fair report of a judicial proceeding finally dealing with the matter in open Court has been held libellous. There are authorities which, until they are carefully examined, would seem to support the contention that an *ex parte* proceeding in Court is not privileged. So far as I can ascertain, these are cases where the proceeding was preliminary, and where there was no final determination at the time of the alleged libellous report.

On the other hand, *Curry v. Walter* (2) and *Lewis v. Levy* (1) are strong authorities in favour of the report in this case being protected.

Judgment for the defendants.

Solicitors—Carr, Fulton & Carr, for plaintiff;
Ashurst, Morris & Co., for defendant Hales;
James Goren, for defendant Brearley; H., J. &
T. Child, for defendant Clarke.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
Feb. 20. }

WATT v. BARNETT.

Practice—Substituted Service, Order IX. rule 2—*Process not brought to Defendant's Knowledge*—*Setting aside Judgment by Default after Order for Substituted Service*—*Discretion.*

An order for substituted service, under Order IX. rule 2, is not absolutely final and conclusive, but it is competent to the Court to set aside a judgment regularly signed after such order. This is, however, a

matter of discretion, and a defendant will not be let in to defend as of right merely because he was ignorant of the fact that process had been issued against him.

Where such ignorance appeared upon affidavits which also alleged that defendant had a good defence upon the merits, the Court set aside the judgment upon the terms of defendant giving security for the amount of the judgment and costs.

This was a case in which a writ had been issued against five directors of a company to recover damages for fraudulent representations, alleged to have been made in the prospectus, by which the plaintiff had been induced to take shares in the company.

The defendant Barnett was out of England, and his residence was unknown when the writ issued, and an order was obtained, under Order IX. rule 2 of the Judicature Act, for substituted service upon Mr. Trinders, who had been Barnett's solicitor in a previous action by another shareholder in the same company, against him and five other directors.

Only two of the defendants appeared, and judgment by default was signed against Barnett. The previous cause of *Weir v. Barnett* was tried in April, 1876, the argument, on motion for judgment in that cause, took place in May, 1877, and on the 23rd of November, the Exchequer Division delivered judgment.

The writ in the present action was issued on the 1st of September, 1876. In that same month Messrs. Trinders said that they would not act for Barnett in any new litigious matters, and when the writ, under the above-mentioned order for substituted service, was served upon them, they at once sent it back to the plaintiff, declining to accept it and stating the reason. By affidavit of Mr. Trinders it now appeared that he did not communicate to Mr. Barnett the fact of the order for substituted service; and Barnett's own affidavit stated that he was entirely ignorant of the second action having been begun till after judgment had been signed. His affidavit further stated that in the action of *Weir v. Barnett* the jury found a verdict in his favour, and that the present case was

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really upon the same facts as the former one, and that he was not a party to the prospectus, and had therefore a defence upon the merits.

Rolland now moved the Court, on appeal from *Field, J.*, at chambers, on the part of *Barnett*, to set aside the order for substituted service, and all subsequent proceedings, and that he should be allowed to appear and defend the action.—If the Court is satisfied that the writ has not come to the knowledge of the defendant, it will set aside the proceedings and the order.

[*COCKBURN, L.C.J.*—Why should the order be set aside? It was regular, and justified the subsequent proceedings.]

The substituted service ordered failed altogether, because the solicitor did not act upon it. The rule is new in form, but under section 17 of the Common Law Procedure Act, 1852, the defendant is entitled to have the order set aside on shewing that he has been without the jurisdiction ever since the issuing of the writ, and did not know of it—*Day's Common Law Procedure Act*, 4th ed. p. 43; *Hope v. Hope* (1).

Reginald Brown, for the plaintiff.—An order of this kind once made is conclusive. There is no statutory provision for setting aside a judgment signed after an order for substituted service. Such order would be useless if it were not final.

[*COCKBURN, L.C.J.*—There must be an inherent power in the Court to deal with its own procedure.]

If it be necessary to prove that the writ came to the defendant's knowledge, then nothing more is given by Order IX. rule 2, than existed by section 17 of the Common Law Procedure Act, 1852—*Hope v. Carnegie* (2). As to the facts the Court will not believe that the defendant was ignorant of the second action, when the solicitors on whom the order for substituted service was made, were acting for him in the first action in which judgment was delivered the very day that the second action came on for trial.

(1) 19 Beav. 237; s. c. 23 Law J. Rep. Chanc. 682.

(2) 4 De Gex, M. & G. 328.

COCKBURN, L.C.J.—This question is one of some importance, as involving what is the true meaning of Order IX. rule 2. That rule says, "If it be made to appear to the Court or a Judge that the plaintiff is, from any cause, unable to effect prompt personal service, the Court or Judge may make an order for substituted or other service, or for the substitution of notice for service, as may seem just."

Now, in the present case, we must assume upon the statement of *Mr. Trinders*, the solicitor on whom by the order of the divisional Court substituted service was made, that he at once declined to become the vehicle of conveying the service, or the knowledge of the service of the writ to the defendant, and sent back the writ to the plaintiff's solicitor. Therefore the substituted service intended by the Court became of no practical avail in informing the defendant.

The first question is whether such order is finally binding and conclusive, or whether it is competent to the defendant to come and say that the substituted service failed because it was never communicated to him. Secondly, whether that fact of itself entitles him to ask to be allowed to appear and defend as if no judgment against him had been signed.

It is said that such an application ought to be accompanied by an affidavit of merits, so that the Court may see that in granting it justice will be done.

First, is the order made under rule 2 conclusive? Now, it certainly cannot be said to be an irregularity in itself, nor can the proceedings upon it be irregular which were authorised by it; but I cannot help thinking that the Legislature or those who framed these rules did not intend that the order for substituted service should be finally conclusive and binding when it becomes manifest and clear that such service has failed in bringing to the knowledge of the defendant that the action has been commenced against him; because it is *ex debito justitiæ* that a man shall have the fact of the action brought to his knowledge. When it is clear to the Court that substituted service ordered under rule 2 has failed to bring this knowledge home to the defendant, it is perfectly competent to the

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Court, and not only competent but it is what they ought to do, to allow the defendant to come in and defend the action. At the same time it is a matter in which the Court must exercise a discretion; it is not enough for the defendant to say that he did not know of the writ, and that therefore all that has been done upon it must be set aside. If he knew that process was going on, any how, from any source, and nevertheless waited and took his chance of the result of the action, then, in such circumstances, we ought not to allow a judgment which is perfectly regular, so far as it is in obedience to the order, to be set aside. In my view it was not intended that the order should be absolutely conclusive against the defendant, if the Court become aware that justice has not been done through the order not coming to the knowledge of the defendant.

Then, as to the practical application to this case, we must see here if the defendant has a fair case to submit to the consideration of a jury. Are we satisfied, first, that the fact of this pending action had not been brought to his knowledge? This seems to me a very unlikely thing from the other circumstances, though he does say as much in his affidavit. Again, has he merits? This also appears to me to be a matter of considerable doubt. That being so, the questions being doubtful, the best way of doing justice is to give the defendant leave to come in and defend, on giving security for the 450*l.* remaining due, and for the costs of the action.

MELLOR, J.—I have come to the same practical conclusion as to the course we ought to take in this case.

The object of the rule was to substitute the service directed by the Court for personal service, and that being done all the consequences of regular service follow. It appears to me that the rule means that when the Court have determined that it is just that a different mode than personal service shall be sufficient, then all the consequences flow exactly the same upon such a mode as upon personal service. Therefore all the proceedings being regular here, the defendant cannot be let in without merits, and (as weighing with

us in granting the indulgence), without shewing that he did not know of the action, and neglected no opportunity of applying as soon as he did know that the process was going on against him. I agree, in view of the facts, in the conditions that we should impose upon him being those that the Lord Chief Justice has laid down.

Order accordingly.

Solicitors—Linklater & Co., for plaintiff; W. W. Wynne, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. }
Jan. 25. }
Feb. 1. }

BRADBURN v. FOLEY.

Landlord and Tenant—Custom of Country—Outgoing Tenant—Compensation for Seeds, Acts of Husbandry, &c.

A custom by which the incoming tenant of a farm is alone liable to compensate the outgoing tenant for seeds, acts of husbandry, tillages, &c., for which, as outgoing tenant, he is entitled to be compensated, is unreasonable, and cannot be supported at law.

SPECIAL CASE stated pursuant to Order XXIX. of the County Court Orders of 1875.

The action was brought to recover a sum of 45*l.* 17*s.* 1*d.*, the balance alleged to be due from the defendant to the plaintiff as trustee of one Davies, a liquidating debtor, upon the following particulars of claim:—

	March 25, 1877.	£	s.	d.
To amount of seed bill for seeds sown on farm by liquidating debtor		35	8	5
Sowing and harrowing 46 acres, 3 roods, 14 perches, at 1 <i>s.</i> per acre		2	7	0
To amount due to the said trustee for acts of husbandry, tillage, &c., to the land by the debtor		69	12	0

1. On March 25, 1873, Davies became tenant from year to year to the defendant, and an agreement dated the 16th of May, 1873, was subsequently signed, which

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agreement forms part of this case. When Davies entered upon the farm he took to, and paid for, the seeds, acts of husbandry, tillages, &c., to the then outgoing tenant, one Thomas Wilson, and he did this under and by virtue of the terms of the said agreement (1).

2. On the 29th of September, 1876, notice to quit the said tenancy on the 25th of March, 1877, was given by Davies to the defendant.

3. On the 11th of October, 1876, Davies filed his petition for liquidation in pursuance of the "Bankruptcy Act, 1869," and on the 27th of October, 1876, the plaintiff was duly appointed trustee under the said liquidation. Shortly after the plaintiff's appointment as trustee, the defendant caused the plaintiff to be served with a notice under the said Bankruptcy Act to disclaim or elect to continue the tenancy for the remainder of the term, and on the 29th of November, 1876, the plaintiff as such trustee elected to continue. On the 25th of March, 1877, a new tenant, one Timmins, took and entered upon the said farm by agreement with the defendant, and still is in possession of the same.

4. No agreement was entered into or valuation made between the said Timmins as incoming tenant, and the plaintiff as outgoing tenant, and although the plaintiff requested the said Timmins to take to the said seeds, acts of husbandry, and tillages, he refused to do so, and thereupon the plaintiff requested the defendant, as landlord, to consent to have a valuation

of the said seeds, acts of husbandry, and tillages, &c., and to pay the amount of such valuation to the plaintiff, but he also refused to do so, and absolutely denied his liability.

5. It was admitted on both sides that the plaintiff was entitled to be paid for the said seeds, acts of husbandry, tillages, &c., by either the defendant as landlord, or by the said Timmins as incoming tenant.

It was contended for the plaintiff that there was an implied contract between the defendant and the said Davies that at the termination of the tenancy, the defendant would pay the said Davies for the seeds, acts of husbandry, and tillages, &c., and therefore that the plaintiff as such trustee was entitled under such contract to recover the value of the same. It was also contended for the plaintiff that the said implied contract arose from the said agreement, and also from the course of dealing between the defendant and the said Davies, and also by the well known custom of the country. Evidence was given on the part of the plaintiff that the custom of the country was for the landlord to pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c., unless an agreement was made between the outgoing and incoming tenant, that the incoming tenant should pay for the same.

For the defendant it was contended that he was not liable, and that by the custom of the country when there was an incoming tenant who entered on the farm at the expiration of the tenancy of the outgoing tenant, he, and not the landlord, became liable to pay the said outgoing tenant for the seeds, acts of husbandry, tillages, &c. Evidence was thereupon given on behalf of the defendant that such custom existed, and that the custom was that the incoming tenant should pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c., and that the landlord was only liable when there was no incoming tenant.

By way of reply it was contended that no such custom as that set up by the defendant, could, in fact, exist, and that such custom was unreasonable and bad.

The County Court Judge entered the

(1) The only part of this agreement which it is necessary to refer to is the following clause:—"The tenant to pay and compensate the said Thomas Wilson as outgoing tenant (in exoneration of the landlord) for the ploughing and cleaning of all the turnips, fallows and land sown with rye for sheep keep, and all the seeds, also half the crop of wheat, and also the Swedes and other turnips not consumed, and also for all unconsumed hay, straw and fodder, the tenant to consume and spend upon the premises all hay, straw, fodder, dung, turnips or other green crops, manure, and compost to grow or be produced thereupon, and to have the liberty of selling all such produce unconsumed at the determination of the tenancy to the succeeding or incoming tenant to be consumed on the premises at a consuming price, and if no incoming tenant, the same shall be sold to the landlord at a consuming price."

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verdict generally for the defendant upon the evidence before him, finding that by the custom of the country, the incoming tenant, and not the landlord, was liable to pay for the seeds, acts of husbandry, and tillages.

The questions for the opinion of this honourable Court are—

1. Whether such a custom as that set up by the defendant can, in fact, exist?

2. Whether if such a custom can, in fact, exist, whether it is a good custom?

3. Whether upon the facts stated, the landlord or the incoming tenant is liable to the plaintiff for the seeds, acts of husbandry and tillages, &c.

If the Court shall be of opinion that the first two questions should be answered in the affirmative, and that the incoming tenant is liable, the judgment to stand.

If either the first two questions be answered in the negative, or if this honourable Court shall be of opinion that the landlord and not the incoming tenant is liable, the verdict of the learned County Court Judge to be set aside, and a verdict to be entered generally for the plaintiff subject to a valuation.

Jelf, for the plaintiff.

J. D. S. Sim, for the defendant.

The following authorities were cited :—*Dalby v. Hirst* (1); *Hutton v. Warren* (2); *Stafford v. Gardner* (3); *Faviell v. Gascoin* (4); *Codd v. Brown* (5); *Boraston v. Green* (6); *Davis v. Connop* (7).

The judgment of the Court (8) was (on Feb. 1) delivered by

LINDLEY, J.—It appears to us that, if the custom found to exist in this case can be supported in point of law, there is nothing in the lease under which plaintiff held inconsistent with the custom so as

to exclude its application to him when his tenancy determined. It is very true that when he went in, he agreed to pay the outgoing tenant's valuation "in exoneration of the landlord," but there is no provision in the lease to the effect that the landlord should compensate the plaintiff on his going out; and apart from custom no obligation so to do can be implied. The expression "in exoneration of the landlord," shews that the landlord was (or might be alleged to be) liable to compensate the plaintiff's immediate predecessor in the occupation of the farm; but whether such liability was by reason of some custom, or some contract, is not stated, and is not known to us; and even if it were, by reason of some supposed custom, the existence of such custom is inconsistent with the custom found in fact to exist.

The custom here found to exist in point of fact, is to the effect that the incoming tenant, if there be one, is the only person liable to compensate the outgoing tenant; the custom as found exempts the landlord from liability altogether. Such a custom will be found on examination to involve the following consequences :—

1. That the outgoing tenant has imposed upon him for his sole exclusive debtor a person, in whose selection he has no choice, and with whom he has made no contract at all.

2. That the incoming tenant has to make compensation to the outgoing tenant irrespectively of the purposes for which he (the incoming tenant) may want the land; and whatever the terms between him and the landlord may be; and whether the incoming tenant takes the land for a week or a month, a year or a long term.

3. That the outgoing tenant can make no arrangement with his landlord as to his valuation, unless the incoming tenant is party to it and assents to it.

4. That in the event of a letting and underletting, it is (on the custom as stated) uncertain who is to pay, viz., the immediate lessee from the landlord or the ultimate tenant who takes possession.

5. That such a custom would lead any prudent tenant to run his farm out as

(1) 1 B. & B. 224.

(2) 1 Mee. & W. 466; s. c. 5 Law J. Rep. Exch. 234.

(3) Law Rep. 7 C.P. 242.

(4) 7 Exch. Rep. 273; s. c. 21 Law J. Rep. Exch. 85.

(5) 15 Law Times N.S. 536.

(6) 16 East 71.

(7) 1 Price 53.

(8) Lindley, J., and Lopes, J.

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much as by law he could, and to leave as little as possible for the incoming tenant to pay for. A custom having such consequences as these, appears to us so unreasonable, uncertain and prejudicial to the interests, both of landlords and tenants, as to be incapable of being supported in point of law.

The argument that it is to the interest of the landlord to secure a solvent tenant, and that, consequently, the outgoing tenant runs practically little or no risk, does not meet all the grounds of unreasonableness above pointed out. Indeed, it does not adequately meet any of them; for it would be to the interest of an unscrupulous landlord to put in an insolvent man as tenant for a short time, so as to avoid having to pay to the outgoing tenant himself, and yet to obtain possession before the poverty of the new tenant could be productive of injury.

The reasonableness and unreasonableness of a custom is a question of law for the Court, see *Tyson v. Smith* (9), and not a question of fact for the jury, and the principles applicable to such questions will be found in *Com. Dig. Copyhold, S.* and *Tyson v. Smith* (9), and on these principles we proceed.

It may indeed be said that the custom here condemned is that which prevails in practice all over England, it being well known that, as a matter of fact, the outgoing and incoming tenant usually settle questions themselves without referring to the landlord. This is, no doubt, true; but if the practice is examined, it will be found to be based entirely on the principle that the landlord is liable by custom to the outgoing tenant, and that the incoming tenant is not liable to the outgoing tenant where there is no contract, express or tacit, between them. See *Faviell v. Gaskoin* (4); *Stafford v. Gardner* (3); *Codd v. Brown* (5).

The custom here found to exist is totally different; it exonerates the landlord from all liability, and imposes a liability on the incoming tenant to the outgoing tenant, even in the absence of any contract, express or tacit, between

them. There is no inconsistency, therefore, in condemning the custom upholding the practice which is based upon a custom wholly opposed to that with which we have to deal.

Holding, as we do, that the custom found to exist in point of fact cannot be supported in point of law, we set aside the verdict of the County Court Judge, and direct a verdict to be entered for the plaintiff subject to a valuation; the defendant must pay the costs of the action and of this appeal.

Judgment for the plaintiff.

Solicitors—Walker, Son & Field, agents for C. W. Collis, Stourbridge, for plaintiff; Gregory & Co., agents for Bernard & King, Stourbridge, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
Feb. 20. }

MOORE v. HALL.

Prescriptive Easement—Ancient Lights—Light sufficient for Premises as now used—Measure of Damages.

Where the access of light to ancient windows is interfered with, the measure of damages is the diminished value of the premises, having regard to any purpose to which they may reasonably be put. The right of the owner of the dominant tenement is to the quantum of light which has always entered the windows without reference to the purpose for which it has been used.—Martin v. Goble dissented from.

This was an action to recover damages for the obstruction of ancient lights. The plaintiff was owner of a house with windows looking out upon a street, on the opposite side of which were the defendant's premises. The plaintiff's was a low building occupied as a cookshop, the upper rooms being used as bedrooms. The defendant had rebuilt his warehouse, and carried it to a height considerably greater than it was before, thereby darkening to some extent the bedroom win-

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dows of plaintiff's house. It was admitted that as bedrooms the rooms were not materially injured by the diminution of light, and the plaintiff had not lost his lodgers on account of it.

At the trial Cockburn, L.C.J., left the question of damages to the jury in the following terms:—

“Whether any sensible diminution of light to the plaintiff's premises had been occasioned by the erection of the defendant's premises, so as to make them less available either for the purpose of occupation or business to which they were then or might thereafter be made applicable.

“If the sensible diminution, which it was admitted must have been occasioned by the erection of defendant's building, was a diminution of the amount of light enjoyed prior to 1864, the plaintiff was entitled to the verdict. But if the jury should be of opinion that there was no probability that the premises would ever be applied to other than their present purpose, and that consequently there was not, practically, any diminution in their value, the damages should be nominal only.

“If the jury were of opinion that there had been any real diminution of light, sufficient to lessen or interfere with the use of the premises or any part of them for the purpose of occupation or business, then the damages should be substantial according to the estimate of the jury of diminution in value.”

The jury found a verdict for the plaintiff with substantial damages.

A rule *nisi* for a new trial on the ground of misdirection having been obtained,

H. D. Greene (*Lake* with him) appeared to shew cause against the rule, but the Court called on

Slaveley Hill, to support the rule.—The question is whether when a person has used light for a certain purpose, he is entitled to light for any greater purpose to which his building may reasonably be expected to be put. It is contended here that, though there has been a diminution of light in fact, yet the amount of light so taken away has not been used by the plaintiff, and the loss is no present injury.

The plaintiff has only obtained a right to as much light as he has been using. *Martin v. Goble* (1) expressly decides this, and it has never been overruled. The Chief Baron there says—“The house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house. The converting it from one to another could not affect the rights of the owners of the adjoining ground.” This principle is upheld by Lord Westbury in *Jackson v. The Duke of Newcastle* (2), who said that a speculative injury cannot be taken into consideration. It would seem, therefore, that the amount of light which a man uses during the time he is gaining the prescription is all that he is entitled to, and he has no right to claim damages for the obstruction of any extra light beyond that.

[COCKBURN, L.C.J.—That was a case of an injunction which is different.]

Malins, V.C., in *Lanfranchi v. Mackenzie* (3), speaks of *Martin v. Goble* (1) as being good law and good sense, and he decided in accordance with it. He there says—“Unless you can shew there has been that open uninterrupted enjoyment of the light, in the manner in which it is at present enjoyed, for a period of twenty years, there is no right to interfere with the proceedings of the neighbour.” It is true that *Yates v. Jack* (4) and *Dent v. The Auction Mart Company* (5) are rather against the defendant's contention, but in the latter case *Martin v. Goble* (1) is treated as being law and is reconciled with *Yates v. Jack* (4).

[COCKBURN, L.C.J., referred to *Aynsley v. Glover* (6).]

That case only decides that where ancient windows are enlarged, the adjoining owner does not gain any right to obstruct the light coming to the ancient part.

MANISTY, J.—I am of opinion that this rule should be discharged.

The plaintiff had a building in which were certain windows. They had been in

(1) 1 Campb. 322.

(2) 33 Law J. Rep. Chanc. 698.

(3) 36 Law J. Rep. Chanc. 518.

(4) 35 Law J. Rep. Chanc. 639.

(5) 35 Law J. Rep. Chanc. 555.

(6) 44 Law J. Rep. Chanc. 523.

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the same state for a period sufficiently long to impose the servitude on the proprietor of the opposite building of not interfering with that quantity of light which had always passed through the plaintiff's windows. The defendant was, by the user of light which the plaintiff had so long enjoyed, restrained from doing anything to obstruct it. The defendant, however, by building a tall warehouse opposite, did interfere with the quantity and flow of light to plaintiff's house; and as was admitted interfered injuriously. Consequently there was a good cause of action.

What, then, is the measure of damages for the interference with the old light? The Lord Chief Justice told the jury that they might take into consideration the character of the neighbourhood, and the present and probable future use of the plaintiff's house. This was in favour of the defendant, as I think, for it was equivalent to telling them that they might find that there was no substantial damage done, or might find that the damage which was done was reduced by reason of those circumstances. I think that, if anything, this direction was too favourable to the defendant.

Take the instance of a small tenement in which an upper room had been used as a bedroom, and the light of the window was ample for that use. Then the owner lets it to an artist, and puts a skylight in the roof letting in a great quantity of additional light, making it very suitable for the new purpose, as having a combination of vertical and horizontal lights. Why should a man be allowed to come and say, "What are you using this for? Now you have the vertical light, I shall interfere with impunity with your horizontal light, because it will be quite enough if I leave sufficient to enable you to use the room as a bedroom as before." How can the use made of the light inside the room by the plaintiff affect the question of the duty of the defendant not to obstruct it outside?

The servitude is what we ought to look to. Can it be said to increase or diminish according as the dominant tenement uses it or not? If so, the easement would never be certain or the same. I think that it

was a question for the jury what was the value of the loss of light to the plaintiff, and then they might properly consider that the room might be used for some other purpose than that for which it was used at the time of the interference by the defendant with the light.

MELLOR, J.—I am of the same opinion. I think that the direction was perfectly right. It appears to me that the test suggested in *Martin v. Goble* (1) was incorrect, and I agree entirely with the observations of the Master of the Rolls in *Aynsley v. Glover* (7), that the mode of occupation cannot be the test of the right. He says, "The mere change of the use of a room will not deprive the party complaining of his right to the access of light." And I therefore think it is established that the test of the rights of owners of neighbouring premises laid down by the Chief Baron in *Martin v. Goble* (1) is not the correct test to be applied in these cases. It is obvious that it would be a very varying and uncertain and unsatisfactory test; and if it were correct, how could the person submitting to the acquisition of the right ever find out what was being acquired against him? In *Lanfranchi v. Mackenzie* (3), which was a case where an injunction was sought for, the decision only amounted to this, that there could be no claim to require light for an extraordinary purpose of which the adjoining owner could have no knowledge. True it is that the Vice-Chancellor uses words approving *Martin v. Goble* (1), but I think that may be explained by their application to the case before him, where the evidence as to the effect of the new building on the plaintiff's light was very conflicting. When, however, a man is in the enjoyment of a certain quantum of light, and any person does anything to obstruct that enjoyment, that amounts to an injurious diminution of the light. This the jury have found in the present case, and Mr. Hill admits that the verdict is properly against him, but raises an objection to the damages being anything beyond nominal, because the purpose to which plaintiff's room has been and is being put is such that the

(7) 43 Law J. Rep. Chanc. 777.

Moore v. Hall, Q.B.

injury is inappreciable. But surely it is right to take into calculation the reasonable application of the room to other purposes, using the same orifices of course, not altering or increasing them in any way. I am, therefore, clearly of opinion that this being a substantial injury, the jury were entitled to measure the damages for it, and no better rule for their doing so could be given than that laid down by the Lord Chief Justice in his summing up.

COCKBURN, L.C.J.—I am very glad that this case should have been submitted to the opinion of my learned brothers, because it is not desirable that the Judge whose direction is made the subject of question should form half the Divisional Court before which the rule is argued.

I am satisfied that the direction here was right. The question is to what has the servient tenement become subject? It is to the admission of light through the several apertures in the plaintiff's house, and the defendant has nothing to do with the purpose for which the light so admitted is used. Look at the matter practically. A man builds a house and opens windows in it. Does the owner of the opposite house or of the adjoining land consider at all for what purpose those windows are used? Suppose, after using premises in one way, the proprietor of the ancient windows changes their internal use, it cannot be said, and so far as I know, has never been suggested, that because less light may then be required in the use to which the premises are applied, the owner of the servient tenement can obstruct the windows so far.

The true measure of damages is the diminished value of the premises. How is this to be ascertained? Is it by reference to the present use of the premises? Why, in the course of a very short time the premises may be used for a purpose where the full access of light is wanted. Why is the owner to be deprived of it? I cannot see; and except the case of *Martin v. Goble* (1), which I think is wrong, the authorities are all the other way. In *Yates v. Jack* (4) Lord Cranworth says, "The right conferred or recognised by the statute 2 & 3 Will. 4. c. 71, is an absolute and indefeasible right

to the enjoyment of the light without reference to the purpose for which it has been used." Then Vice-Chancellor Page Wood in a subsequent case approves the same view—*Dent v. The Auction Mart Company* (5); and the present Master of the Rolls, whose view is always an authority, says in *Aynsley v. Glover* (7), with reference to the very passage I have read from Lord Cranworth's judgment in *Yates v. Jack* (4), "That I think is a correct interpretation of the law," and he expresses a decided opinion that *Jackson v. The Duke of Newcastle* (2) is not law.

I am, therefore, of opinion that in estimating damages for the admitted interference with the access of light to the plaintiff's house, the jury may fairly take into consideration the question whether the tenement will be always applied to the same use as now, or whether there is a reasonable probability of its being applied to some other purpose where the full light will be wanted. When that time comes and the full light is wanted, it seems to me monstrous that the dominant owner should be deprived of it without any compensation.

Rule discharged.

Solicitors—Tilley Soames, for plaintiff; H. E. Brown, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1877.	{	LAING (<i>appellant</i>) v. THE OVERSEES OF THE POOR OF THE TOWNSHIP OF BISHOPWEARMOUTH AND THE ASSESSMENT COMMITTEE OF THE SUNDERLAND POOR LAW UNION (<i>respondents</i>).
Nov. 21.		
1878.		
Jan. 24.		

Poor-rate—Ship-yard, Rateable Value of Machinery and Plant, Enhancement of Rateable Value by.

[For the report of the above case, see 47 Law J. Rep. M.C. 41.]

[IN THE QUEEN'S BENCH DIVISION.]

1878. { ROSE AND OTHERS v. THE
Feb. 14. { GARDEN LODGE COAL, COKE
AND FIREBRICK COMPANY
(LIMITED).

Practice—Staying Proceedings in Action—Winding-up of Company—Liquidator's Costs—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 85 and 138.

The plaintiffs brought an action in the Queen's Bench Division against the defendant company, after a resolution to wind up the latter had been passed and confirmed, for the purpose of recovering a sum of money for goods supplied. On an application by the liquidator to this Court to stay the action, under the provisions of 36 & 37 Vict. c. 66. s. 24, sub-sec. 5, it appeared that there were no funds capable of being distributed among the creditors, the assets being barely sufficient to cover the liquidator's own costs. The Court nevertheless made the order, staying the proceedings in favour of the liquidator.

This was a motion on the part of the liquidator to restrain the plaintiffs from taking further proceedings in an action which they had commenced against the defendants (1).

At an extraordinary meeting of the

(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138, "Where a company is being wound up voluntarily, the liquidator or any contributory to the company may apply to the Court . . . to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court."

By section 85 it is enacted that "The Court may, at any time after the presentation of a petition for winding-up a company under this Act, and before making an order for winding-up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any action, suit or proceeding against the company, upon such terms as the Court think fit."

defendant company, held on the 1st of May, 1876, it was resolved that the said company should be wound up voluntarily, in pursuance of the Companies Act, 1862, which resolution was subsequently confirmed at an extraordinary meeting of the company.

It was for some time probable that the company would be resuscitated and disposed of as a going concern, of which fact the plaintiffs were well aware; but this was afterwards found to be impossible in consequence of the bad state of trade which then prevailed.

On the 15th of September, 1877, the plaintiffs issued a writ out of this Division of the High Court against the company to recover the sum of 54*l.* 19*s.* 9*d.*, for goods sold and delivered by the plaintiffs to the company. The official liquidator stated in his affidavit that the plaintiffs had all along had full knowledge of the winding-up proceedings, and that the value of the assets of the company were so seriously depreciated by bad trade that they were barely sufficient to cover the costs of the winding-up.

Medd now applied, on behalf of the liquidator, to have the action stayed, and cited *Walker v. The Banagher Distillery Company* (2) and *Re Poole Firebrick and Blue Clay Company* (3).

Edwyn Jones appeared for the plaintiffs.

COCKBURN, L.C.J.—I think this rule must be granted in favour of the liquidator. It is admitted that if there were funds in hand belonging to the company, which were capable of being distributed, that the plaintiffs would be prevented, by virtue of the provision of section 85, from proceeding with their action, and would be compelled to come in and take their share, *pari passu*, with the other creditors. Here, however, it appears that there are no funds capable of being so distributed, the funds in hand being scarcely sufficient to pay the liquidator's costs: the plaintiffs' contention is, that, under these

(2) 45 Law J. Rep. Q.B. 134; s. c. Law Rep. 1 Q.B. Div. 129.

(3) 43 Law J. Rep. Chanc. 447; s. c. Law Rep. 17 Eq. 268.

Rose v. Gardden Lodge Coal, &c. Co., Q.B.

circumstances, their claim ought to be preferred to that of the liquidator. I am of opinion, however, that this contention will not hold water, and that the liquidator is entitled to be paid. The Legislature thought that where there is an insolvent estate it is much better that all creditors should come in and each bear his share of the loss than that the estate should be torn to pieces by a race of contending parties. To carry out this liquidators are to be appointed to determine what proportion the assets will bear to the claim, and to distribute such assets accurately. Unless the liquidators were protected against loss, nobody would be found willing to undertake the office. If the plaintiffs had come in with the rest of the creditors they would not have been in a position to say that their claim ought to have been preferred to the liquidator's; and I do not think, under the present circumstances, they ought to be allowed to improve their present position by this action.

MELLOR, J.—I am of the same opinion.

Solicitors—Mackrell & Co., for plaintiffs; R. W. Marsland, agent for Addleshaw & Warburton, Manchester, for the liquidator.

[IN THE COURT OF APPEAL.]

1878. }
Feb. 1. } HOGARTH v. LATHAM & CO.*

Partners—Bill of Exchange—Power of Partner to bind Firm—Blank Acceptance.

A partner has no implied authority to bind his firm by issuing acceptances in blank.

F., of the firm of L. & Co., gave an acceptance purporting to be made by the firm, with a blank for the name of the drawer. C. gave it to H. for value. H. filled up the bill, putting the name of his firm, H. & C., as drawers, and indorsed it to himself, knowing when he did so that F. had

no authority to accept the bill:—Held, that L. & Co. were not liable on the bill at the suit of H.

Semble, that a bona fide holder for value to whom the bill had come in a perfect state would have been entitled to sue.

This was an appeal from a judgment given, at the trial of this cause, by Hawkins, J.

The action was brought upon two bills of exchange at three months for 987l. 6s. 4d. and 493l. 4s. 8d. respectively, purporting to be drawn by Messrs. Hogarth & Cotton upon Latham & Co., accepted by Latham & Co., and indorsed to the plaintiff.

In reality, one Foster, a partner in the firm of Latham & Co., had drawn the acceptances in blank, a space being left for the drawer's name, and had handed them in that state to Cotton. Cotton was at the time largely indebted to James Hogarth, one of his partners, and handed to him the acceptances in payment of the debt. The first acceptance was in the following form when handed to the plaintiff.

987l. 6s. 4d. London: February, 1876.

"Three months after date pay to our order the sum of nine hundred and eighty seven pounds six shillings and fourpence value received.

"To Messrs. Latham & Co.,
"Merchants, Dover.

"Accepted payable at the National Provincial Bank of England, Dover.

"Latham & Co."

The other acceptance was precisely similar.

James Hogarth kept the acceptances till maturity, and then filled up the blank with the name of the firm of Hogarth & Cotton as drawer, indorsed them in the same name, and claimed to hold them as security for Cotton's debt.

Cotton having absconded, and the defendants having refused to pay the amount of the bills, the plaintiff brought this action.

For the defence it was proved that Foster (who had also absconded) had made the acceptances in fraud of Latham & Co., and without the knowledge or consent of the firm.

* *Coram* Bramwell, L.J., Brett, L.J., and Cotton, L.J.

Hogarth v. Latham (App.).

The jury found that when the plaintiff received the bills in their imperfect condition, he believed them to be perfectly good, but afterwards, and before they were drawn or indorsed, he believed that there was something wrong, and that they would not be met, and, further, that he had a suspicion about them, and wilfully abstained from making further enquiries, lest he should find out something more; and with that suspicion on his mind, he wrote the names of the drawers and indorsees, and completed the bills.

On these findings the Judge directed that judgment should be entered for the defendants.

Against that judgment the plaintiffs appealed.

Cohen and R. M. Bray, for the plaintiff.—The defendants have allowed these acceptances to be issued, and are liable, though they were drawn in blank. There are no English cases exactly like the present. *Harvey v. Cusw* (1) is the nearest. There, one Chippendale sent a bill to the defendant with a blank space for the drawer's name, and the defendant accepted it, and sent it back to him. He transferred it to the plaintiff for value, and the plaintiff inserted his own name as drawer; and the Common Pleas division drew the inference that the plaintiff had authority to insert his name, and could sue on the bill. In *Crutchley v. Clarence* (2) the bill sued on was issued with the payee's name in blank; and Lord Ellenborough there said, "As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his act." *Crutchley v. Mann* (3) is a similar case. The plaintiff here came into possession of the bill regularly and *bona fide*. When he received it there was implied authority from Latham to the holder to insert his name, and Latham cannot revoke that implied authority by giving notice to the plaintiff, for the plaintiff has acted on it by giving value for the bill.

(1) 33 *Law Times*, N.S. 64.

(2) 2 *M. & S.* 90.

(3) 5 *Taunt.* 529.

The precise point at issue in this case has been decided in America, in a case where a partner in a firm issued a blank form of bill, omitting the amount, date, payee and drawee, signed with the name of the firm as drawers; and a *bona fide* holder for value was held entitled to sue on the bill when filled up by the person to whom it had been given—*Chenning Canal Bank v. Bradner* (4).

MacIntyre and Wheeler, for the defendants, were not called upon to argue.

BRAMWELL, L.J.—I am of opinion that this judgment ought to be affirmed. It is really curious, but with the exception of the American case, I never heard of such a case till last Chester Assizes, when there was a case absolutely identical with this, except that the firm in that case were actually indebted to the person to whom the bill was sent. I ruled there, and I am still of opinion that I was right, that although if the bill had been drawn by a creditor of the defendants, it would have bound the defendants, yet the bill being drawn in blank when accepted, and having been so sent to the creditor, who handed it to the plaintiff, who filled up the omission, the defendants were not bound. I held that it was not a mercantile transaction, and the acceptance of the blank bill by a partner did not bind the firm. I am of that opinion still; and, indeed this, if I may use the expression, is a worse case, since here the firm was not indebted to the person to whom the bill was sent, and this is evidently not a mere ordinary business transaction within the usual authority of partners.

The plaintiff knowing that the bill was accepted by one member of the firm only, in the name of all, and knowing that there was no drawer's name on the bill, must be held to have taken the bill at his own peril; and before he can recover, he must shew that the other partners authorised the acceptance; or at all events, that he had good reason to suppose that the acceptor had power to make the contract. It has been urged that this would impose great restrictions on the use of bills of exchange. I do not think so, but I think it is a very good rule to protect firms against

(4) 44 *New York Rep.* 680.

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the frauds of single partners. In the present case the plaintiff had no reason to suppose that Foster had authority. Good reason points altogether the other way. When a debt is paid by a bill properly drawn, the firm have this advantage, that the bill itself is evidence of the payment. But here, on the face of the bill they appear to pay some one else; for the bill is for value received from H. Cotton & Co. Mr. Bray says that the same remark would apply where one member of a firm draws a check payable to A., and pays a debt due to B. with it. In that case he says the partner would be exceeding his authority. As between the firm and B. I should say certainly not. But he says, suppose the holder of the cheque to be some one other than the creditor, could he maintain an action upon it? I am not quite sure; and if the case should arise, I should probably take time to consider the point. I cannot say how that would be, unless there is something to shew that the cheque has been given in satisfaction of the creditor's debt. But I do not like to lay down a general rule; for in some cases it would be monstrous if the firm were held not liable. And one would be unwilling to hold that, if a firm of A. and B. owe money to C., and one of the partners accepts a bill in blank and sends it to C., who fills in his own name as drawer, the firm is not liable on the acceptance. But that question does not arise here. If the bill is in the hands of a *bona fide* holder without notice, the company would be liable. And if it is in the hands of the creditor, it does not much matter whether he sues on the bill or for the debt. But here, when there was no debt due from the firm to Cotton, the case is different.

I have some doubts whether this bill was a negotiable instrument, and if it is not, can it be said that the holder has a right to assume that it was given for value? But suppose he has, then if he finds the acceptance drawn in the handwriting of one partner of the firm only, he has no right to put in his own name as drawer, not being a creditor of the firm; and if he does so, he must shew that the other partners authorised the document being put in circulation.

I am of opinion that there was no such authority in point of law, and no evidence of any implied authority given by the firm. Nor could evidence of such authority be given, for it would be evidence to contradict the law. The only evidence given was, that it was a common practice of commercial firms to accept bills drawn in blank and remit them to their creditors. And, no doubt, such cases may sometimes occur, but that is no proof of a binding custom.

As to the case of *Harvey v. Cave* (1) the Court had power to draw inferences of fact, and I should very much like to know what the facts were from which they inferred the authority of the partner to bind the firm. Here I do not see anything which shews that Latham had power to authorise Cotton to put his name to the bill as drawer, or to say to mankind in general, "any one who takes this bill may fill up the blank." It is also to be observed that *Harvey v. Cave* (1) differs entirely from the present case, inasmuch as the defendant who accepted the bill had no partners, and accepted it in his own name.

In the case of *Aude v. Dixon* (5) the defendant agreed to join his brother in a promissory note, on condition that a third party would also join, and signed a note with a blank for the name of the payee. The condition was not fulfilled, and the defendant's brother in fraud of the defendant delivered the imperfect note to the plaintiff, who inserted his name as payee. In delivering judgment Parke, B., said, "It is unnecessary to decide whether this instrument is a forgery or not, but there is certainly ground for contending that the making of it complete contrary to the directions of the defendant, renders it a false instrument as against him." (this of course is not applicable here) "I do not gainsay the proposition that a person who puts his name to a blank paper impliedly authorises the filling of it up to the amount that the stamp will cover." But this is a different case. "A party who takes such an incomplete instrument, cannot recover upon it unless the person from whom he

(5) 6 Exch. Rep. 869; s. c. 20 Law J. Rep. Exch. 296.

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receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances shew that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is *nemo plus juris in alium transferre potest quam ipse habet*. It is a fallacy to say that the plaintiff is a *bona fide* holder for value. He has taken a blank piece of paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother; and he had no authority; consequently, the instrument is void as against the defendant."

The same reasoning applies here, and I see no reason why the plaintiff should recover, but a very good one why he should not. Mr. Cohen says this was a negotiable instrument when the plaintiff took it. I think not. The cases, as far as they go—(there is no case where the drawer's name was left blank)—shew that an incomplete instrument may sometimes be made complete by a person who is not a party to the instrument, on the ground that the person who had given the instrument, must be taken to have given authority to fill it up to any person into whose hands it has come for valuable consideration.

But in this case, before the plaintiff used any such authority he became aware—not that it was revoked—but, that that which we will suppose was a presumable authority in Latham, in point of fact had never existed. No doubt a general authority exists in partners to bind their firms by acceptance. But if the firm says there is no such power with us, then a single partner may give a bill and accept it, and the holder may sue on it, but he cannot recover.

Here the plaintiff knew when he filled up the bill that the presumed authority of the partners to give him authority to draw the bill did not exist, and, therefore, that he had no such authority. It might have been otherwise if he had filled up the draft at the time when he had a right to think (if there was any ground for the supposition at any time) that he had autho-

riety. It may be said it is a hard case. Still, so it is. He did not fill up the bill at a time when he might have been justified in supposing that he had a right to do it, but when he knew he had no such right. Then it is said a *bona fide* holder for value, not knowing that the bill had been drawn in blank, might have brought his action on the bill. I am inclined to think that is so, for this reason: As a general rule, a partner has authority to accept a bill for his firm, and the plaintiff in such a case would have taken what on the face of it would be a perfect bill of exchange, and the defendant could not in that case say, "you knew that the bill was accepted without authority."

The question must be, whether there was an authority *bona fide* given to accept the bill, or whether the plaintiff gave credit to the signature of the partnership upon an instrument valid on the face of it. In this case neither one nor the other of the propositions is true, and the judgment is right; there is no imputation of fraud on the plaintiff; and his case is, to some extent, hard, for if he had not obtained this piece of paper, he might have pursued his remedy against Cotton. But as in fact this bill was not accepted by the defendant's firm for value, he has no remedy. It is, like the case of *Currie v. Misa* (6), a hard case, where some one must suffer; but our view is against the plaintiff, and in favour of the defendants.

BRETT, L.J.—The plaintiff in this case brought his action against two defendants, of whom one, Foster, has let judgment go by default, and the question is whether the plaintiff in his individual capacity can maintain his action against the other defendant, Latham. Unless the bill of exchange is a valid instrument to bind Latham it is quite certain there is no privity between him and the plaintiff. All depends, then, upon the effect of the instrument. It is alleged to be a bill of exchange drawn by Hogarth & Cotton and accepted by Latham & Co. Such a bill the plaintiff was bound to prove. It seems to me that in order to succeed

(6) 44 Law J. Rep. Exch. 94; s. c. Law Rep. 10 Exch. 158.

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against Latham the plaintiff must shew that the bill was drawn by Hogarth & Cotton, or by their authority, and accepted by Latham & Co., or by their authority expressed or implied, or by the authority of Latham; or that the creditor had a right to believe that Latham had given such authority. None of these conditions are fulfilled here. The plaintiff fails to shew that he had a right to believe that the bill was drawn by Hogarth & Cotton or by their authority, or that it was accepted by or with the authority of Latham & Co. or Latham. And he also fails to shew that it was in fact drawn with such authority or accepted with such authority. As to the drawing, it is clear that Hogarth & Cotton never in fact drew the bill. The person who signed the name of the drawer was the plaintiff himself.

The drawing in fact is therefore a drawing by himself, and he cannot rely upon it as a drawing by the company, unless he can at least shew that he had a right to believe that he had the authority of Hogarth & Cotton to put their names on the bill.

What are the facts? The acceptance was given to the plaintiff by Cotton with the representation that Cotton had a right to draw the bill on Latham & Co. It was at first represented that Cotton had in fact drawn it, but, as a fact, the acceptance was given by him to the plaintiff in blank. The utmost the plaintiff then had a right to assume was that the defendants were willing to accept a draft in which Cotton's name should be put as drawer, or his own name by Cotton's authority. In that case he ought to have put in either Cotton's name as drawer or his own. Even at the time when the plaintiff took the bill he had no right to suppose he might put in the name of any one else. But the argument for the plaintiff goes to shew that he might have put in any name. I can see no authority in the books that goes so far. The utmost he could do at that time would be to fill in Cotton's name or his own. But he did not put in his own name. When he received the bill, the authority of Cotton, if any, to put in a drawer's name had not been exercised; when it was put into the plaintiff's hands there was still no drawer,

and the question is—Had he a right afterwards to draw the bill in the name of Hogarth & Cotton? Before he made them the drawers he knew that they had given no authority to draw, and he deliberately put in the names of persons who he knew had not given him authority to do so.

If we assume that all the cases that have been cited are correct, and correct to the extent for which they have been cited, yet none of them goes to the extent required by the plaintiff. Even *Harvey v. Cave* (1) does not go so far, and I wish to reserve to myself the liberty of considering the authority of that case on some future occasion if necessary. Neither does the New York case go so far, for there is no evidence in that case that at the time the plaintiff filled in the drawer's name he knew he had no authority to do so. It seems to me in the present case to be contrary to every principle of law and mercantile usage to suppose that the plaintiff had authority, or could suppose he had authority, to make Hogarth & Cotton the drawers.

So much for the drawing. Then as to the acceptance, no authority, express or implied, was given by Latham to Foster to accept this bill in any form. It is obvious there was no express authority, nor was there any implied authority to give acceptances except in respect of partnership transactions. Had the plaintiff then a right to assume, contrary to fact, that Latham had such authority? Until a custom is so satisfactorily proved that the Court may take judicial notice of it, to the effect that it is an ordinary custom for partners to accept bills on the partnership account in blank, so that the person who takes them may fill them up with the name of any drawer—until that is proved, I agree with my Lord that we must consider such a course not within the ordinary custom of merchants.

No such custom was proved in the present case. Mr. Bray says the point was not taken. But that will not do; he ought to say that he could have proved the custom. But if he had called twenty witnesses to say the same thing as the witness he did call he could not have proved the custom to the extent neces-

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sary for him. Till that is proved the person who takes such an acceptance in blank has no right to say he is aggrieved by the refusal of the acceptor to pay, or that he is justified in putting any name in as drawer.

I consider therefore that the plaintiff had no right to treat the drawing as one by the persons by whom the bill, as sued upon, purported to be drawn, or to assume that the acceptance was by the persons by whom the bill, as sued upon, purported to be accepted. It was not in fact accepted by Latham or by his authority. I think the reasoning of the cases which have been cited, though the facts are not altogether parallel, fortifies this opinion, and on both points I am of opinion the defendants are entitled to succeed. I may, however, add that it does not follow as an inference from what I have said that if the bill had been indorsed away by Hogarth in a perfect state to a *bona fide* holder for value, that holder could not have maintained an action upon it.

CORTON, L.J.—I think the plaintiff in this case must fail. The action is on a bill of exchange accepted in the name of the plaintiff's firm, and the question is whether Latham is liable, for the other defendant allowed judgment to go by default. The plaintiff says that he is entitled to succeed because he became the *bona fide* holder of a negotiable instrument without notice that it was invalid.

When he took it, it was an acceptance merely and not a bill. There was no drawer, and it was assumed in the argument that the instrument, when he took it, was one on which he could not sue. That destroys the idea that when he took it he got a negotiable instrument, by which I understand an instrument which by delivery or indorsement enables the right of action to be transferred. There was no such thing here. How, then, did the plaintiff obtain a right of action? This was an acceptance for any one who should fill the paper up, having authority to put in his name as drawer. Could he have thought that he had the authority of the firm to do so through Foster? It is hardly necessary to ex-

press an opinion as to the result of an individual writing an acceptance on a piece of paper without a drawer's name. I should think it would enable the person to whom it was sent to put in his own name, and that it did not give a right to anyone into whose hands it might come to do so. Then comes the further question—Is it *bona fide* within the scope of partnership transactions that one partner should bind a firm by a blank draft? In my opinion we cannot hold that such a transaction came within the partnership contract without much stronger evidence than we have here.

The question is—Had the plaintiff authority to do so at the time when he altered the instrument, so as to enable himself to sue upon it? No fraud is actually imputed to the plaintiff, but he did in point of fact know that something was wrong. He knew that there had been a fraud on the partnership. He knew that Foster was never in a position to give him authority to become the drawer of the bill. It is not a question of Latham revoking an authority which he had given after it had been acted on by the plaintiff paying money or putting himself in a worse position, but whether Foster had power to use the partnership name for all purposes. If he had, he could bind the firm by acceptance of a blank draft. Did the plaintiff think he had that authority at the time when he filled up the draft? He had notice that he had no such authority. In my opinion, therefore, at the time when he made the acceptance a perfect instrument, so that he might acquire a right to sue, he had notice that Foster had no right to bind the firm, and therefore he had no right to sue, as Foster had no right to give him such power. This is a question between two innocent parties; the whole question is whether the plaintiff has a legal right to bring his action, and I am of opinion that he has not.

Judgment affirmed.

Solicitors—May, Sykes & Batten, for plaintiff
Woodward & M'Leod, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1877.
 Dec. 20. } HINDAUGH (appellant) v. BLAKEY
 1878. } (respondent).
 March 5. }

Bill of Exchange—Acceptance—19 & 20 Vict. c. 97. s. 6—Acceptance in Writing.

*A bill of exchange is not sufficiently accepted to satisfy the 19 & 20 Vict. c. 97. s. 6, which requires the acceptance to "be in writing on such bill and signed by the acceptor," if the person on whom it is drawn merely writes his name across the face of it, and there are no words amounting to a statement that the bill is accepted.**

Appeal from the decision of the County Court of Northumberland, holden at Newcastle. The plaint was entered to recover 20*l.* 18*s.* 8*d.*, which consisted of the defendant's acceptance for 20*l.* and 18*s.* 8*d.* for interest.

The plaintiff produced at the trial the bill of exchange, which was as follows:—

"1876, July 3, Newcastle-on Tyne.

"£20.

"Three months after date pay to my order the sum of twenty pounds, value received.

"Robt. Hindhaugh.

"Mr. Geo. B. Blakey,
 "Golden Lion Hotel,
 "South Shields."

The plaintiff proved that he saw the defendant sign the bill, that the bill was given for value, and that the sum claimed was due.

The defendant's solicitor contended that the bill was not sufficiently accepted according to 19 & 20 Vict. c. 97. s. 6, and that the plaintiff was not entitled to recover in consequence thereof.

The learned Judge decided that the bill was not accepted within the meaning of 19 & 20 Vict. c. 97. s. 6, owing to the absence therein of the word "accepted," and gave judgment for the defendant with costs.

* See, however, the recent Statute 41 Vict. c. 13, s. 1, which enacts that an acceptance shall not be deemed to be insufficient under 19 & 20 Vict. c. 97, by reason only that such acceptance consists merely of the signature of the drawer written on such bill.

The question for the opinion of the Court was whether the bill was sufficiently accepted by the defendant by his writing his name across it without the word "accepted."

R. E. Webster, for the appellant.—The decision of the County Court Judge was wrong. The question is whether the defendant, by writing his name across the bill in the way he has done, has not accepted the same within the meaning of the 19 & 20 Vict. c. 97. s. 6. That section enacts that "no acceptance of any bill of exchange, whether inland or foreign, made after the 31st of December, 1856, shall be sufficient to bind or charge any person, unless the same shall be in writing on such bill, or if there be more than one part of such bill on one of the said parts, and signed by the acceptor or some person duly authorised by him." Before that statute there existed the 1 & 2 Geo. 4. c. 78, by section 2 of which an acceptance of an inland bill was required to be in writing on such bill. That Act did not apply to foreign bills, and previously to that Act there were decisions that the acceptance need not have been on the bill itself, but might have been by a collateral writing, or even by parol—*Powell v. Monnier* (1), *Lumley v. Palmer* (2) and *Olarke v. Cock* (3). The word "accepted," or any writing of the drawer which was equivalent to a consent to comply with the request of the drawer, was sufficient to constitute an acceptance in writing within the meaning of 1 & 2 Geo. 4. c. 78—*Dufaur v. Ozenden* (4). Then the 19 & 20 Vict. c. 97. s. 6, requires, it is true, that there should be the signature of the acceptor, which need not have been before that statute, but the signature of the acceptor alone was before the statute an acceptance, and so it is since the statute. It would be for the jury to say with what intention such signature was put on the bill. In *Armfield v. Allport* (5), Pollock, C.B., says, in delivering the considered judgment of the

(1) 1 Atk. 611.

(2) 2 Str. 1,000; s. c. Rep. temp. Hardw. 74.

(3) 4 East, 57.

(4) 1 Mood. & R. 90.

(5) 27 Law J. Rep. Exch. 42.

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Court, a "man who writes his name across a stamped paper as acceptor, there being a direction to him upon the paper, is liable; he gives his authority to anybody to draw upon him when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it for this purpose."

[GROVE, J.—The learned Chief Baron is not speaking in that case with reference to this statute of 19 & 20 Vict. c. 97. DENMAN, J.—In *Byles on Bills*, 12 ed. p. 190, the learned author says, "Finally the 19 & 20 Vict. c. 97. s. 2, enacts that no acceptance of a bill, *inland or foreign*, made after the year 1856 shall charge any person, unless in writing on the bill, and signed by the acceptor or some person duly authorised by him," and the word "signed" is in italics.]

The author, after stating that "signature was not essential to a written acceptance within the statute 1 & 2 Geo. 4. c. 78," says, "but the drawee's name alone written on any part of the bill was a good acceptance." The last statute, viz., 19 & 20 Vict. c. 97. s. 6, did not intend to alter that. Its object was to have the signature of the acceptor, which was not previously necessary. The acceptance, that is the acceptance in fact, was, as before such statute, to be in writing, but that did not necessarily mean that it should be expressed by so many words to that effect. It might be expressed as it had been under 1 & 2 Geo. 4. c. 78, by the signature only of the drawee.

Meek, for the respondent.—In *Byles on Bills*, the author seems to think that even before the 19 & 20 Vict. c. 97, the usual mode of accepting a bill was by writing across it the word "accepted" and signing the name of the drawee, and that that statute now positively requires to be done that which was the usual mode of accepting before such statute. So in *Addison on Contracts*, 7th ed. p. 954, after reference has been made to the 19 & 20 Vict. c. 97. s. 6, it is said, "The acceptance is usually made by the drawee's writing across the bill the word 'accepted,' and signing his name thereto. Formerly, if the drawee merely wrote his name upon the face of the bill, without

the word 'accepted,' or if he wrote 'accepted,' 'presented' or any direction to pay, addressed to a third person, or merely put his mark upon the bill, or promised in writing to accept or pay the bill, this was evidence for a jury of an acceptance of the instrument by him."

B. E. Webster in reply.—There is no magic in the word "accepted." It must always be a question for the jury, whether the party on whom the bill is drawn has accepted it or not.

[DENMAN, J.—May it not be to avoid any such question that this enactment has been passed?]

The statute does not say that there should be any such word as "accepted" or its equivalent written upon the bill.

Our. adv. vult.

DENMAN, J. (on March 2), delivered the following judgment of the Court (6):—This was an appeal from a decision of the learned Judge of the County Court of Northumberland, holden at Newcastle. The action was brought by the plaintiff as drawer against the defendant as acceptor of a bill of exchange, and the question raised upon the case was whether the bill was sufficiently accepted, the defendant having merely written his name across the face of it without having used any words amounting to a statement that he accepted the bill. Before the statute of 1 & 2 Geo. 4. c. 78. s. 2, it was not necessary that a bill should be accepted by any writing upon the bill itself; it was sufficient if, in any other document, the acceptor used language shewing his intention to be bound by the bill as acceptor—*Wynne v. Raikes* (7) and other cases. It was also sufficient before that statute if the drawer verbally undertook to pay an existing bill—*Lumley v. Palmer* (2) and *Powell v. Monnier* (1). Disapprobation of the law, as it then existed, was expressed by very learned Judges, see per Lord Kenyon in *Johnson v. Collings* (8) and per Lord Ellenborough in *Clark v. Cook* (3), and it was one of the

(6) Grove, J., and Denman, J.

(7) 5 East, 514.

(8) 1 East, 98.

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particulars in which the English law was at variance with the law of Scotland. In the year 1821 it was enacted by 1 & 2 Geo. 4. c. 78, s. 2, "that no acceptance shall be sufficient to charge any person unless such acceptance be in writing on such bill."

Since this statute, it has been laid down by high authority that a mere signature on the face of the bill, without any words of acceptance, may be an acceptance in writing within the statute—*Selwyn's Nisi Prius*, 11th ed. p. 348, and *Byles on Bills*, 12th ed. p. 191, and, on the other hand, that words of acceptance without a signature, if intended as an acceptance, might suffice—*Dufaur v. Oeenden* (4); see also *Corlett v. Conway* (9). By the 19 & 20 Vict. c. 97. s. 6, it was enacted, "That no acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless the same be in writing on such bill and signed by the acceptor or some person duly authorised by him." In the present case it was contended that, inasmuch as before the statute a mere signature would have been a sufficient acceptance in writing, within the 1 & 2 Geo. 4. c. 78. s. 2, it was not the less so now; and that, inasmuch as it was a signature of the acceptor, the bill was both accepted in writing and signed by the acceptor within the meaning of the later enactment. But looking at the history of the law and of the enactments on the subject, we are of opinion that the County Court Judge was right in holding that the statute had not been complied with. It is not for us to speculate upon the object of the Legislature, but if it were necessary to do so we think it may well have been intended by the enactment now in question to prevent ignorant persons from being too easily bound by a mere signing of their name, and that it was therefore purposely required that there should be upon the face of the bill some words indicating an intention to be bound by it as acceptor as well as the mere signature of the party. Comparing the words of the later statute with those of the former, we think it impossible that a

mere signature of a name can be held to fulfil the double requirement that the acceptance shall be in writing on the bill and signed by the acceptor. We therefore think that upon the question submitted to us the learned County Court Judge was right.

It appears to us, however, that there is a statement upon the face of the case which makes it at least doubtful whether the judgment for the defendant ought to stand. It is stated in the case that the plaintiff proved that the bill was given for value. If this means that the plaintiff proved that the defendant received an advance of money from him, or goods for the value of which the bill was given, it would appear to be a case in which the learned Judge had full power to amend the claim and give judgment for the plaintiff (see 19 & 20 Vict. c. 108. s. 97), and we do not see any reason why this should not now be done, so far as appears upon the face of the case. We desire, however, not to be considered as withdrawing this question from the discretion of the County Court Judge, inasmuch as the case before us having been stated with the view of raising the point of law upon which we have given a decision, he may probably have stated the facts with regard to proof of value more in favour of the plaintiff, than would have been warranted if the learned Judge had had the question argued before him. We think that the case should be remitted to the County Court Judge, in order that he may reconsider this point, and give judgment for the plaintiff or the defendant accordingly as he may think right to act upon this suggestion or not with reference to the facts actually proved.

Case remitted accordingly.

Solicitors—Williamson, Hill & Co., agents for Ingledew & Daggett, Newcastle-upon-Tyne, for plaintiff; J. Scaife, agent for Duncan & Duncan, South Shields, for defendant.

(9) 5 Mee. & W. 653; n. c. 9 Law J. Rep. Exch. 105.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1878.

Feb. 8. }

MORTIMORE v. CRAGG.*

Sheriff—Fieri Facias—Levy without Sale—Right of Sheriff to Poundage.

Where a sheriff has seized goods in execution of a writ of fieri facias, but before sale the debtor pays the debt and costs, the sheriff is entitled to poundage under 28 Eliz. c. 4.

Bissicks v. The Bath Colliery Company (46 Law J. Rep. Exch. 611; s. c. Law Rep. 2 Exch. Div. 457) approved. *Roe v. Hammond* (46 Law J. Rep. C.P. 791; s. c. Law Rep. 2 C.P. Div. 300), overruled, *Nash v. Dickinson* (Law Rep. 2 C.P. 252) distinguished.

In this case the plaintiff obtained a judgment against the defendant and issued execution against his goods. The sheriff of Surrey took possession, and remained in possession until the defendant paid the sheriff's officer the amount of the debt and costs and possession money, together with a sum of 4l. 9s. for poundage. Thereupon the sheriff delivered possession of the goods to the defendant again without selling.

A rule was then obtained by the defendant to shew cause why the sheriff should not repay to the defendant the sum of 4l. 9s., on the ground that, there having been no sale, the sheriff was not entitled to poundage (1). This rule was

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 28 Eliz. c. 4 makes it illegal for sheriffs "to take for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person or persons whatsoever more or other consideration or recompense than . . . twelve pence of and for every twenty shillings where the sum exceedeth not 100l., and sixpence of and for every twenty shillings being over and above the sum of 100l. that he or they shall so levy or extend and deliver in execution or take the body in execution for by virtue and force of any such extent or execution whatsoever."

The fees to be taken by sheriffs, in addition to poundage, for the execution of civil process are now regulated by 1 Vict. c. 55, and by the table of fees drawn up in pursuance of that statute.

made absolute by the Common Pleas Division, on the authority of the case *Roe v. Hammond* (2).

From this decision the sheriff appealed, and the case was now argued by—

The Solicitor-General and Grantham, for the sheriff.—Poundage is due to the sheriff wherever the payment of the debt is the result of what the sheriff has done. That is the meaning of the word "levy." The money may be levied though there has been no sale, and no sale is necessary to entitle the sheriff to poundage. In *Bissicks v. The Bath Colliery Company* (3), Cockburn, L.C.J., lays down the right rule. Actual execution of the writ is not necessary, but virtual execution is sufficient. The Lord Chief Justice in that case throws doubt upon *Roe v. Hammond* (2), which was decided on an anonymous case in *Lofft's Reports*, p. 433. The Exchequer and Common Pleas Divisions are at issue on the point, and the question for this Court to decide is which is right.

Talfourd Salter and Lumley Smith, for the defendant.—The defendant relies on the case of *Roe v. Hammond* (2), where Lord Coleridge lays down that the sheriff is not entitled to poundage unless there has been a sale, and distinguishes *Alchin v. Wells* (4), where there was a compromise, by which the parties were not allowed to defeat the sheriff. *Dilke v. Havelock* (5) points in the same direction, for it is there said that "if the goods are sold, the sheriff receives poundage." In that case Lord Ellenborough says that for the mere execution of the king's writ the sheriff cannot claim poundage. In *The King v. Robinson* (6), goods were seized to the amount of 824l. to satisfy a debt to the Crown of 1,000l. But a compromise was effected, and only 500l. worth were sold. Baron Parke held that poundage could only be

(2) 46 Law J. Rep. C.P. 791; s. c. Law Rep. 2 C.P. Div. 300.

(3) 46 Law J. Rep. Exch. 611; s. c. Law Rep. 2 Exch. Div. 457.

(4) 5 Term Rep. 470.

(5) 3 Campb. 374.

(6) 2 Cr. M. & R. 334.

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claimed on 500*l.* Baron Parke there commented on *Alchin v. Wells* (4).

[BRETT, L.J.—But he was only dealing with the amount, not the principle.]

Again, in *Masters v. Lowther* (7) it was shewn that poundage can only be claimed on the amount actually levied. *Miles v. Harris* (8) and *Nash v. Dickinson* (9) are both cases where, for various reasons, there was no sale, and poundage was not allowed. In *Sneary v. Abdy* (10) the question did not arise; see the judgment of Grove, J., in *Roe v. Hammond* (2). The phrase “delivery in execution,” in 29 Eliz. c. 4, shews that poundage is not to be paid unless the powers of the warrant are exhausted. When goods are released and money not made out of them, the sheriff gets a discharge fee. It cannot be intended that he should get less when he sells than when he does not.

[BRETT, L.J.—The discharge fee is not in lieu of poundage, but in lieu of the selling fee.]

Grantham, in reply, referred to *Tomline's Law Dictionary*, “Levy,” *The Queen v. Jetherell* (11), *Chapman v. Bowlby* (12).

BRAMWELL, L.J.—I am of opinion that this judgment should be reversed. I must confess, with all respect, I think the statutes and authorities are clear. The statute of Elizabeth (28 Eliz. c. 4) says that the sheriff is not to have “for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person or persons whatsoever” more than twelve pence in the pound where the sum does not exceed 100*l.*, and sixpence for every pound beyond that amount “that he or

they shall so levy or extend or deliver in execution. Now, I am of opinion that the words “deliver in execution” must be taken in connection with the word “extend,” for there may be an extent without delivery in execution; and that phrase cannot apply to the goods or the body of the debtor, but must refer only to land. Where lands are taken under a writ of *elegit*, the sheriff holds an inquisition and delivers the lands in execution, so that it is not necessary to bring ejectment in order to recover possession.

But Baron Watson, in the case of *Carter v. Hughes* (13), says,—“It appears from the cases of *Peacock v. Harris* (14) and *Tyson v. Paske* (15) that the 28 Eliz. c. 4 gave the sheriff poundage on executing an *elegit*. But doubts having arisen as to the amount, the 3 Geo. 1. c. 15. s. 16 restricts the poundage to a certain amount, according to the yearly value of the land of which the sheriff has delivered possession or seizure.” Then he says,—“Although the word ‘*elegit*’ is not found in the enacting part of the clause, the intention clearly was that it should apply to an *elegit*, and the language is large enough to include that writ. Then upon what is poundage to be paid? It is to be paid in respect of land whereof the sheriff has delivered possession or seizure.”

It is clear, therefore, the words do not apply to goods or money. The sheriff, in a sense, “delivers” the money, but he does not deliver it in execution, but in payment of a debt, and the money could be recovered in an action for money had and received to the execution creditor's use. Then the words of the section are that he is to receive the poundage “upon what he shall so levy.” What, then, is the duty of the sheriff under the writ of *fieri facias*? He is bound to seize the goods and to cause to be made of them the sum named in the writ.

Notwithstanding this, he is bound to receive payment, and I doubt his right

(7) 11 Com. B. Rep. 948; s. c. 21 Law J. Rep. C.P. 130.

(8) 12 Com. B. Rep. N.S. 550; s. c. 31 Law J. Rep. C.P. 361.

(9) Law Rep. 2 C.P. 252.

(10) 45 Law J. Rep. Q.B. 803; s. c. Law Rep. 1 Exch. Div. 299.

(11) Parker 177.

(12) 8 Mee. & W. 249; s. c. 10 Law J. Rep. Exch. 299.

(13) 2 Hurl. & N. 712, at p. 723; s. c. 27 Law J. Rep. Exch. 225.

(14) 1 Salk. 331.

(15) Ibid. 333.

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to seize after tender of the amount of the debt; certainly he cannot sell after such tender.

In *Taylor v. Bekon* (16) the case was this:—"Debt upon a judgment. The defendant pleads that he was taken upon a *capias* and committed to the marshal of this Court, and that he had paid the money to him in satisfaction of the judgment. Upon demurrer judged no plea, for the marshal is not to receive the debt, but only to detain the defendant in prison until he hath paid it to the plaintiff. But payment to the sheriff upon a *feri facias* is a good plea, for he hath thereby authority to levy the debt."

Why so, unless the payment to the sheriff is a levy? And if it is a levy, the sheriff in this case is within the statute. I do not mean to question that decision. I think it was a good one. And I think the case of *Nash v. Dickinson* (9) was rightly decided. In that case there was no levying; there was no seizure at all; and the test is this—if the execution debtor had brought an action against the sheriff for wrongful seizure, he could not have maintained it.

I have shewn that to levy means to seize the goods and thereby obtain the money. And, in addition to that reasoning, there is a current of authorities all one way and all in favour of the sheriff getting the money. Nay, the authorities are much stronger than the present case, for here the actual seizure procured the money; but the cases shew that when in consequence of the seizure there is a compromise, nevertheless the sheriff shall have his poundage. All the authorities are one way until this case in the Court below, unless we adopt the line of argument that because in one case it is said that the sheriff can have his poundage if he seizes and sells, we are therefore to say he cannot have it if he seizes and does not sell. But I do not think there is any trace of authority against the sheriff, and therefore he is entitled to our judgment. As to the case where the execution has been set aside, of course the sheriff is not entitled there, for the whole proceeding is withdrawn; and the

cases shew that if the judgment is set aside for irregularity, all the sheriff can claim is that he is not liable to an action for executing the process of the Court. Yet the solicitor or party who has issued the writ is liable in an action for trespass, and it is only when the judgment is set aside on the merits that he has a good answer. But it would be unreasonable in such a case to say that there has been a levy.

BRETT, L.J.—I am of the same opinion. It seems to me that the transaction consists of four parts—1st, the delivery of the warrant; 2nd, seizure by the sheriff; 3rd, there may be payment by the debtor after seizure; 4th, there may be sale and payment of the money by the sheriff. The delivery of the warrant does not entitle the sheriff to poundage, for although he has got the warrant, yet perhaps he may not seize, and if not, there is no poundage. This is decided in the case of *Nash v. Dickinson* (9). If he does seize, nothing may be realized, for the seizure may be held wrongful, and then the execution is withdrawn by the decision of the law, and nothing is obtained; or after seizure and before anything is obtained, the execution may be withdrawn by the execution creditor with the consent of the sheriff, and then, I should think, there will be no poundage; but if after seizure the money is obtained in consequence of the seizure, either directly or indirectly, then the sheriff is entitled. It is obtained directly in consequence of the seizure, if the execution debtor pays out the sheriff—for he pays to get rid of the seizure—or the money may be obtained indirectly by a compromise, then the money is obtained by the indirect consequence of the seizure, though there is no sale; in either case the poundage is due. That this is what we ought to hold is clear both by statute and by authority. First, by statute, on the proper construction of the Act, one part of the section applies to goods levied, another part to things extended and delivered in execution. Now, the words "delivered in execution" do not apply to the case of a levy. A levy in its legal meaning seems to me to be where

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goods are seized and money is obtained by the compulsion of the seizure, and does not necessarily comprise "sale" at all. The case of *Alchin v. Wells* (4) is directly in point. It was held there that the sheriff was entitled, and the whole ground of the decision was that, though there was no sale, yet there was a levy; the money was obtained because of the seizure, and the sheriff was entitled because there had been a compromise in consequence of the seizure. The same doctrine is laid down in *The King v. Robinson* (6), and there the same language was used as to "levy" as in the statute. There is a "levy" when anything is obtained by the compulsion of seizure, although there is no sale. The same thing was held in *Chapman v. Bowlby* (12), and there is the case before the Lord Chief Justice and Baron Cleasby. There are four cases in point in favour of the claim of the sheriff, and only one—the case under revision—against it. It appears from the decision in the last case that Mr. Justice Grove was wrong as to the opinion of Baron Cleasby. It may be he had the opinion attributed to him at the time, but it cannot have been his final judgment, for he was a party to the judgment delivered by the Lord Chief Justice in *Bisicks v. The Bath Colliery Company* (3). I am therefore of opinion, both on authority and on the construction of the statute, that this judgment should be reversed.

COTTON, L.J.—We are here called upon to decide between the conflicting decisions of the Queen's Bench and the Common Pleas Divisions, and my opinion is that the sheriff is entitled to poundage. If the case is not governed by authority, it depends upon the construction of the statute. Can we say the phrase "delivery in execution" in the statute of Elizabeth applies to anything that has to do with goods? If it does, what can it possibly mean? On that point I think the view taken by Lord Justice Bramwell is right. Then what is a levy? To effect a levy when the sheriff has a warrant delivered to him I should think he must seize, and if there is no seizure, it cannot be said that the

sheriff is entitled to poundage. But when he has seized, is it necessary that he should raise the money by sale? I should think not. If there is a seizure, and a compulsory payment in consequence of seizure, or if, by some compromise, payment is made, or if there is a complete execution of the writ, then the sheriff has made a levy—that is, he has seized, and by means of the seizure obtained the money. That is a reasonable construction of the section, and I do not think we ought to be influenced by the argument about discharge fees. All the authorities are one way, except one *dictum* in *Lofft's Reports*. It is not a decision, and at that time it appears that poundage could not be levied, but had to be recovered separately. Perhaps where payment of the money could not be obtained without sale the sheriff could not sue for poundage without sale. But we cannot rely on that *dictum*, and all the decisions are the other way. In *The King v. Robinson* (6), before Parke, B., 500*l.* was levied, and the only question was on what amount poundage should be paid, and it was decided that what was levied was the amount of the compromise, and that poundage should be paid on that amount. In the case in the Common Bench (8) one of the Judges says, that as the goods have not been turned into money there can be no poundage. But there could be no sale, for the writ was altogether set aside, and the clear meaning of that case is that poundage could not be recovered because there was no possibility of making the process effectual for the recovery of the money. But wherever the obtaining of the money is the effect of the seizure, in my opinion the sheriff is entitled to claim poundage on the money paid.

Judgment reversed.

Solicitors—Abbott & Co., for the sheriff; S. Chester, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]
 1878. }
 Feb. 14. } BULLOCK AND CO. v.
 CORRIE AND CO.

Discovery—Inspection of Documents—Action for Breach of Charter-Party—Right of Defendants to be Indemnified by Third Party—Second Action—Right to Production of Proceedings in Former Action—Privilege.

The plaintiffs sold a cargo of rice to the defendants, and chartered a ship from E. for the purpose of having the same conveyed to the purchasers. Under the terms of the charter-party, the plaintiffs undertook to name a safe port for the ship to discharge her cargo. The plaintiffs, at the request of the defendants, named a port which turned out to be unsafe, whereupon E. recovered damages in an action against the plaintiffs for breach of the terms of the charter-party. Plaintiffs thereupon (who had, in the contract of sale with the defendants, made a like stipulation as to the naming of a safe port by the latter) sought to enforce their remedy over against the defendants by action for breach of contract:—Held, that the defendants were not entitled to inspect the proceedings in the first action, including the correspondence that passed between the plaintiffs' solicitors and E.'s solicitors, such documents being privileged from discovery.

Appeal from a decision of Field, J., at chambers, the material facts being as follows:—The plaintiffs chartered a ship from one Evans for the conveyance of a cargo of rice sold to the defendants to a port to be named by the latter. One of the terms of the charter-party entered into between the plaintiffs and Evans was that the charterer should name a safe port. The defendants ordered the ship to be discharged at a certain port near Ghent, which turned out to be unsafe, and Evans thereupon sued Bullock & Co., the present plaintiffs, under the charter-party, for naming an unsafe port, and recovered damages for demurrage and other expenses of removing the ship to Antwerp. The plaintiffs thereupon sued the defendants to whom they had sold the rice while afloat, under a contract incorporating the terms of the charter-party, to recover from them what was

recovered from the plaintiffs by Evans, the defendants being bound to take delivery according to the terms of the charter-party.

The defendants applied, by summons, to Field, J., at chambers, for the production by the plaintiffs to the defendants or their solicitors of the papers and proceedings in the action of *Evans v. Bullock*, the correspondence between the plaintiffs' solicitors and Messrs. Bateson & Co., the solicitors of Evans, in order that the defendants might inspect the same and take notes thereof or extracts therefrom. The learned Judge dismissed the summons, whereupon the defendants brought this appeal.

Maurice Powell, for the appellants (the defendants).—The plaintiffs are now seeking indemnity from the defendants for the damages the former had to pay in the action brought against them by Evans; the defendants are therefore entitled to know exactly what took place in the former action, and how the plaintiffs have arrived at the amount of damages claimed.

[COCKBURN, L.C.J.—That would be settled by the amount of damages given by the jury; the discovery here sought for relates to communications that passed between one of the parties and his solicitors.]

The privilege which attaches to communications between solicitor and client is limited to the existing suit—*Hutchinson v. Glover* (1); as Blackburn, J., remarked in the course of his judgment, "Everything which will throw light on the case is *prima facie* subject to inspection."

Arthur Wilson, for the plaintiffs.—The question is whether the doctrine of privilege is limited to an existing action, it being admitted that the documents of which discovery is now sought by the defendants would be privileged in the former action. The plaintiffs are willing to produce the pleadings in the action brought against them, or anything in the nature of *publici juris*, to employ a phrase

(1) 45 Law J. Rep. Q.B. 120; s. c. Law Rep. 1 Q.B. Div. 138.

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used in *Nicholl v. Jones* (2) and *Walsham v. Stainton* (3), but no more. The general principle, as remarked by Malins, V.C., in *Wilson v. The Northampton and Banbury Junction Railway Company* (4), is that "all correspondence between solicitors and clients relating to the subject-matter of a contract which has been entered into, and which may lead to litigation—whether it has done so or may do so, whether it is probable or improbable that it will do so—ought certainly to be privileged. He also cited *Anderson v. The Bank of British Columbia* (5) and *Bustros v. White* (6).

Maurice Powell replied.

COCKBURN, L.C.J.—I entertain no doubt that my brother Field was right in the decision at which he arrived in this case, and that inspection of these documents ought to be refused. The privilege which attaches to communications between solicitor and client ought in my judgment to be religiously observed, and to destroy such a privilege would, I think, lead to most mischievous results. I go so far as to say, that, except perhaps in very special cases, once privileged always privileged; and *à fortiori* this is so in a case like the present, where the action is practically the same. Let us suppose for a moment there are cross-actions, the defendants against the plaintiffs in one action and the plaintiffs against the defendants in another; in these cases what passed between solicitors and clients in both causes would clearly be privileged. Again, supposing there were two actions by the same plaintiff against different defendants, viz., *A. v. B.* and *A. v. C.*, the subject-matter of the two actions being substantially the same; communications between solicitor and client in the action against *B.* would be privileged in the action against *C.* In these cases the matters in dispute are so immediately connected that confidential communica-

tions in the one action ought to be protected in the other. Here the facts in both actions are identical, and if there is any liability on the part of the present defendants, it is because they are in the same position as the plaintiffs were in the action brought against the latter by the shipowners. It is practically possible and by no means merely theoretical that the plaintiff may have been aware that under the terms of the charter-party he would be liable to pay damages to the shipowner, and that his only remedy would be against third parties. He may have laid before his confidential advisers the whole of the facts relating to his own liability and remedy over against the present defendants. To tell me that such communications would not be privileged is to tell me what in point of good sense and justice I think would be most unfair, and I accordingly am of opinion that this appeal ought to be dismissed.

MELLOR, J.—I am of the same opinion for the reasons stated by the Lord Chief Justice, and am glad to find that our decision is in conformity with the cases cited by Mr. Wilson.

Appeal dismissed with costs.

Solicitors—Hollams, Son & Coward, for plaintiffs;
W. J. Foster, for defendants.

[IN THE EXCHEQUER DIVISION.]

1878. } BODY AND ANOTHER (*appellants*) *v.* JEFFERY (*respondent*).
Jan. 29. }
Feb. 4. }

Highway—Locomotive Engines on Roads—Wheels—Locomotive Act, 1861 (24 & 25 Vict. c. 70), sec. 3—"Shoes or other Bearing Surface of a Width not less than Nine Inches."

[For the report of the above case, see 47 Law J. Rep. M.C. 69.]

(2) 2 Hem. & M. 588.

(3) *Ibid.* 1.

(4) Law Rep. 14 Eq. 477.

(5) 45 Law J. Rep. Chanc. 449; s. c. Law Rep. 2 Chanc. Div. 644.

(6) 45 Law J. Rep. Q.B. 642; s. c. Law Rep. 1 Q.B. Div. 423.

[IN THE COMMON PLEAS DIVISION.]

1878. }
Feb. 26. } BRYANT AND ANOTHER v.
March 2. } HERBERT.

Costs—Detinue—Contract or Tort—30 & 31 Vict. c. 142. s. 5 (County Court Act, 1867).

Detinue is an action of contract within the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5.

Plaintiffs delivered to defendant a picture in order that defendant might determine whether it was a genuine picture painted by himself or not. Defendant having come to the conclusion that the picture was not genuine, refused to give it back to the plaintiffs except upon conditions to which the plaintiffs would not agree.

In an action brought for the wrongful detention of the pictures, the plaintiffs obtained a verdict for 10l., the value of the picture, and 1s. as damages for its detention. The Judge at the trial refused to make any order for the delivery up of the picture, and made no order as to costs:—

Held, that the plaintiffs were deprived of their costs by 30 & 31 Vict. c. 142. s. 5.

Appeal from the decision of Master Dodgson refusing to tax the plaintiffs' costs, on the ground that the action being founded on contract the plaintiffs were not entitled to costs by virtue of 30 & 31 Vict. c. 142. s. 5.

By the statement of claim the plaintiffs, as owners and entitled to the possession of a certain picture entitled "Lady Russell interceding for the Life of her Husband," sued the defendant, for that "the defendant detains the said picture from the plaintiffs, and although requested to deliver it to the plaintiffs has refused and neglected to do so, whereby the plaintiffs have been deprived of the said picture." The plaintiffs claimed—first, the said picture or its value; second, 50l. damages for its detention. The defendant in answer denied the plaintiffs' property in the picture or that they were entitled to its possession, and also traversed the detention.

It appeared from the facts that the plaintiffs, who were picture dealers, had

purchased of a Mr. Hill, a carver and gilder, a picture entitled "Lady Russell interceding for her Husband," giving 20l. in exchange. The picture purported to be painted by the defendant, who was a member of the Royal Academy, and it was signed in the corner with the defendant's name. The plaintiffs being desirous to have the picture certified by the defendant as a picture painted by him, took it to the defendant's residence and left it for the defendant to examine, taking a receipt for the picture. The defendant pronounced the picture to be spurious, and refused to restore it to the plaintiffs unless the signature was erased, and an undertaking signed by the plaintiffs that the picture would not be sold and that it was spurious. This the plaintiffs refused to do, and the present action was accordingly brought.

At the trial the jury found a verdict for the plaintiffs with 10l. damages, the value of the picture, and 1s. for its detention. The learned Judge (Denman, J.) gave judgment for that amount, but refused to make any order for the delivering up of the picture, and also refused to make any order as to costs.

Notice to tax the costs was given in the usual course, but Master Dodgson declined to tax them (1).

A summons to shew cause why the Master should not tax the costs was issued and referred by Denman, J., to the Divisional Court.

Finlay (Denman with him), for the plaintiffs.—The action is one of tort, no contract is alleged or proved, and the plaintiffs have succeeded merely in proving their title to the picture. In *Day's Common Law Procedure Act*, 4th ed. p. 376. the author in commenting on section 5 of

(1) The Master's refusal to tax the costs was as follows:—"I decline to tax the costs on the ground that the action appears to me to be founded on contract. The plaintiffs, as I gather from the statement of their case in their brief, and from the evidence given at the trial, left the picture in the first instance with the defendant in order that he might examine it, and they did this voluntarily and took a receipt for the picture. This seems to be a bailment, and a bailment, as I think, is a contract."

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30 & 31 Vict. c. 142 (2), says, "Although detainee was formerly regarded as an action founded on contract, it would seem that for the purpose of this section it is to be regarded as founded on tort." And *Danby v. Lamb* (3) is referred to, in which the majority of the Court lay down two propositions—first, that detainee is an action for wrong, or in other words, tort; secondly, that detainee was not within section 34 of the Common Law Procedure Act, 1860 (4).

[LINDLEY, J.—The language of the section is directed not so much to what you sue for as to what you recover, here you only recover money.]

In *Danby v. Lamb* (3) only damages were recovered. The substantial question is whether detainee is an action of contract or of tort. The old authorities shew that the action of detainee commences with an imaginary bailment ending with a wrongful detention, but it has been held that the bailment is not traversable—*Clossman v. White* (5), because it is not an essential part of the declaration. In *Tidd's Practice*, Ch. I. it is said that "actions for wrongs are case, detainee, replevin and trespass *vi et armis*, and under Schedule B of the Common Law Procedure Act, 1852, wrongful detention of property is

placed under the head of "wrongs independent of contract." *Gledstane v. Hewitt* (6), *Byrne v. M'Evoy* (7), *Walker v. Needham* (8) and *Pontifex v. The Midland Railway Company* (9) were also referred to.

Henry Matthews (Bagnall-Wild with him), for the defendant.—The present action is one of contract. 30 & 31 Vict. c. 142. s. 5 (2), only more fully bears out s. 11 of 13 & 14 Vict. c. 61 (10), where detainee is classed among actions of contract. Detainee has always been an action of contract. A man may have debt and detainee—*Bacon's Abr.* Tit. Debt, which proves that they are actions of the like nature. Detainee and trover cannot be joined, *Willes' Reports*, 118. Detainee does not lie if the plaintiff has not the general or special property at the time of the action. *Comyn's Digest*, Tit. Detainee, Letter D. Trover, which was resorted to by the old lawyers to avoid wager of law, from which detainee was not free—*Blackstone's Com.* 21st ed. 152, recognises a tortious divesting, *id.* and the transfer of property converted relates back to the time of the conversion—*Addison on Torts*, 969, 4th ed. The action of detainee proceeds on the principle that the property is in the plaintiff, and that there is an implied contract to deliver it back. In the present case there was a plain bailment, which always imports a contract to re-deliver. A tortious taking divests the property, but the plaintiff may waive the tort and take advantage of the fiction of a bailment, and

(2) Sec. 5. "If in any action commenced after the passing of this Act in any of her Majesty's Superior Courts of record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit, unless the Judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a Judge at chambers shall by rule or order allow such costs."

(3) 11 Com. B. Rep. N.S. 423; s. c. 31 Law J. Rep. C.P. 17.

(4) 23 & 24 Vict. c. 126 (Common Law Procedure Act, 1860), s. 34. "When the plaintiff in any action for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict . . . unless the Judge shall immediately afterwards certify," &c.

This section is now repealed by the County Courts Act (30 & 31 Vict. c. 142, 1867), and section 5 substituted.

(5) 7 Com. B. Rep. 43; s. c. 18 Law J. Rep. C.P. 161.

(6) 1 Cr. & J. 565; s. c. 9 Law J. Rep. (o.s.) Exch. 145.

(7) 5 Ir. C.L. Rep. 568.

(8) 4 Scott N.R. 222; s. c. 1 Dowl. P.C. N.S. 220.

(9) 47 Law J. Rep. Q.B. 28; s. c. Law Rep. 3 Q.B. Div. 23.

(10) "If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record, in covenant, debt, detainee or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.* . . . or if, in any action . . . in trespass, trover or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs . . ."

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implied contract to re-deliver. See *Yeor Book*, 6 Hen. 7. p. 7, *Chitty on Pleading*, 7th ed. p. 137, *Bishop v. Montagus* (11), *McManus v. Orickett* (12), *Mills v. Graham* (13), *Whitehead v. Harrison* (14), *Olements v. Flight* (15). An action for tort could not be sent down to the sheriff for trial—*Watson v. Abbot* (16), but detainee could be so tried—*Walker v. Needham* (8). The damages in trover are limited to the value of the chattel, so that the plaintiffs could not have recovered the 1s. if they sued in tort. It is true that the Common Law Procedure Act, in schedule B., places the action of detainee under the head of "Wrongs independent of contract," but the person who placed it there must have followed *Tidd's Practice*, because it is placed contrary to the old forms of pleading. In *Byrne v. McEvoy* (7) it was immaterial whether the action was one of contract or tort, and the dictum of Monahan, J., is *obiter*—*Brooks' Abr. Tit. Detinue, plea 19*. All these decisions shew that by setting up a contract, the plaintiff in detainee is not departing from the root of the action; and that, although by the Common Law Procedure Act, it is not now necessary to allege a fictitious bailment, yet the law remains the same, and it is only by suing in contract the plaintiff has that which he could not have obtained in tort. Under the Judicature Act the plaintiff can now be deprived of costs by the Court—*Baker v. Oakes* (17).

Finlay, in reply.—Wager of law did not depend on a question of contract or tort, see *Blackstone's Com.* 15th ed. vol. iii. p. 345, it would lie in real actions, it was not applicable in assumpsit, it depended on the nature of the action. Trover does not pass the property until the value of the goods has been paid to the plaintiff—

Brinsmead v. Harrison (18), see also *Bullen and Leake*, p. 271, 3rd ed. Non-joinder of plaintiffs is no defence to an action of detainee, whereas in contract it would be fatal—*Broadbent v. Ledward* (19), *Baylis v. Lintott* (20), *Tattan v. The Great Western Railway Company* (21).

Cur. adv. vult.

The judgment of the Court (22) was (on March 2) delivered by

LINDLEY, J.—The plaintiffs in this action had delivered to the defendant a picture in order that he might determine whether it was a genuine picture painted by himself or not. He having come to the conclusion that it was not, refused to give it back to the plaintiffs except upon conditions to which they would not agree. They accordingly brought an action against him for its recovery, and they obtained a verdict and judgment for 10*l.*, the value of the picture, and 1*s.* as damages for its detention. The learned Judge declined to make any order for the delivery up of the picture, though requested to do so by the plaintiffs' counsel, and made no order as to costs, and therefore (under Order LV. of the Judicature Acts) the plaintiffs having succeeded in the action are entitled to their costs, unless they are deprived of them by some statutory enactment. The defendant contends that the 30 & 31 Vict. c. 142. s. 5 deprives the plaintiffs of their right to costs, inasmuch as this action was founded on contract and not on wrong within the true meaning of that enactment, and the question we have to decide is whether this contention is well founded or not.

We cannot give our decision without expressing our obligation to the learned counsel who argued the case for their very learned and exhaustive arguments on both sides.

In form the plaintiffs' action was an action of detainee; in substance it was for

(11) Cro. Eliz. 824.

(12) 1 East, 107.

(13) 1 B. & P. (New Rep.) 140.

(14) 6 Q.B. Rep. 423; s. c. 13 Law J. Rep. Q.B. 312.

(15) 16 Mee. & W. 42; s. c. 16 Law J. Rep. Exch. 11.

(16) 2 Cr. & M. 150; s. c. 3 Law J. Rep. Exch. 38.

(17) 46 Law J. Rep. Q.B. 246; s. c. Law Rep. 2 Q.B. Div. 171.

(18) 40 Law J. Rep. C.P. 281; s. c. Law Rep. 6 C.P. 584.

(19) 11 Ad. & E. 209.

(20) 42 Law J. Rep. C.P. 119; s. c. Law Rep. 8 C.P. 345.

(21) 2 E. & E. 844; s. c. 29 Law J. Rep. Q.B. 184.

(22) Denman, J., and Lindley, J.

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the wrongful detention of the property of the plaintiffs. It was strongly urged upon us that an action could not be regarded as founded on contract when the plaintiffs could recover in the action without alleging or proving any contract at all, and could succeed simply on alleging and proving their own title to the picture and its wrongful detention from them. This argument was moreover strengthened by the fact that, in the schedule B of forms to the Common Law Procedure Act, 1852, actions for detaining title deeds are classed amongst actions for wrongs as distinguished from actions on contract.

In order, however, to put a proper construction on the section of the statute which we have to construe, it is necessary to bear in mind the prior legislation on the same subject. The previous statutory enactments are 9 & 10 Vict. c. 95. s. 129; 13 & 14 Vict. c. 61. s. 11; and 19 & 20 Vict. c. 108. s. 30, and in one of these, namely, 13 & 14 Vict. c. 6. s. 11, actions of detinue are specially mentioned amongst those in which more than 20*l.* must be recovered in order to entitle the plaintiffs to costs.

We regard this as a clear declaration of the intention of the Legislature on this particular subject; and although in the later Acts general words describing actions are used instead of a specific enunciation, we see no indication on the part of the Legislature of any intention to alter the rule thus unambiguously laid down in the statute 13 & 14 Vict. c. 61.

If we look further into the history of actions of detinue we find them based upon the theory of a bailment real or fictitious, imposing upon the defendant an obligation to return the chattel bailed when his right to retain it as bailee had ceased to exist; a contract real or fictitious was the foundation of this obligation; and although his breach of it was a wrong, it was so only in the sense in which every breach of every contract is a wrong. In theory the action was founded on contract and not on wrong independently of contract. This is, we think, proved by the passages referred to by Mr. Matthews in *Brooke's Abr.* Tit. Detinue; by the fact that counts in debt and detinue could be joined in one action—1 *Oh. Pleading*, 109;

by the fact that the defendant could wage his law in this form of action on the ground that he had been previously trusted by the plaintiff—*Bacon's Abr.* Tit. Detinue; and by the fact that detinue was one of those actions in which damages could be assessed by the sheriff under 3 & 4 Will. 4. c. 42. s. 17, when the plaintiff had obtained judgment by default, see *Walker v. Needham* (8), where counsel urged in vain that detinue was an action founded on tort, the gist of the action being the wrongful detainer. In this case Lord Chief Justice Tindal said, "Detinue falls within that class of actions called actions of contract; and the whole course of the proceedings shew that it is a matter rather of contract than of tort."

It is very true that Tidd (whose authority on these matters was, in our opinion, too lightly esteemed by Mr. Matthews) classes detinue amongst actions of tort, see 1 *Tidd's Practice*, and that Baron Bayley in *Gledstane v. Hewitt* (6) said, "The action of detinue is an action of wrong;" and it is quite true that the cause of action is the wrongful detention. In *Danby v. Lamb* (3), when this view was urged upon the Court, it was held that detinue was not an action for an alleged wrong within the terms of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). This decision we regard as fatal to the contention that since the passing of the Common Law Procedure Act, 1852, detinue must, by reason of Schedule B to that Act, be regarded as an action founded on tort and not as an action founded on contract.

Having regard, then, to the history of the action, and especially to the terms of the statute of 13 & 14 Vict. c. 61. s. 11, we are of opinion that detinue ought to be regarded as an act founded on contract, and not as an action founded on wrong within the true meaning of the statute 30 & 31 Vict. c. 142. s. 5, which we have to construe.

In this case it so happens that there was a real bailment of the picture by the plaintiffs to the defendant, and although there was no express promise by him to return it when the purpose of the bailment was accomplished, his obligation then to restore it was a legal consequence

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of the terms on which he acquired it from the plaintiffs, and did not depend upon the mere fact that they were the owners of the picture. In this particular case, therefore, the plaintiffs' cause of action was quite as much a breach of contract as a wrong independent of contract. In construing the section of the statute on which this case turns, we have referred to the following decisions—*Legge v. Tucker* (23), *Tattan v. The Great Western Railway Company* (21), *Baylis v. Lintott* (20), *Pontifex v. The Midland Railway Company* (9).

All these cases were decided on the sections of the County Courts Acts, which are material for consideration, and they all, with the exception of *Tattan v. The Great Western Railway Company* (21), support the view we take. That case, which turned on 9 & 10 Vict. c. 95. s. 129, is not, we think, opposed to our present decision, for the decision there was that the plaintiff had chosen to base his claim upon tort, and not upon contract as he might have done. In this case the plaintiff not only framed his claim as a claim in detinue claiming a return of the picture itself, but he actually recovered nominal damages for the detention of the picture, which he could not have done if he had sued simply for damages in an action founded purely on wrong.

Whilst, therefore, we agree with the plaintiffs that as an abstract question an action for the wrongful detainer of goods may often be an action founded on wrong; this action is not so founded within the true meaning of the statute which we have to interpret. The decision of the Master was therefore, we think, correct, and this application must be refused with costs.

Solicitors—E. W. Parkes, for plaintiffs; Field, Roscoe & Co., for defendant.

(23) 1 Hurl. & N. 500; s. c. 28 Law J. Rep. Exch 71.

[IN THE COMMON PLEAS DIVISION.]

1878. } FIFTH v. THE BOWLING GREEN
March 1, 2. } COMPANY.

Negligence—Wire Fencing—Adjoining Occupiers of Land—Injury to Cattle through Eating Wire.

Defendants' land was separated from plaintiff's by a fence which had been put up by defendants' predecessors in title, and which was maintained by the defendants. This fence was constructed of old wire rope, the strands of which had by long exposure to the weather decayed and separated into pieces; some of these fell on to plaintiff's land where they lay hidden among the grass. Plaintiff's cow in grazing picked up and swallowed one of these pieces of wire and in consequence died:—

Held, that the plaintiff was entitled to maintain an action for the loss of the cow.

Wilson v. Newberry (41 Law J. Rep. Q.B. 31) distinguished.

SPECIAL CASE.

The action is brought to recover the sum of 27l. 16s. as damages for the loss of a cow, the property of the plaintiff, in consequence of the negligence of the defendants, and in consequence of the mode in which the defendants have used and enjoyed their property.

At the trial before W. T. S. Daniels, Esq., Q.C., Judge of the Bradford County Court, on the 22nd and 29th of June, 1877, the following facts were proved:—

1. The plaintiff, at the time of the alleged grievance, was, and had for many years past been, the tenant, from year to year, under Mr. Saville, of a farm called Lower Chatts Farm, situate at Hansworth, in the county of York.

2. The defendants are a limited company, incorporated in the year 1870 under the Companies Act, 1862, and prior to their incorporation, their predecessors in title had for several years carried on extensive colliery and ironworks, under the style of "The Bowling Iron Works."

3. At the time of the alleged grievance the defendants were, and their predecessors in title had for several years been, the lessees under the said Mr. Saville of the mines of coal and iron stone underlying (among other lands) the farm occu-

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pied by the plaintiff. This farm contains about forty-two acres, divided into several inclosures and used principally for pasturing milk cows.

4. In one of the inclosures (containing about ten acres of pasture) there is a large pit hill or bank, which, prior to the incorporation of the defendants, had been formed by their predecessors in title from the spoil obtained in sinking a coal shaft. The said pit hill has been for some years, and was at the time of the alleged grievance, unused by the defendants, except that a tramway, forming part of the defendants' works and used by the defendants, ran over it.

5. By the terms of their lease the defendants were bound to protect (amongst other things) the tramways by the erection of stone walls, or by posts and rails of a specified description, for the benefit of the lessor, his heirs and assigns, and his and their tenants.

6. About twenty years ago the predecessors in title of the defendants placed round the base of the said pit hill a fence constructed of two parallel lines of wire rope supported by posts. The wire ropes had originally been used for the purposes of the colliery, but owing to wear had ceased to be suitable for such purposes.

7. The defendants allowed the said fence of wire rope to remain, and from time to time mended or stopped any broken places with wooden rails, and thus prevented cattle straying on the said pit hill or tramway.

8. From long exposure the strands of wire composing the rope rusted, decayed and separated into pieces, some of which fell to the ground and lay hidden in the grass of the plaintiff's said pasture and were liable to be taken up by the cattle grazing there.

9. In October, 1867, two heifers belonging to the plaintiff died in consequence of their taking up pieces of wire with the grass while feeding in this pasture. The carcasses of the heifers were examined, and a piece of wire, several inches long, and in a rusted and decayed state (which no doubt had formed part of the said wire rope), were found in the stomach of each of the heifers. The plaintiff complained to the landlord's

agent, Mr. Lipscomb, and afterwards wrote to the defendants the following letter:—

"Lower Chatts Farm, Hunsworth,
"East Bierley, near Bradford,
"October 10th, 1867.

"To the Bowling Iron Company.

"Gentlemen,—I am requested by Wm. Lipscomb, Esq., agent to the late Earl of Scarborough, to inform you that I have lost two heifers from your wire roping. The cattle has got it into their stomachs with grass, and it has killed them, and I want recompense for them.

"I remain, respectfully yours,

"Martha Firth."

The letter was not answered, and the plaintiff did not take any legal proceedings to try to enforce her rights against the defendants.

10. In the autumn of 1876, the cow, the subject of this action, was feeding in the same pasture. During the autumn she was observed to be getting very thin and losing strength, and became so ill that she was killed, which was the prudent and proper course. On examining her carcass a piece of wire, about eight inches long, was found imbedded in the inner side of the pericardium, and was the cause of the illness resulting in her death.

11. This piece of wire had been picked up by the cow while grazing in the said pasture, and was a decayed portion of the said wire rope, which had in some way, without fault on the part of the plaintiff, fallen upon the land which she occupied.

12. The plaintiff's loss, owing to the death of the cow, was shewn to be the sum claimed, 27*l.* 16*s.*

The question for the opinion of the Court is whether upon the above facts the defendants are liable for the death of the plaintiff's cow, &c.

Cave (Wilberforce with him).—Every one has a right to the enjoyment of his land, with this distinction, that in the case of two adjoining proprietors, each has a right to the enjoyment of the land in its natural state, but if he alters it he is liable for any injury thereby occasioned, in accordance with the maxim, *sic utere*

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tuo ut alienum non ledas—*Bonomi v. Backhouse* (1), *Rylands v. Fletcher* (2). The same principle applies in the case of land adjoining a highway—*Barnes v. Ward* (3). Where a man constructed a hayrick on the edge of his land, and it caught fire and burnt his neighbour's house, the owner of the hayrick was liable. It was perfectly lawful to construct the hayrick, but if put so near the edge of the ground as to occasion damage, then liability attached—*Vaughan v. Menlove* (4). So in the present case it was perfectly lawful for the defendants to put up the fence; but then they are liable for damage occasioned thereby. *Wilson v. Newberry* (5) is distinguishable. That case was decided on demurrer, and the facts were not clearly ascertained. There was no allegation, either to shew the position of the yew trees on the defendants' land, nor how the clippings got on to the plaintiff's land. Had the defendants in the present case put up a yew hedge, and the plaintiff's cattle had eaten it and died, the defendants would have been liable. It seems that they were bound to fence, but this does not matter, for it is the bringing of something on to their land which has occasioned mischief for which they are liable. Further, the falling of the pieces of wire on to the plaintiff's land was a trespass for which the defendants were liable—*Lambert v. Bessey* (6); but the case does not depend so much on this as on the principle that the defendants by bringing something on to their land are liable for the consequences.

[LINDLEY, J.—Is not the damage too remote?]

No. Had this happened for the first time it might have been different; but the fact of a heifer having been killed in a similar way in 1867, would

shew the cow's death to be a natural consequence of the condition of the fence.

Swift (*Alfred Willis* with him).—The only duty of the defendants is to guard against reasonable consequences. Pollock, C.B., in *Greenland v. Chaplin* (7), says, "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may, under any circumstances, arise, and, in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated. See also *Jordin v. Crump* (8), *Lawrence v. Jenkins* (9).

[DENMAN, J., referred to *Humphreys v. Cousins* (10), also to a case in the Court of Appeal, *Hurdman v. The North Eastern Railway Company* (11).]

Cur. adv. vult.

LINDLEY, J. (on March 2), delivered the judgment of the Court (12).

Since the argument of this case we have had an opportunity of considering the case referred to in the Court of Appeal (11), and we are satisfied it is not necessary for us to delay our judgment.

This is an action by the plaintiff for the loss of a cow which had died under the following circumstances:—The defendants' land, which adjoined the plaintiff's, was separated therefrom by a fence of the defendants; both plaintiff and defendants held under the same landlord. Whether the defendants were under any obligation to fence is immaterial, for, in fact, they maintained a fence which had been put up twenty years ago by the defendants' predecessors in title. This fence was of a peculiar nature, it was composed of old iron rope, and was of such a character that, by long exposure to the weather, the strands of the rope

(1) E. B. & E. 622; s. c. 28 Law J. Rep. Q.B. 378.

(2) 3 H.L. Cas. 330; s. c. 37 Law J. Rep. Exch. 161.

(3) 9 Com. B. Rep. 392; s. c. 19 Law J. Rep. C.P. 195.

(4) 3 Bing. N.C. 468; s. c. 6 Law J. Rep. C.P. 92.

(5) 41 Law J. Rep. Q.B. 31; s. c. Law Rep. 7 Q.B. 31.

(6) T. Raym. 422.

(7) 5 Exch. Rep. 243; s. c. 19 Law J. Rep. Exch. 293.

(8) 8 Mes. & W. 782; s. c. 11 Law J. Rep. Exch. 74.

(9) 42 Law J. Rep. Q.B. 147; s. c. Law Rep. 8 Q.B. 274.

(10) 46 Law J. Rep. C.P. 438; s. c. 2 C.P. D. 239.

(11) *Post*, page 368; s. c. Law Rep. 3 C.P. D. 168.

(12) Lindley, J., and Denman, J.

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rusted, and separated into pieces, some of which fell on to plaintiff's land where they lay hidden in the grass. The plaintiff's cow, in eating the grass, picked up and swallowed one of these pieces of wire, and in consequence died. It was urged that notice of a similar occurrence had been given to the defendants, but it seems to us it would be going too far to hold that a notice given in 1863 to a company incorporated under the defendants' title in 1870, was a notice to the defendants; there is no evidence to shew the letter containing the notice ever reached its destination, there was no answer written to it. But even supposing the letter had been received by the predecessors of the defendants' company, it would, we think, be going too far to hold this letter to have been a good notice at law.

Apart from this notice, the action on the bare facts of the case appears to us to be maintainable. Whether the nature of the wire was known to the defendants, the falling of pieces on the plaintiff's land was a natural result of the decay of the wire, and the defendants are therefore liable for the injury to the cattle, which was caused by the natural result of their acts.

We have read the judgment of the County Court Judge and, with the exception of that part of it which treats the notice to the defendants as creating a knowledge on their part that similar accidents had previously occurred, we concur in his view. We also adhere to the judgment delivered in *Humphreys v. Cousins* (10), as extending the principle on which we hold this action to be maintainable.

The only case which has caused us any doubt is the *Yew Tree Case* (5), but, on consideration we think it distinguishable on the grounds stated by Mr. Cave, namely, that the decision proceeded on demurrer, the facts were obscure, and it did not appear in what part of the defendants' land the yew trees were, nor how the clippings came on to the plaintiff's land. The facts of that case are too obscure for it to avail the defendant, and we do not consider we ought to take it as our guide when all the other cases which

were cited are clear and distinct on the principle contended for by the plaintiff.

We think on principle this action is maintainable, and that the judgment of the County Court Judge should be affirmed.

Judgment affirmed with costs.

Wills asked for leave to appeal.

GROVE, J. (who had come in during the delivery of the judgment).—There is some doubt, but I do not think we have any power to grant leave. (*Vide Lely and Foulkes' Judicature Acts*, pp. 46, 47.)

Judgment for the plaintiff; leave to appeal refused.

Solicitors—H. F. Wood, agent for Berry & Robinson, Bradford, for plaintiff; Field, Roscoe & Co., agents for Taylor, Jeffery, & Little, Bradford, for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)
1878. }
Feb. 8. } FRENCH & SON v. NEWGASS & CO.*

Ship and Shipping—Charter-party—Warranty of Class—Cancellation of Certificate after Charter.

The plaintiffs chartered a ship to the defendants. The charter-party was headed, "A. 1½ on the record of the American and foreign shipping book," and in the body of the document she was described as "classed as above." At the time of chartering she was actually so classed, but afterwards and before loading she was found to have been wrongly classed, and her certificate of classification was cancelled. The defendants thereupon refused to load:—Held, that there had been no breach of warranty on the part of the plaintiffs, and that the defendants were bound to load in accordance with the charter.

In this case the plaintiffs were the owners of a ship called the *William Jackson*, which they chartered in 1875 to the defendants. At the time of the charter

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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the vessel was registered as "A. 1½" on the books of the American Lloyds or "Record of American and Foreign Shipping."

The charter-party was headed "A. 1½ Record of American and Foreign Shipping Book," and it was thereby agreed that the ship "newly classed as above," should sail to New Orleans and there take in a cargo of cotton, and when loaded, should proceed to Liverpool, or some port on the Continent between Havre and Hamburg, &c.

The vessel sailed for New Orleans accordingly, and arrived there on the 13th of November, 1876. While she was lying at New Orleans, and before she was loaded, she was officially examined and it was found that she had been improperly placed on the register, and on the 25th of November the certificate of the classification of the vessel was cancelled.

Thereupon the defendants refused to find a cargo unless certain improvements were made in the vessel, which the plaintiffs refused to make. Eventually this action was brought for loss of freight; and the defendants relied as a defence upon the cancellation of the certificate, which they treated as a breach of warranty on the part of the plaintiffs. They also set up a counter-claim for the loss sustained by them in providing another ship, and in warehousing and storing the cotton before shipment.

At the trial before Denman, J., judgment was entered for the plaintiffs; his Lordship holding that they had been guilty of no breach of warranty, and that the defendants were bound to perform their part of the contract.

From this decision the defendants now appealed.

Herschell and Spencer Butler, for the defendants.—The plaintiffs will rely on the case of *Hurst v. Osborne* (1). But that case is distinguishable. The vessel was prevented by weather from arriving at the port of loading, till her class had

run out; and Willes, J., observes that the contract speaks as at the time of the charter-party. The warranty here is not merely that the vessel is classified "A. 1½" at the date of the charter-party, but that it is validly and not voidably so classed. The object of the agreement is, that the shipper shall have a ship of a certain class to carry his goods, but here the defendant has not got what he bargained for. Another way of stating the warranty is, that the shipowner warrants that the ship is classed A. 1½, and will remain so classed till her class is determined by effluxion of time. If the vessel is not equal to her class, the association have a right to cancel her certificate until such alterations as may be necessary have been made in the vessel—*Clover v. Royden* (2), and if the vessel were detained for the purpose of such alterations, so as to frustrate the adventure, the charterer would have a right to refuse to load—*Jackson v. The Union Marine Insurance Company* (3). It may well be, therefore, that the true construction of the charter is, that it warrants the vessel to be rightly classed A. 1½.

Charles Russell and French, for the plaintiffs, were not called on to argue.

BRAMWELL, L.J.—I am of opinion that this judgment ought to be affirmed. It seems to me quite clear. I should think the statement in the charter-party is a warranty that the vessel is classed A. 1½ on the American Lloyds books at the time of the charter being made. It is clear that it is a warranty of some sort, and the question is, what is the warranty? Mr. Herschell, as I understand him, says that it is a warranty that the vessel is so classed, and will remain so classed till by effluxion of time her class is altered. Mr. Butler says it is that she is so classed, and rightly so classed. But I do not think either of those two constructions can be placed on the warranty. If we look at the reason of the thing we see that such a warranty cannot be expected; for the shipowner would be made

(2) 43 Law J. Rep. Chanc. 665; s. c. Law Rep. 17 Eq. 190.

(3) 44 Law J. Rep. C.P. 27; s. c. Law Rep. 10 C.P. 125.

(1) 18 Com. B. Rep. 144; s. c. 25 Law J. Rep. C.P. 209.

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liable in respect of facts of which he has no greater knowledge than the charterer. The shipowner has a vessel on the American register, and the charterer knows she is registered. But neither of them knows more than the other what are the rules of the society, and what steps they take for the purpose of putting a vessel on the register or taking it off. What then is the true expansion of the terms of this warranty? I think it is this:—"I, the shipowner, warrant that the American Association, having satisfied themselves by means they have thought fit to take, have registered the vessel as A. 1½, and she is now on the register as such; but I do not tell you that they may not change their mind, or that something new may not come to their knowledge which may make them think the ship ought not to be on the register."

How can you reasonably say that the shipowner undertakes that the association will not alter their mind, and take the ship off the register? It is impossible that we can hold that there is such an undertaking. Mr. Herschell's view of the warranty, that the registration will last during the time for which the ship is classed, cannot be the true one; for if so, even if the vessel was not rightly removed from the register, the charterer would be entitled to bring his action. Mr. Butler's definition of the warranty is neater, but it is wrong; for according to it the shipowner might be liable to an action even if the ship remained on the register.

It is an important matter, for if the defendants' contention is right, all policies on ship cargo and freight would be void, and one mischief of our holding in favour of Mr. Herschell would be that the consequences would be far more disastrous than if we decide the other way, for the shipper can protect himself by examining the ship, and so guard against losses.

There was another argument on the part of the defendants that I must notice, and that is, that if the plaintiffs are right the defendants suffer an injury for which they have no remedy. And Mr. Russell admits that damage might result, as the goods could not be insured on the same

terms. For that, says Mr. Herschell, there ought to be a right of action, and the plaintiffs would have their remedy against the American Association. Even if that were so, we must not misconstrue the warranty in the charter-party. But I do not think it is so, and I cannot see how an action could lie against the American association. Their regulations do not undertake to come to a right conclusion. They can only undertake to use due diligence, and whether it could be proved that they have not done so, I do not know. But even suppose it could, could the plaintiffs say to them, "You failed in your duty, you put my ship on the register as A. 1½ when you ought not, and I got a contract in consequence. Then you took it off, and I have consequently lost the contract." Surely the damage would be too remote if the plaintiffs put their complaint in that form. The mischief is as great to the one party as to the other. It was a misfortune to both that the ship was improperly put on the register, and that a charter-party was entered into in consequence.

But in my opinion the utmost warranty given by the plaintiffs was, that the ship was at the time of the warranty in fact on the register as A. 1½. Something has been said as to subsequent proceedings annulling the classification *ab initio*. But I cannot see how, except by special agreement or by legislation, cancelling should purport to mean, not, in fact, a cancellation, but, on the ground that the certificate never should have been issued, an annulling. As a fact, the ship was on the register at the time of the charter-party, and, as a fact, that is still true. You may provide by agreement that you shall act as if it had not been so, but you cannot by cancellation prevent it from having happened. The warranty is limited to the fact that the vessel was rated A. 1½ at the time of the charter-party, and that is all.

BRETT, L.J.—I am of the same opinion. The question is what is the true construction of this instrument. I quite admit that the construction which we adopt is attended with a certain amount of hardship; but so also would be the

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construction offered to our consideration by Mr. Herschell. We must apply the ordinary rules and principles of construction. This is a business instrument, and it is elliptical in its construction. It is headed "A. 1½ on the Register of the American and Foreign Shipping Book." According to the ordinary meaning of charters, that applies to the ship, and in the body of the charter the ship is said to be now classed as above, *i. e.*, now classed A. 1½ in the Register of the American and Foreign Shipping Book. There may be some doubt as to what that means, but clearly it only states a fact. It is, however, more than a mere statement. I am of opinion that it is a warranty, and that there is a condition which must be fulfilled before the plaintiffs can compel the defendants to accept the vessel. Now, there is a rule of construction that unless words are of a technical character they must be construed according to their ordinary and grammatical meaning; and there is another rule that you cannot, by any evidence, import into any contract anything contradictory or inconsistent with its terms. If the words are technical you may add to them by evidence of a custom not inconsistent with them. But if there is no evidence of any technical use or any custom to add anything to the words as they stand, the words must be construed according to their ordinary grammatical construction. In the present case the words are a simple statement of fact as to the actual registration of the vessel. The only argument in favour of the defendants which it is possible to use with any force, is the argument used in *Hurst v. Usborne* (1).

Mr. Herschell says it is a warranty, not only that the vessel is so classed, but will remain so classed according to her classification, *i. e.*, during the time for which she is so classed. But the fatal defect of that construction is that it adds words which are not in the document, having reference to the future; whereas the warranty is only a statement as to existing facts. The hardship which would result from such a construction is manifest. It has been shewn that such a warranty would have failed, supposing the classification to have been cancelled

without a shadow of an excuse. Mr. Butler saw that, and by the stress of the argument was induced to alter the construction and say that the warranty was that the ship was so classed and rightly so classed. But he thus adds to the words and adds to the meaning, and, as my Lord has pointed out, it is open to this objection, that it makes the shipowner warrant not only that the vessel is classed, but that the surveyor has made no mistake. We ought to stand by the words of the document, as there is no reason for departing from their ordinary sense, to hold that they amount merely to a warranty of an existing fact.

COTTON, L.J.—I am of opinion that this appeal must fail. We cannot enquire whether the plaintiffs would have a remedy over. Whether that is so or not, having regard to the terms of the contract, the question is whether it is either a warranty or a contract which has been broken, so as to justify the defendants in refusing to accept the vessel. This depends on the heading and four words in the body of the document, where it is said that the vessel is "newly classed as above." What then is the warranty? Except in the case of fraud (which does not arise here, and about which therefore I will not speak) does the contract amount to more than this, that at the time the contract is made the ship is of the description named, *i. e.*, A. 1½, and newly so classed? I think it does not. It could not be taken as a warranty that the ship would remain on the register, and Mr. Herschell did not put it exactly so, but gave two alternative constructions, the most plausible being that there was a warranty not only that the vessel was classed at the time, but that it would be so till, barring accidents, the class in due time was run off. But that cannot be taken as the true construction of the words, for it would include the case of the vessel being taken off the register by the wrongful act of the American association. If the defendants want to guard against any possible damage, such as has happened in this case, they should have provided for it by contract and agreement; but they cannot make up for the

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omission by referring to that which is a warranty of a fact as containing further stipulations.

Assuming, then, that the warranty is only that the vessel answers the description, and that the vessel is without fraud on the register, has the cancellation made a constructive breach of the warranty? Does it make the position of things as if the registration had never been made? It cannot, for the only warranty is as to what the fact then was, namely, that the ship was on the register. I do not think it can be said that the cancellation annuls the registration, even if it was rightfully cancelled, and clearly it does not if the cancellation was wrongful. No doubt there are cases where a Court of Equity cancels documents *ab initio*, that is to say, that no rights which have arisen under the document shall have their legal effect. But the Court could not cancel the existence of that which was a fact as between other parties who have acted upon it. In my opinion therefore we cannot import into this document the terms which Mr. Herschell asked us to import, and this judgment must be affirmed.

Judgment affirmed.

Solicitors—Smith, Williams & Quiggin, Liverpool, for plaintiffs; Haigh & Sons, Liverpool, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { STRAKER v. KIDD & COMPANY.
Mar. 8. { PORTEOUS AND OTHERS v. WATNEY
AND ANOTHER.

Ship and Shipping—Bill of Lading—Charter-party—Consignee prevented discharging Cargo within the Time by Default of other Consignees—Demurrage.

The defendants in two actions, who were indorsees of bills of lading for portions of cargoes of wheat, were sued by the respective shipowners for demurrage.

In the first action, the bill of lading contained the following stipulation: "Three working days to discharge the whole cargo, or 30*l.* sterling per day demurrage."

In the second action the charter-party under which the ship was chartered stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days' demurrage at 35*l.* day by day, and the bill of lading said, "paying freight for the same goods and all other conditions as per charter-party."

In both cases the defendants' portions of the cargoes were stowed at the bottom of the hold, and in consequence of the consignees of the upper portions not being ready to take delivery as soon as the ship was ready to discharge, they were unable to clear their portions till after the expiration of the lay days:—

Held, in both cases, that defendants were liable, on the ground that the stipulation in the bill of lading in the first case, and that in the charter-party (which was to be read into the bill of lading) in the second case, amounted to an absolute contract to pay demurrage if defendants failed to discharge the cargo within the time, unless prevented doing so by the default of the shipowner.

These two actions were tried before Lush, J., at the Guildhall during the last Hilary sittings, and judgment in both actions was reserved by him for further consideration.

In the first case, *Charles Russell* and *M^r Leod* appeared for the plaintiff; and

W. Williams and *J. O. Mathew*, for the defendants.

In the second case, *A. L. Smith* and *R. T. Reid*, for the plaintiffs; and

C. P. Butt and *J. O. Mathew*, for the defendants.

The facts and arguments appear sufficiently from the judgments which, after time taken to consider, were delivered on the 8th of March.

STRAKER v. KIDD AND COMPANY.

LUSH, J.—This is an action for two days' demurrage of the steamer *Charles Mitchell*, which had been chartered by Messrs. Gibson & Co. for the conveyance of a cargo of wheat from Dantzic to London. Eight bills of lading were given by the master, for various portions of the wheat shipped by the charterers, one of

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which had been indorsed to the defendants. Each of them contained the following clause: "Three working days to discharge the whole cargo, or 30% sterling per day demurrage." The vessel arrived on the morning of the 23rd of May, was reported at the Custom House at eleven o'clock, and was ready to discharge at noon of the same day. None of the consignees, however, were ready to receive delivery on that day, and the discharge did not commence till the morning of the 24th. One question raised at the trial was, whether the lay days commenced at noon on the 23rd or on the following day. In the view which I take of the contract, it becomes immaterial to decide this question.

It happened that the defendants' portion of the cargo, except a comparatively small quantity which lay in the bunker, and upon which no question arises, was part of a larger bulk stowed at the bottom of the hold, which belonged to the defendants, and to another consignee in given proportions. This bulk was not reached till between two and three o'clock on Saturday the 26th. The barges of the other consignee being alongside first, his portion of the bulk was first delivered, and the defendants, though their barges had been in readiness the whole day, were unable to get any part of their cargo till after five o'clock. The discharge was, therefore, only commenced that afternoon, and was not completed till the Monday, whereby the vessel lost two days' sail.

The defendants contended, that as they could not get their goods in time to clear the ship on that day, they were entitled to a reasonable time on the Monday to complete; that the default, if any, was that of the master who was unable, and, therefore, was not ready to deliver in time to enable them to discharge the ship within the lay days.

On the other hand, it was argued that the plaintiffs were always ready and willing to discharge the cargo, and that the risk of being prevented from getting their goods by the delay of other consignees is a risk which falls on the consignee, and not on the shipowner.

The first question is, what is the con-

tract which is implied by the acceptance of a bill of lading containing the stipulation in question. It cannot be said that the words have no meaning, or that they were not intended to be binding to some extent. For the obvious purpose of the shipowner in inserting them was to secure the payment of a stipulated sum per day for demurrage in case his ship should be detained in the process of unloading beyond three days. And the only meaning of which the words are fairly capable, is, that if the whole cargo is not discharged in three days, demurrage at the rate of 30% per day shall be paid. This is the alternative which the bill of lading presents, and which the consignee impliedly agrees to, by taking the benefit of it.

The objection urged against this rendering of the clause is undoubtedly striking. It virtually makes each holder of such a bill of lading answerable for the others, as well as for himself though he has no control over their acts.

But no other construction can be put upon the clause without doing violence to the words or introducing a qualification which destroys their force. If the words had been as the defendants contend they should be read, "Three days to discharge the goods in this bill of lading—" or demurrage," the defendants would have been in no better position; for these words must have been construed as an absolute contract to clear the goods within that time.

The argument on the part of the defendants requires the insertion of a proviso, making the liberty to demurrage conditional on their not being delayed by the acts or defaults of the other consignees. That would make it an entirely different contract, and defeat the obvious intention of the shipowner, which was to put pressure upon all the consignees and make it the interest of all of them to clear the ship within the stipulated period under the penalty of their having to pay 30% per day, leaving it to them to settle between themselves how, by whom and in what proportions the demurrage account should be paid.

It seems to me, therefore, impossible to construe this clause otherwise than as

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contract to pay the stipulated demurrage if the ship is not cleared within three days.

There is, of course, an implied condition that the shipowner shall be willing and ready to deliver. If he wrongfully refuses to give over the goods, or if by reason of any default of his, or of any obstacle for which he is responsible, the consignee is unable to get his goods, this would afford a good answer to the claim, and this is the substance of the defence which is pleaded.

Now, the only thing which prevented the delivery in the present case was the inability of the master to get at the goods, because they were stowed at the bottom of the hold, and because the owners of the superincumbent goods had neglected to take those goods away in proper time. Can this neglect of the other consignees be said to be the default of the master? If not, it is immaterial whose fault it was; for the defendants undertook that whether they were able to get away their goods or not, they would pay the demurrage if the ship was not cleared within the stipulated period, the contract being, as I have said, an absolute and not a conditional contract. The defendants are therefore liable unless they can shew that some act or default of the owner or of some one for whom he is responsible, prevented them from performing their contract.

Now it is clear that the master was not in default. He was ready and anxious to deliver. The leaving those goods in the ship which overlaid the defendants' goods was not his act, but was the act of third persons, not with his consent, but against his will. The case, therefore, falls within the principle laid down in *This v. Byers* (1), and the cases there cited, that when the vessel has arrived at the place of discharge and the master is ready to commence and complete the delivery, the lay days begin to run, and the consignee must bear the risk of any ordinary casualty or obstruction which might occur to interrupt the process of discharge.

(1) 46 Law J. Rep. Q.B. 511; s. c. Law Rep. 1 Q.B. Div. 244.

The cases on this particular point are but few, and they are conflicting. In *Leer v. Yates* (2) the Court of Common Pleas held, after taking time to consider, under a similar bill of lading, that the consignee was liable for demurrage, though he was prevented from getting his goods by the delay of other consignees whose goods lay above his. But Lord Tenterden in two subsequent cases, *Rogers v. Hunter* (3) and *Dobson v. Droop* (4), dissented from this doctrine, and directed the jury in a similar case, that if a consignee cannot get his goods because some other person's goods prevent him, he is not liable for the detention of the vessel. I do not find that this ruling was questioned by motion to the Court, nor do I find any subsequent decision on the point. *Leer v. Yates* (2) has, however, been repeatedly quoted as an authority, and is, I think, upon principle, a sound decision. Lord Tenterden's dictum describes the position of a consignee, whose bill of lading mentions no specific time for unloading, but it overlooks the nature and effect of such a stipulation as was contained in the bill of lading in those cases, and as is contained in the bill of lading now in question. My judgment is, therefore, for the plaintiff for two days' demurrage at 30l. per day and costs.

Judgment for the plaintiff.

PORTEOUS AND OTHERS v. WATNEY AND ANOTHER.

LUSH, J.—The circumstances under which the defendants in this case are sought to be made liable to demurrage, are precisely the same as those in the other case of *Straker v. Kidd*.

The only distinction between the two cases is in the form of the bill of lading.

In the present case the ship was chartered to convey a cargo of grain from Cronstadt to this country, and to be delivered here as directed by bills of lading.

The charter stipulated that fourteen working days were to be allowed for

(2) 3 Taunt. 387.

(3) Mood. & M. 68.

(4) Id. 441.

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loading and unloading at the port of discharge, and ten days' demurrage at 35*l.* day by day.

The bills of lading, one of which for a part of the cargo was indorsed to the defendants, contained the words, "paying freight for the same goods and all other conditions as per charter-party."

Seven days had been consumed at the port of loading, so that seven working days remained for unloading at the port of discharge.

It was argued that the words of reference in the bill of lading import into it only so much of the stipulation in the charter-party as applies to these particular goods; that is, that it gives the consignee such a proportion of the seven days for discharging them, as his part of the cargo bears to the whole. But this is not the natural meaning of the words, nor can it have been the intention of either party.

The object of the shipowner obviously was to place the consignees under the same obligation as to payment of demurrage as the charter imposed, and every consignee knows before he reads the charter that if lay days are provided for, they are given for discharging the whole cargo.

The bill of lading must therefore be read as if instead of the words referring to the charter-party, it had contained the entire stipulation expanded so as to be adapted to the facts. "Seven working days are to be allowed for unloading the ship at the port of discharge, also ten days on demurrage at 35*l.* day by day."

This puts the present case exactly in a parallel with that of *Straker v. Kidd*, and I therefore, for the reasons given in the judgment in that case, hold that the defendants are liable for the three days' demurrage claimed by the writ, making 105*l.*, and give judgment accordingly, with costs.

Judgment for the plaintiffs.

Solicitors—In *Straker v. Kidd*: Stocker & Jupp, for plaintiff; Hollams, Son & Coward, for defendant. In *Porteous v. Watney*: Plews & Irvine, for plaintiffs; Hollams, Son & Coward, for defendants.

[IN THE COURT OF APPEAL.]

1878. } HURDMAN v. THE NORTH-EASTERN
March 1. } RAILWAY COMPANY.*

Trespass to Land—Percolation of Water from Artificial Mound—Consequential Damage—Cause of Action.

The plaintiff's statement of claim alleged that the defendants deposited on their land and against a wall of the defendants, adjoining the house of the plaintiff, a large quantity of soil, clay, &c., thereby raising the surface of the defendants' land above that of the land on which the plaintiff's house was built; and that the plaintiff's house was consequently injured by the percolation of water through the defendants' wall:—Held, on demurrer, that the statement shewed a good cause of action.

Appeal from a judgment of Manisty, J. in favour of the plaintiff, on demurrer to a statement of claim.

Statement of claim:—

1. At the time of the damage hereafter mentioned, the plaintiff was and is still possessed of a house, No. 16, Lodge Terrace, Sunderland.

2. The defendants then were, and still are, possessed of a certain close of land adjoining the house of the plaintiff.

3. The defendants placed and deposited in and upon the close of the defendants and upon and against a wall of the defendants which adjoins and abuts against the house of the plaintiff large quantities of soil, clay, limestone and other refuse close to and adjoining the house of the plaintiff, and thereby raised the surface of the defendants' land above the level of the land upon which the plaintiff's house was built.

4. The rain which fell upon the soil, clay, limestone, and other refuse, so placed as aforesaid, oozed and percolated through the wall of the defendants into the house of the plaintiff, and the plaintiff's house thereby became wet, damp, unwholesome and unhealthy, and less commodious for habitation.

5. By reason of the acts of the defendants

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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dants the walls of the house of the plaintiff became and were very much injured, and the paper upon the walls has been destroyed.

6. In the alternative the plaintiff alleges that the defendants negligently and improperly placed and deposited the soil, clay, limestone and refuse, upon the plaintiff's land, and that the rain water falling thereon oozed and percolated through and into the plaintiff's house, whereby the plaintiff's house was damaged as before mentioned.

7. In the alternative the plaintiff alleges that the defendants were guilty of negligence in this, that the wall of the defendants against which the defendants so placed the soil, clay, limestone and other refuse, was not sufficiently and properly constructed and built so as to prevent the water falling upon the soil, clay, limestone and refuse from oozing and percolating through the wall and into the plaintiff's house, and that the defendants were guilty of negligence in placing the soil, clay, limestone and refuse, against the wall, being so insufficient to prevent the water falling upon the soil, clay, limestone and refuse from percolating through and into the plaintiff's house, whereby the plaintiff's house was damaged.

The defendants demurred to the claim, on the ground that the acts, matters and things alleged to have been done by the defendants, do not give rise to any cause of action on the part of the plaintiff.

The demurrer came on for argument before Manisty, J., who gave judgment for the plaintiff.

From this decision the defendants now appealed.

Herschell and Gainsford Bruce, in support of the demurrer.—The statement of claim shews no cause of action. What has been done by the defendants has been done on their own land, and has caused their own wall to be damp. The plaintiff has built his house against our wall, and complains because it is injured by the proximity. But there is no duty on us to keep our wall dry for the benefit of the plaintiff. He need not have built his

house there. Suppose there had been no house, he could not complain.

[BRAMWELL, L.J.—Except on the principle of the case where the drippings from the defendant's roof injured the plaintiff's land, and the defendant was held liable.]

That is the principle laid down in *Rylands v. Fletcher* (1). But that case has no application here. There is no collection of water here, no "wild beast," as it has been called. The damage done here is entirely owing to natural gravitation and percolation, for which the defendants are not liable. In *Wilson v. Waddell* (2) Lord Blackburn holds such damage to be "*damnum absque injuria*," and he cites and distinguishes *Smith v. Fletcher* (3) and *Orompton v. Lea* (4) where the diversion was of a defined stream of water. The user of the land by the defendants in this case is as much a natural user of the land as mining. In one case the level is raised; in the other, depressed.

As to the 7th paragraph in the statement of claim, the allegation of negligence makes no difference. If there is no duty, the defendants are not liable—*Gautret v. Egerton* (5), *Brine v. The Great Western Railway Company* (6). *Smith v. Kenrick* (7), is a leading authority in the defendants' favour, and so are all the mining cases. If the plaintiff's contention were right, no one could build a high wall on the edge of his land for fear of keeping off the rain, or wetting the ground of his neighbour by too much rain trickling down. But even if the defendants had

(1) 37 Law J. Rep. Exch. 161; s. c. Law Rep. 3 H.L. 330.

(2) Law Rep. 2 App. Cas. 95.

(3) 41 Law J. Rep. Exch. 193; s. c. Law Rep. 7 Exch. 305; on appeal 43 Law J. Rep. Exch. 70; s. c. Law Rep. 9 Exch. 64.

(4) 44 Law J. Rep. Chanc. 69; s. c. Law Rep. 19 Eq. 115.

(5) 36 Law J. Rep. C.P. 191; s. c. Law Rep. 2 C.P. 371.

(6) 2 B. & S. 402; s. c. 31 Law J. Rep. Q.B. 101.

(7) 7 Com. B. Rep. 515; s. c. 18 Law J. Rep. C.P. 172.

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collected the water, they would not be liable for the result of "vis major"—*Nichols v. Marsland* (8).

Waddy and J. Edge, for the plaintiff.—Neither *Wilson v. Waddell* (2) nor *Gautret v. Egerton* (5) have any application here. The latter case is that of a man who comes on another man's land uninvited, and is injured. *Crompton v. Lea* (4) explains the mining cases, and shews that they have no application. The plaintiff's complaint is that the defendants have made an artificial construction on their own land, by which they have damaged the plaintiff. They are, therefore, liable—see per Gibbs, C.J., in *Sutton v. Clark* (9), and see *Broder v. Saillard* (10). In that case the Master of the Rolls held the defendant liable for damage done to the plaintiff's premises by water collected in a mass of made earth placed near the plaintiff's premises by the defendant. He says, "An artificial work, a work made by man, is a work which, if it causes a nuisance, is a thing for which the owner of the land is responsible." This is an "artificial work made by man," and is not like mining, which is the natural use of the soil. The defendants have, in fact, imposed a new servitude upon the plaintiff's land, and given it a greater amount of water to carry off than before. This being done by a non-natural use of the land, is a wrong for which the defendants are liable—per the Lord Chancellor (Cairns) in *Rylands v. Fletcher* (1) at p. 164. *Chasemore v. Richards* (11), proceeds on the ground that no man has an interest in subterraneous waters flowing in no known channel, but that principle does not entitle the defendants to cast on the plaintiff a servitude which he had not before—*Gale on Easements*, pp. 402, 403, note; *Baird v. Williamson* (12).

(8) 44 Law J. Rep. Exch. 134; s. c. Law Rep. 10 Exch. 265.

(9) 6 Taunt. at p. 44.

(10) 45 Law J. Rep. Chanc. 414; s. c. Law Rep. 2 Chanc. Div. 692.

(11) 7 H.L. Cas. 349; s. c. 29 Law J. Rep. Exch. 81.

(12) 15 Com. B. Rep. N.S. 376; s. c. 33 Law J. Rep. C.P. 101.

They also cited *Orump v. Lambert* (13); *Tenant v. Goldwin* (14); *Cracknell v. The Mayor of Thetford* (15).

Our. adv. vult.

The judgment of the Court was (on March 1) delivered by—

COTTON, L.J.—In this case the plaintiff has brought an action for injury alleged to have been caused to his house, which abuts on a wall of the defendants, by certain acts done by the defendants on their own land. The question is raised on demurrer to the statement of claim, and the question, therefore, is whether that alleges a good cause of action. [His Lordship then read the statement of claim except paragraph 7, and proceeded.] It is unnecessary to read the 7th paragraph, because it is based on a supposed obligation of the railway company to make their wall water-tight, but in our opinion there is no such obligation, and if the statements contained in the preceding paragraphs do not shew a cause of action, the statements of the paragraph which has not been read do not enable the plaintiff to sustain this action.

For the purposes of our decision we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is, that rain-water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of. The question is, are the defendants, admitting this statement to be true, liable to the plaintiff? and we are of opinion that they are. The heap or mound on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an

(13) Law Rep. 3 Eq. 409.

(14) 2 Lord Raym. 1089; s. c. 1 Salk. 360.

(15) 38 Law J. Rep. C.P. 353; s. c. Law Rep. 4 C.P. 629.

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occupier of land may protect himself by action against any one who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if anyone by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the late case of *Broder v. Sailard* (10). I have limited this statement of liability, to liability for allowing things in themselves offensive to pass into a neighbour's property, and for causing by artificial means things in themselves inoffensive to pass into a neighbour's property to the prejudice of his enjoyment thereof, because there are many things which, when done on a man's own land (as building so as to interfere with the prospect, or so as to obstruct lights not ancient), are not actionable, even though they interfere with a neighbour's enjoyment of his property.

But it is urged that this is at variance with the decision that if, in consequence of a mine owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mine owner cannot maintain any action for the loss which he thereby sustained. But excavating and raising the minerals is considered the natural use of mineral land; and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land; and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled) is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour

of his land. That this is the principle of these cases appears from the case of *Wilson v. Waddell* (2), and from what is said by the Lord Chancellor in *Rylands v. Fletcher* (1). Moreover, the cases referred to have laid down that a mine owner is exempt from liability for water which, in consequence of his works, flows by gravitation into an adjoining mine, only if his works are carried on with skill and in the usual manner, and in the present case it is stated that the defendants have conducted the operation negligently and improperly. The decisions, therefore, as regards the rights of adjoining mine owners do not enable the defendants to discharge themselves from liability.

It was also argued that a landowner, who by operations on his own land, drains the water percolating underground in the property of his neighbour, is not liable to an action by the man whose land is thus deprived of its natural moisture; and this it was argued was inconsistent with a judgment for the plaintiff on a statement alleging as a cause of action an alteration in the percolation of water. It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognises his title; and the law does not recognise any title in a landowner to water percolating through his property underground, and in no definite channel.

We are of opinion that the maxim "*sic utere tuo ut alienum non lædas*," applies to and governs the present case; and that as the plaintiff by his statement of claim alleges that the defendants have, by artificial erections on their land, caused water to flow into the plaintiff's land in a manner in which it would not but for such erection have done, the defendants are answerable for the injury caused thereby to the plaintiff.

Judgment affirmed.

Solicitors—Wright & Pilley, agents for Tilley, Sunderland, for plaintiff; Williamson, Hill & Co., agents for Richardson, Gutch & Co., York, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878.
Feb. 22, 23. { SWAINSON v. THE NORTH
EASTERN RAILWAY COM-
PANY.*

Master and Servant—Liability of Master for Negligence of Servant—Common Employment—Railway Company—Joint Operations of Two Companies.

At Leeds there are two railway stations adjoining one another, one belonging to the Great Northern Railway Company and the other to the North Eastern Railway Company. Part of the lines running into the two stations are used in common by the two companies for the interchange of traffic between the two lines. This part is under the management of a "joint station staff" in the employment of the Great Northern Railway Company. Half of the wages of the joint station staff is paid by the North Eastern to the Great Northern Railway Company.

While S., a signalman on that staff, was employed in his ordinary duties he was struck and killed by a passing engine of the North Eastern Railway Company, which at the time he was not engaged in signalling, through the negligence of the driver.

In an action against the North Eastern Railway Company by the widow of S., under Lord Campbell's Act,—Held (reversing the decision of the Exchequer Division) that the deceased was not, at the time of his death, engaged in a common employment or service with the engine driver so as to take away the liability of the defendants for the negligence of their servant; and that the plaintiff was entitled to recover.

This was an appeal from a decision of the Exchequer Division. The action was brought against the railway company by the widow of Thomas Swainson, a signalman, to recover damages under Lord Campbell's Act, for the death of her husband, who was killed through the negligence of an engine driver in the service of the defendants, under the following circumstances:—At Leeds there are two railway stations adjoining each

other, one belonging to the Great Northern Railway Company, the other to the North Eastern.

Part of the lines outside the two stations were used in common by both companies for the interchange of traffic between the two lines, and the signals and points governing such lines were worked by a "joint-station" staff, of whom the deceased was one. The joint-station staff were engaged and paid by the Great Northern Railway Company, whose uniform they wore. The pay-sheet signed by the deceased when he received his wages was headed "The Great Northern Railway Traffic Department Pay Bill. Joint-Station Staff." The North Eastern Company, however, allowed the Great Northern half the salaries of the joint-station staff, in account between the two companies. On the 7th of May, 1875, Swainson was engaged on the joint lines of the two companies, and was standing on the six-foot space between the Great Northern and North Eastern departure lines.

A North Eastern engine came towards the station on the Great Northern arrival line, with some Great Northern coal-trucks, and was signalled by Swainson to the North Eastern departure line. The engine driver, having taken the trucks to the North Eastern station, came back again by the North Eastern departure line of rails without giving proper notice; the deceased was struck by the step of a van attached to the engine, knocked down and killed.

*The case came on for trial before Quain, J., in the Middlesex Trinity Sitings in 1876. The jury, in answer to questions by his Lordship, found that there had been negligence on the part of the driver of the defendants' engine, and no contributory negligence on the part of Swainson. On these findings a verdict was entered for the plaintiff for 600*l*.*

Afterwards the defendants moved the Exchequer Division to set aside the verdict and enter judgment for the defendants, on the ground that the engine driver and the deceased were, at the time of the death, engaged in a common employment for the benefit of the North Eastern Railway, and that the risk which

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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resulted in Swainson's death was incidental to that employment, and therefore the defendants were not liable. They also moved to set aside the verdict as against the weight of evidence.

The Exchequer Division refused to disturb the verdict as being against the weight of evidence; but gave judgment for the defendants on the ground that, on the facts proved, Swainson was servant to both companies, who *quoad* his service were partners, and that the case was governed by the principle that where there is a common employment in a common service the master is not liable. Against this decision the plaintiff appealed, and the defendants gave notice of cross-appeal on the question of the evidence.

Benjamin (Willis and T. L. Wilkinson with him), for the plaintiff.—There was no common employment here. The judgment in the Court below proceeded on the ground that the deceased was one of a joint staff. But that is not so. It is not a "joint staff," but the staff of the "joint station," employed by the Great Northern Railway Company. *Bourke v. The White Moss Colliery Company* (1) is a different case; there was a common service, for both deceased and the man who killed him were acting as servants of the contractor. All the relations of master and servant depend upon contract, and the master's exemption from liability is based on the hypothesis that the servant undertakes the risks incidental to the employment, and that the master shall not be liable for the result of those risks. The distinction between the liability of a master for the acts of his servants, as regards the general public, and as regards those in his employment, is pointed out by Lord Cairns in the case of *Wilson v. Merry* (2). At page 331, his Lordship cites the opinion of Lord Cranworth in *The Bartonshill Coal Company v. Reid* (3). Those cases put the law in its strongest light against the liability of the master. The case of an actual fellow-servant is

not the only one in which the master is exempt; but there must be a common employment, for the exemption depends on the knowledge of the employed of the risks attending the employment. The law was rightly stated in the Court below, but a wrong view was taken of the facts. The deceased and the man who killed him were at work for different employers and for different purposes at the time when the accident happened.

Charles Russell and Crompton, for the defendants.—"Common employment" is too narrow a basis on which to found the master's exemption. It is enough if the injured and the injurer were members of a common establishment, nor does the non-liability depend on contract entirely. *Wilson v. Merry* (2) puts it a good deal higher. The original doctrine, as laid down in *Wiggitt v. Fox* (4), is much extended by *Morgan v. The Vale of Neath Railway Company* (5), where the injured man and the injurer were not engaged in the same work. See also the judgment of Shaw, C.J., in *Farwell v. The Boston Railway Corporation* (6). *Warburton v. The Great Western Railway Company* (7) was a stronger case than the present. There the employment of the two men was quite distinct; but in this case, though the two men may have been under different masters, yet they were members of one establishment doing common work, and therefore the railway company is not liable. *Murray v. Currie* (8) (the stevedore's case), *Rourke v. The White Moss Colliery Company* (1), *Degg v. The Midland Railway Company* (9), where a volunteer was injured, and *Southcote v. Stanley* (10) are all in point. If it can be shewn that the deceased,

(4) 11 Exch. Rep. 332; s. c. 25 Law J. Rep. Exch. 188.

(5) 5 B. & S. 736; s. c. 33 Law J. Rep. Q.B. 260; in Exch. Ch. 35 Law J. Rep. Q.B. 23; s. c. Law Rep. 1 Q.B. 149.

(6) 4 Metcalfe, 49.

(7) 36 Law J. Rep. Exch. 9; s. c. Law Rep. 2 Exch. 30.

(8) 40 Law J. Rep. C.P. 26; s. c. Law Rep. 6 C.P. 24.

(9) 1 Hurl. & N. 773; s. c. 26 Law J. Rep. Exch. 171.

(10) 1 Hurl. & N. 247; s. c. 25 Law J. Rep. Exch. 339.

(1) 46 Law J. Rep. C.P. 283; s. c. Law Rep. 1 C.P. Div. 556; s. c. Law Rep. 2 C.P. Div. 205.

(2) Law Rep. 1 Sc. App. 326.

(3) 3 Macq. H.L. 282.

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though employed by the Great Northern Railway Company, adopted terms of service which included service to the North Eastern Railway Company, and involved joint operation between the servants of the two companies, the servants are *colaborateurs* within the rule laid down in *Wilson v. Merry* (2), and the defendants are not liable. That this state of things existed is amply proved by the evidence.

[They also contended that there was no evidence for the jury of negligence on the part of the engine driver.]

Willis in reply.—There is ample evidence of negligence. [He was stopped on that point by the Court.]

Even assuming (which the plaintiff does not admit) that the deceased was jointly in the service of the two companies, yet the circumstances which led to his death were quite outside the service for which he had contracted. He had ceased to be in any way connected with the management of the engine which killed him, or with the act of its driver. There must be a real community of service, and there must be an actual agreement to accept the risk. None of the cases are inconsistent with this view, and *Wilson v. Merry* (2), which does not really involve the relation of fellow-servant at all, does not extend the exception in favour of the master; with regard to which the true principle is to be found in *Morgan v. The Vale of Neath Railway Company* (5) and *Hutchinson v. The York, Berwick and Newcastle Railway Company* (11).

Cur. adv. vult.

The next day (Feb. 23) the following judgments were delivered:—

BRAMWELL, L.J.—I am of opinion that this appeal should be allowed, and really on the reasoning of the Court below. With great respect, I think that the judgment of Baron Pollock was the result of a misconception of the facts. Now the question in this case may be put this way. A man is, as a general rule, liable for damage caused to a stranger by the negligence of his ser-

vant when the servant is acting within the scope of his authority. I am not going to attempt to justify the distinction between the case of a stranger and that of a servant, for, beyond all question, it exists as a principle of law. The reason of the distinction may be taken to be that a stranger has no voice in the choosing of the servant, nor any choice as to whether he will in any way be brought into contact with him. Then if he is run down in the street by the servant with whom he has nothing to do and no acquaintance whatever, it is a good rule that the master should, in all such cases, be liable for the act of the servant. But when a relation is established between the person injured and the master of the person who does the injury, the case is different, and we must see what rights and liabilities they have mutually assumed or contracted. The rule is not limited to servants. We may also take the case of guests who cannot sue the master of the house for injuries done by his servants, for there is a relation established between them which prevents it. So in the case of a fellow-servant, a relation subsists between the servant who does the injury and the person injured, and we must see what obligations that person has brought himself under.

The rule is usually stated thus: that the servant undertakes the risks of his employment, including the risk of injury by the negligence of his fellow-servant. I do not quarrel with that statement of the rule; but it has been quarrelled with, and I do not see why, to avoid alleging it in the form of a contract, we may not say that he has not stipulated that his master shall be liable for the negligence of his fellow-servants. I cannot see that there is any material difference between the two ways of stating the proposition. In all cases it is necessary to see if a relation has been established between the person who complains and the master of the person who did the injury. And that seems to be the opinion of Baron Pollock in the Court below, for he says, "Whether the relation of *Swainson* to the defendants was such that this action cannot be maintained against them is a question the solution of which is more

(11) 5 Exch. Rep. 343; s. c. 19 Law J. Rep. Exch. 296.

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difficult, and requires a careful consideration, both of the facts proved and of the law properly applicable to them. It will be well, in the first place, to see what is the principle affecting this case which can be gathered from authority. Up to a certain point this is clear, that wherever the person injured, and he by whose negligent act the injury is occasioned, are engaged in a common employment in the service of the same master, no action will lie against the master if he be innocent of any personal negligence. The negligence of a fellow-servant is taken to be one of the risks which, as between himself and his master, he undertakes when he enters into the service."

Then in considering the facts, he says, "The deceased man, Swainson, though engaged by the Great Northern Company and wearing their uniform, was one of a joint staff, and for four years had received his weekly wages as such, and he was, therefore, practically in the service of the two companies, who, *quoad* his service and employment, were partners.

"Referring to the duties of Swainson, and the very acts on which he was engaged at the time of his death, the evidence shews that they were not performed by him as servant of or for the benefit of one company only, but were essentially necessary for the common business of both, namely, the interchange of traffic between the two stations. The case, therefore, falls within, and is governed by the principle that when there is common employment in common service the master is not liable."

I cannot take that view of the facts. It seems to me that the deceased was in no sense the servant of the North Eastern Railway Company. He was not engaged by them. He received no part of his wages from them; they could not discharge him; they could give him no orders, except by the authority of the Great Northern Railway Company, so that such orders would be in point of fact the orders of the Great Northern. To put another illustration. A master is bound not to employ dangerous, because incompetent, persons or machinery in a defective and dangerous state. Suppose

the North Eastern Railway had employed a dangerous engine or a dangerous driver. Could Swainson have brought an action for breach of contract on that account? It seems to me that he could not. The defendants could have said, We never entered into any agreement of that kind with you. It is certainly a strange thing, but it would seem that if the two companies were to agree together to enter into partnership with regard to the business carried on at the joint station, and arrange that the servants shall be joint servants of both companies, then neither company would be liable for the injuries done to their servants in a case like this. But in that case it may be observed that by way of compensation the servants would have some one else besides the Great Northern Railway Company to look to for their wages; and though the advantage may not be very great, we cannot decide on different principles from those on which we should decide if, instead of two great companies, the employers were two very small people, and in such a case no doubt the joint servants would have a right to complain, if either company in the partnership business employed an incompetent servant or a dangerous engine.

But the companies in this case have done nothing of the kind; and I am of opinion that the plaintiff was not in any sort the servant of the North Eastern Railway Company, and not in any sort the fellow-servant of the engine-driver. It has occurred to me that if the accident had happened while the plaintiff was engaged in doing work for the North Eastern Company, by turning their engine into the Great Northern Station, it might be said the two men were in a common employment under the Great Northern Railway Company; that the driver was put into the employment either as a lent servant or as a volunteer; that both were therefore in the position of servants working for the Great Northern Railway Company as a common master, and therefore the defendants were not liable.

But I think that would not be a well-founded argument. Such a case would be like the one (I forget the name of it)

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in which a carman goes to receive delivery of sacks, and by the negligence of the warehouse servants a sack is dropped on the man's head (12).

In such a case it was held, and I think rightly held, that an action could be maintained against the wharfinger for the negligence, although in some sense the injured man and the man who did the injury were engaged in a common occupation; for in reality one man was only receiving the sacks and the other delivering them, and therefore the common occupation was no answer to the action. But here that question does not arise, for what really happened was this: the North Eastern engine had finished the joint part of the work, and had gone back to the North Eastern premises, and had remained there for a definite time, and might have remained there for any length of time without altering the case, and then came back along its own line, and did the mischief. If that is so, the case I have put does not arise, and I think this judgment should be reversed. I adopt Baron Pollock's view of the law, but I differ as to facts. The only way the master can defend the action is by shewing a relation between himself and the person injured, such as the defendants have not been able to shew here.

BRETT, L.J.—I am of the same opinion. As to the original rule which makes the master not liable for the negligence of his servants, which causes injury to their fellow-servants, I have given my opinion of the state of the law elsewhere; and we are not entitled to enter upon those considerations here. As to the rule, or exception to the rule, whichever it may be properly called, the great mass of authorities say that it arises in the case of master and servant (though it exists in another class of cases also) out of an implied contract—that it is a stipulation implied in the contract of service. But I am of opinion that the plaintiff is entitled to recover, because the deceased was not in a common service with the person who injured him, and was not at

the time of the accident in a common employment, nor was he at that time taking part in any joint operation.

After considering the cases, we assent to the proposition which was laid down correctly (or nearly so) by Baron Pollock.

In all the cases there is a common employment, and work done in common by servants under a common master. The cases shew that both those conditions, or something equivalent to both, is necessary to raise the exception to the general rule of liability. We cannot say that the common service required is necessarily a common service arising out of a binding contract to serve for a definite time, or on which the complainant is to receive wages; for there are cases of volunteers, and other cases in which there is certainly no contract and no payment in virtue of one.

But when the volunteer cases are looked at, it will be found that they are all cases of volunteering to serve; in which the complainant put himself voluntarily under the control and order of the defendant as his master; therefore, though not a paid servant, by his voluntary act he puts the defendant in possession of his services, and makes him unsuable so long as he chooses to remain under such orders and control, and so becomes a servant of the defendant.

Mr. Russell did not deny the doctrine, but puts it in another form. He says, "If it can be shewn that Swainson, though employed by the Great Northern Railway Company, adopted terms of service which included service to the North Eastern Railway Company, and involved joint operations by the servants of the two companies, the servants are *collaborateurs* within the rule laid down in *Wilson v. Merry* (2)."

Well, I agree with that statement of the law, if the meaning is given to the words, "adopted terms of service," which I attach to them. If the phrase is enlarged by adding "such as placed him under the orders of the defendant," I think the rule would do. And the question is, Did Swainson bring himself into that position?

It cannot be said that he is by con-

(12) See *Abraham v. Reynolds*, 5 Hurl. & N. 143.

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tract a servant of the North Eastern Railway Company; but it is suggested that with regard to the joint station, the North Eastern and the Great Northern Railway Company were practically partners. I cannot gather that from the facts. The Great Northern Railway Company did all the work. It is true that there was a payment to them by the North Eastern Railway Company in respect of work done by their servants. But nothing has been shewn to exist which is evidence to constitute the two companies partners.

Swainson therefore was employed by the Great Northern Railway Company alone. The contract of service was with them alone, and therefore he was not by contract the servant of the North Eastern Railway Company, but solely of the Great Northern Railway Company.

Then did he adopt terms of service, including service to the North Eastern Railway Company, so as to put him under their orders? I doubt whether he did as to any part of the work that he undertook; but there might be a question, if it were properly raised, whether he might be considered to have done so in so far as he was engaged in moving the engines and trains from one set of rails to the other. It might have been worth consideration whether he was under the orders of the two companies for the joint operation. But at all events we cannot say that he was under their orders further than with respect to such joint operations, and I doubt whether he was so even as to them. The question is, What was the state of things when the accident happened? The train had been taken from the North Eastern line, and left on the Great Northern, and the engine had been again transferred to the North Eastern. It had gone off the Great Northern line, and there was no immediate intention that it should return. The joint operation had therefore ceased. I can't say I think that Swainson had anything to do with the management of the engine; but if there was a joint operation, it had ceased when the engine got back to the North Eastern line from the Great Northern; and the engine being on the North

Eastern line with no intention of coming back, the engine-driver was solely a servant of the North Eastern Railway Company, and the engine was being employed solely on that line under a servant of the company. At the same time the plaintiff was engaged on duties to the Great Northern Railway Company, and not in any respect assuming to act under the North Eastern Railway Company. It seems to me that Swainson was solely in the service of the Great Northern Railway Company, and the engine-driver solely in the service of the North Eastern Railway Company, and the two men as to their employment and services were strangers to one another. It follows that the North Eastern Railway Company are liable for the injury caused by their servant to the plaintiff, who is entitled to our judgment.

COTTON, L.J.—I agree that this judgment should be reversed. The jury have found that the driver of the engine was guilty of negligence, and he was a servant of the defendant company; and therefore, according to a well-established rule, if Swainson was a stranger to the North Eastern Railway Company, the defendants are answerable for the negligence of their servant, for the act of an agent is the act of the principal, so far as liability is concerned. But there is a different rule as to any one injured by the negligence of a servant if he is himself in certain relations with the master. It is a well-established rule that when one member of an establishment is injured by another, he cannot make the head of the establishment liable, or treat the act of the servant as the act of the master. The servants are answerable the one to the other, but the principal is not liable. It is not necessary to say how the rule arises; probably it is based on an implied contract, but it is not necessary even that there should be an actual contract of service between the injured person and the person who by his servant has caused the injury. If the injured man is a volunteer, and is acting as a servant when injured, it is well established that he cannot recover against the head of the establishment; but then

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he puts himself in the same position as if he were actually a servant, and there is the same implied contract, because he has put himself in the same relation. That is the doctrine laid down in *Deggs's Case* (9). The counsel for the defendant and the Judge in the Court below based their view on the ground that the deceased was in some sort the servant of the defendant company. Is that really made out? I think not. He was not performing any service for the North Eastern Railway Company. It might have been more plausibly said that both were acting as servants of the Great Northern, but then they would not have been in the service of the North Eastern, and it has been clearly shewn that that state of things was entirely at an end, for the engine had been finally sent back to the North Eastern line. Can it then be made out that Swainson was in any sense in the service of the North Eastern Railway Company? The line on which he worked belonged to both companies, but was under the control of servants of the Great Northern. It was worked for the benefit of both companies by the Great Northern, who allowed the North Eastern trains to come in, and shunted them from one line to the other. Swainson certainly was engaged by the Great Northern Railway Company. The pay sheet shews that he was one of the joint station staff. That is an ambiguous expression. But the North Eastern Company could make no alteration in his duties. They had no power to dismiss him, and he had no rights against the North Eastern. He was the servant of the Great Northern—he was under their orders, except so far as while engaged in bringing in the traffic of the North Eastern he would probably attend to any suggestion they might make with regard to that work. He was liable to be dismissed by the Great Northern, and therefore in all respects, as far as his contract was concerned, he was a servant of the Great Northern; and the fact that he was engaged for certain joint purposes does not make him a servant of the North Eastern. But it is said the North Eastern paid half his wages. That however is not the case—they paid him

nothing; but one-half of his wages was repaid by them to the Great Northern—in this way, that they repaid half the expenses of the joint traffic, which included one-half of his wages; and while thus employed he had no claim against the North Eastern. I am of opinion therefore that the Court below came to a wrong conclusion as to the relation between Swainson and the defendants. With their exposition of the law I entirely agree, but I differ from them in regard to the facts. I am therefore of opinion that this judgment should be reversed.

Judgment for the plaintiff.

Solicitors—Elgood, for plaintiff; Williamson, Hill and Co., agents for Richardson & Gutch, York, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1877. }
Dec. 6. }

Re HENRY CHALKER.

Acknowledgment by Married Woman—3 & 4 Will. 4. c. 74. s. 85—Delay in filing Certificate.

Upon its appearing that a deed had been duly and properly acknowledged by a married woman before a Commissioner, under 3 & 4 Will. 4. c. 74, the Court allowed the certificate of such acknowledgment to be filed, although such certificate was not made and signed by the Commissioner until upwards of twenty years after the deed had been acknowledged.

F. M. White obtained an order of the Court that the certificate of the acknowledgment of a certain deed, dated the 24th of June, 1857, by Ann Chalker, a married woman, with the affidavit verifying the same, might be received and filed by the proper officer within one week after notice to the heir at law, if the heir at law did not apply to rescind such order.

The deed, which was the post-nuptial settlement of certain freehold lands by

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Ann, the wife of Henry Chalker, was duly acknowledged by her on the 30th of June, 1857, before John Slade and Edwin Newman, two of the Commissioners appointed for taking the acknowledgments of deeds by married women. No certificate of such acknowledgment was prepared and signed at the time, and the said Ann Chalker died in November, 1873. There had been no child of the marriage, and her husband, the said Henry Chalker, having in 1876 contracted to sell the property, it was then for the first time discovered that no certificate of the acknowledgment had been filed. The heir at law refused to concur in the conveyance, and brought an action of ejectment. Since then the Commissioners who had taken the acknowledgment, signed a certificate of such acknowledgment, and the order which had been obtained by *F. M. White*, was an order for the filing of this certificate, with the usual affidavit of verification. It was obtained on the authority of *In re Hannah Packer* (1).

Petheram, for the heir at law, now applied to rescind such order.—If instead of there having been no certificate there had been a certificate which had afterwards been lost before it had been filed, the case of *In re a Married Woman* (2) is an authority that the Court would not make an order for the giving of a fresh certificate. The 84th section of 3 & 4 Will. 4. c. 74, requires the Commissioners when the deed is acknowledged by the married woman to sign a memorandum thereof, and also to sign a certificate of the taking of such acknowledgment. That points to the time when the acknowledgment is made, and rule 6 of Hilary Term, 1834, limits the time for delivering the same to be filed, to one month after the acknowledgment has been made, except with the direction and the authority of the Court. The enactment evidently means, therefore, that the certificate should be given when the acknow-

ledgment is made, and not afterwards. Here the certificate which it is sought to have filed, has only lately been given for the purpose of this application, and upwards of twenty years after the acknowledgment was made. That is entirely contrary to the intention of the Act. The case of *In re Hannah Packer* (1) is very different, for there the certificate was signed by the Commissioners in the proper way at the time when the deed was acknowledged.

F. M. White, contra.—The order which has been made ought not to be disturbed. It has never been held that the certificate should be signed at the time when the acknowledgment is made. The essence of the transaction is the examination of the married woman by the Judge or Commissioners, and the due making of the acknowledgment by her of the deed. The certificate and the affidavit are merely matters provided by the statute for the recording of what is required for the proper making of the acknowledgment, and there is nothing in the statute prescribing when these must be done. The time as to filing the certificate and affidavit is only limited by the rules, not by the statute. In the case of *In re Hannah Packer* (1) the Commissioners before whom the deed had been acknowledged were dead when the certificate was allowed to be filed, and the affidavit verifying it, therefore, could not strictly be made as required by the rules, but the Court made the order for allowing the certificate to be filed, and they pointed out the distinction between strictly complying with the rules and the statute. So in *Re Warne* (3) the Court allowed the certificate to be filed after a lapse of thirteen years upon an affidavit by the surviving Commissioner, stating that it had always been his practice, and as he believed that of his co-commissioner, to make all requisite enquiries of the married woman before taking the acknowledgment, and that from the circumstances of his having signed the certificate and memorandum, he verily believed that all proper enquiries had been made on that occasion, though from the lapse of time

(1) 39 Law J. Rep. C.P. 238; s. c. Law Rep. 5 C.P. 424.

(2) 36 Law J. Rep. C.P. 233; s. c. Law Rep. 2 C.P. 510.

(3) 15 Com. B. Rep. 767.

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he was unable positively to state what the answers were.

[GROVE, J.—I have reason to know that the married woman in the anonymous case reported 36 Law J. Rep. C.P. 223 afterwards made a fresh acknowledgment.]

If the deed could be acknowledged after the lapse of time in that case, when it had been made five years, surely the certificate could equally be given afterwards.

GROVE, J.—I think that the certificate should be allowed to be filed, and, therefore, that the order which has been made should not be rescinded. It is satisfactory to find that Mr. Petheram has not suggested that there was any impropriety in the deed and its acknowledgment, or that there exists any reason for refusing the certificate to be filed, apart from the lapse of time since the deed was acknowledged. Now I find that in one case after twelve, and in another case after thirteen years, the certificate has been allowed to be filed, and in one case the affidavit verifying the certificate, was made *nunc pro tunc*. It is true that the lapse of time in the present case is longer than it was in either of those cases, but those cases are sufficiently in point to enable us to act as we have done, and for the order to be made. In the anonymous case to which Mr. Petheram refers us, the acknowledgment was afterwards made and a fresh certificate given, so it becomes rather an authority in favour of this order which Mr. White has obtained. I see no reason, therefore, for disturbing the order.

LINDLEY, J.—I am of the same opinion. The statute does not state any time when the certificate must be made and signed, and though it provides for the filing of such certificate, together with an affidavit verifying the same, it does not say when this is to be done. It is, indeed, a matter of practice which is regulated only by the rules. I find that in *Re Warne* (3) and also in *In re Hannah Packer* (1) the Court allowed the affidavit to be filed, though made long after the deed had been acknowledged, it appearing that everything which was requisite to

make the acknowledgment good had taken place when the deed was so acknowledged. Now we are asked to do the same as to the certificate. It is not suggested that there has been any *mala fides* in the transaction, and the application is, that the certificate which has now been made and signed by the proper person, should be filed. The only objection to it is, that it has been made and signed comparatively recently, instead of at the time when the deed was acknowledged; but I do not think that that is any reason for not allowing it to be received and filed.

Order allowed to stand.

Solicitors—Le Riche & Son, agents for J. T. Davies, Sherborne, for plaintiff; Bower & Cotton, agents for Mayor & Marsh, Yeovil, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1878.	{	USILL v. HALES.
Feb. 27.		USILL v. BREARLEY.
		USILL v. CLARKE.*

Practice—Security for Costs of Appeal—Special Circumstances—Rules of Court, 1875, Order LVIII. rule 15.

On an application for security for the costs of an appeal, under Order LVIII. rule 15, the Court may take into consideration the subject-matter of the action, and give weight to the circumstance that the appeal is frivolous or vexatious.

Semble—that the mere fact that an appellant is poor, and therefore unlikely to be able to pay costs, is not in itself a "special circumstance" in consequence of which the Court will order him to give security for the costs before proceeding with the appeal.

These were three interlocutory applications in the three cases reported *ante*, p. 323.

The plaintiff having given notice of appeal in all three actions, the defendants

* *Coram* Cockburn, L.C.J.; Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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respectively applied to have the notices of appeal struck out, or that the plaintiff should give security for costs under Order LVIII. rule 15.

Yelverton, for the defendant Brearley.
Bernard, for the defendant Clarke.
Bremner, for the defendant Hales.

They produced affidavits as to the inability of the plaintiff to pay his costs if unsuccessful, and contended that this was a sufficient reason why the plaintiff should give security. They cited *Wilson v. Smith* (1).

Shortt, for the plaintiff.—It is necessary for the defendants to point out some special circumstance which entitles them to security for costs. *Rourke v. The White Moss Colliery Company* (2) shews that the mere poverty of the appellant is no such reason. If it were so regarded, no poor man could appeal. Yet his poverty might have been actually the result of a wrong decision against him.

[COCKBURN, L.C.J.—I think we are entitled to hear the facts of the case, that we may know whether there is some reasonable ground of appeal, or whether the appeal is merely frivolous.]

It is a point which has never been decided before; and, therefore, the plaintiff is entitled to have the opinion of the Court of Appeal.

[He then shortly stated the facts as given *ante*, p. 323.]

COCKBURN, L.C.J.—We think this application must be acceded to. The plaintiff should find security for a moderate amount of costs. I think that in considering the question we are justified in not merely taking into account the pecuniary position of the plaintiff, but also the other circumstances of the case. I believe that if the Court were of opinion that the plaintiff had any reasonable ground for going on with his action, they should not allow mere impecuniosity to stand in the way of his appeal. But we are justified in looking at the peculiar

circumstances of the case; and when we look at them the case appears quite clear. Though there is no immediate decision on the point, yet, if we go upon the rules previously settled, it seems perfectly clear that we cannot because the matter was *ex parte*, and the magistrate had no jurisdiction, take away the privilege of local Courts of justice to which the public have access, so that everyone can hear what takes place there. The publication of reports in newspapers only enlarges the area of publicity given to things which ought to be published, that justice may be done in public and a knowledge of the law promulgated.

We may fairly take into consideration the subject-matter of the action and the questions involved, and we cannot help noticing that there has been vexation in the plaintiff's proceedings. One action would have been sufficient for his purpose, and he brings three, all for the same thing at the same time.

A moderate amount either brought into Court or reasonably secured will satisfy the requirements of the case. 50*l.* should be paid into Court, or security given to that amount in each action, and on such payment being made or security given the plaintiff may be allowed to proceed.

BRAMWELL, L.J.—I am of the same opinion, and will give some kind of note of the terms of the order. The prayer is that the notice of appeal shall be struck out. That cannot be allowed. Then there is an application for the costs of this motion. We cannot possibly grant that. Let it be ordered that the plaintiff shall pay into Court or give security for the sum of 50*l.* in each action, to secure the payment of the costs of appeal, and till such payment is made or security given, that all proceedings be stayed. The costs of this motion to be costs in the appeal.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors—Carr, Fulton & Carr, for plaintiff
Ashurst, Morris & Co., for Hales; James Goren,
for Brearley; H. J. & T. Child, for Clarke.

(1) 45 Law J. Rep. Chanc. 292; s. c. Law Rep. 2 Chanc. Div. 67.

(2) 46 Law J. Rep. C.P. 283; s. c. Law Rep. 1 C.P. Div. 556.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878. }
 Feb. 20. } GODDARD v. THOMPSON.*

Practice—Motion for New Trial—Appeal—Jurisdiction of the Court of Appeal to stay Proceedings—Rules of Court, 1875, Order XXXIX. rule 5—Order LVIII. rules 16, 17.

Where an order nisi for a new trial has been refused by a Divisional Court, and granted on appeal by the Court of Appeal, such order should not include a stay of proceedings. A stay of proceedings in such a case must be obtained by a substantive application to the Divisional Court or a Judge in chambers, or from the Court of Appeal on appeal from such substantive application.

Per BRETT, L.J.—*The Court of Appeal has no original jurisdiction in any case to order a stay of proceedings or of execution.*

This was an action for negligence, tried before Manisty, J., and a common jury.

A verdict was given for the defendant, and judgment entered thereon. The Queen's Bench Division having refused an order nisi for a new trial, the plaintiff appealed, and the Court of Appeal granted the order.

The order as drawn up directed the defendant to shew cause why a new trial should not be had, and ordered all proceedings in the meantime to be stayed.

Firth, for the defendant, now applied to have the order varied by requiring the plaintiff to give security for costs, or that in default thereof the order should be discharged. He argued that the stay of proceedings ought not to have been inserted in the order.

Currie, for the plaintiff, contended that the Court of Appeal had power to order a stay of proceedings under Order XXIX. rule 5 and Order LVIII. rule 16 (1), and that there was no reason why security should be given.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) By Order XXXIX. rule 5, "an order to shew cause shall be a stay of proceedings in the

BRAMWELL, L.J.—I think that rule 5 of Order XXXIX. is subordinate to or qualified by Order LVIII. rule 16, which provides that an appeal shall not operate as a stay of proceedings, "except so far as the Court appealed from or any Judge thereof, or the Court of Appeal may so order."

The consequence is, that if the Queen's Bench Division had granted a rule, that would have been a stay of proceedings. But our granting the rule would not so operate; and the rule should not be drawn up with a clause like the last clause here, unless there is some special reason for it; and even in that case I am inclined to think the other side are entitled to have notice of the application for such an order, and to shew cause against it. I do not say that the Court could not in any case make such an order *ex parte*; for instance, suppose it was shewn that some irreparable damage would be avoided by granting it. But it may be that the application even in such a case must be to the Court below. For under Order LVIII. rule 17, where-ever an application may be made, either to the Court below or to the Court of Appeal, it must be made in the first instance to the Court below. It may be, therefore, that we have no power at all to make the order. But I am certainly of opinion that we ought not to grant it as a common practice; and the right thing to do is for the applicant to take out a summons to shew cause why execution should not be stayed; and very probably the Master might think it right to grant a stay

action, unless the Court shall order that it shall not be so as to the whole or any part of the action."

Order LVIII. rule 16.—"An appeal shall not operate as a stay of execution or proceedings under the decision appealed against, except so far as the Court appealed from or any Judge thereof, or the Court of Appeal may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct."

Rule 17.—"Wherever under these rules an application may be made, either to the Court below or the Court of Appeal or to a Judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or Judge below."

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where this Court has thought fit to grant a new trial. But if cause is shewn for thinking that though the rule has been obtained, yet there is a real danger of the plaintiff not recovering his damages or the defendant, if successful, his costs, supposing the execution to be stayed, then the Master might refuse to order a stay.

In my judgment, therefore, the stay of proceedings ought never to have been inserted in this order, and Mr. Firth is right in his application to have it varied by striking out that part of it.

BETT, L.J.—I think this Court has no original jurisdiction to order a stay of execution or proceedings. When we look at Order XXXIX. rule 5 and Order LVIII. rule 16 together, it is obvious that Order XXXIX. rule 5 applies to the Divisional Court only and not to this Court; and the question is whether we have any original jurisdiction to order a stay of execution or proceedings independently of that rule.

With regard to Order LVIII. rule 16, that rule might have been read as referring only to appeals properly so called. There might have been a distinction intended between an appeal which is the act of the parties, and a rule to shew cause which is the act of the Court; for it might be said that if an appeal was a stay of proceedings, the unsuccessful party might always stay proceedings at his own pleasure; and it might have been contended that where the Court think that *prima facie* there is a case for a new trial, that ought to act as a stay of proceedings, or the Court might order a stay. But the jurisdiction of this Court is shewn by section 19 of the Judicature Act, 1873. By it the Court of Appeal is given jurisdiction and power to hear appeals from any judgment or order of her Majesty's High Court of Justice or of any Judge or Judges thereof. There is therefore no power for this Court to make an original order. It must be on appeal from an order in a Court below. Therefore I think the word appeal in section 58 means *all* appeals, whether set down in the regular way or on motion to the

Court—that is, we must give the word its ordinary interpretation. If that is so, the rule is distinct. Rule 16 says that “An appeal shall not operate as a stay of proceedings under the decision appealed from, except so far as the Court appealed from or any Judge thereof or the Court of Appeal may so order.”

If that stood alone, it might be said that the Court of Appeal could make the order. But rule 17, which is this:—“Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or Judge below,” shews that we must act in accordance with section 19 of the Act of 1873; and though rule 16 gives us power to make the order, it can only be done after an application to a Divisional Court. The proper course is to make a substantive application to a Divisional Court. It might be, and I think it would be, a sound rule of practice that where the Court has given an order *nisi* for a new trial, the Master should stay the proceedings unless good cause is shewn to the contrary; but this is for the Court below to settle.

Till an application has been made to the Court below, we have no jurisdiction either *ex parte* or on an original motion to stay proceedings, as in the case of an order *nisi* in a Divisional Court.

COTTON, L.J.—It seems to me that the final clause staying the proceedings was incautiously introduced into this rule. The case comes within Order LVIII. rule 16, and the only difficulty arises from Order XXXIX. rule 5.

When an order *nisi* is given on appeal, Order XXXIX. rule 5 does not apply, and the successful party is *prima facie* allowed to enforce his judgment; and when we look at the rule it is perfectly clear that it is only applicable to a rule *nisi* granted in the first instance, and not by way of appeal. In one case only are rules *nisi* granted in the first instance by the Court of Appeal, where the cause has been tried by a Judge without a jury. Then the rule *nisi* is granted by

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an original order, and not on appeal; and it would be reasonable that under Order XXXIX. rule 5 the granting such an order should be a stay of proceedings. But in ordinary cases of appeal the practice is governed by Order LVIII. rule 16. And it may be asked why should an order *nisi* on appeal be a stay of proceedings when the Court below thought the case so clear, that they refused the order *nisi* for a new trial?

Stay of proceedings struck out, the defendant in the meantime undertaking not to issue execution for costs until the decision in the Court of Appeal.

Solicitors—H. H. Banyard, for plaintiff; W. B. Brook, agent for R. A. Ward, Maidenhead, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. }
April 15. } TURNBULL v. JANSON.

Taxation of Costs—Special Allowance for Attendance of Witnesses at Trial.

The effect of Rule 8 of the special allowances for costs contained in the Rules of August, 1875, is to give the Master a discretion as to what allowances should be made for the attendance of witnesses in Court, untrammelled by the old scale of charges.

This was an appeal from an order of Field, J., at chambers, dismissing a summons by which the plaintiff was called upon to shew cause why the Master should not review his taxation.

The action was on a policy of marine insurance, the defence being, that the vessel in question was unseaworthy. At the trial before Cleasby, B., and a special jury, the evidence was almost wholly scientific; in the result the verdict being found for the defendant.

Among the items disallowed by the Master on taxation, was a portion of the sums charged for the attendance of scientific witnesses and experts in Court. The

sum charged was 403*l.* 15*s.*, being at the rate of seven guineas a day for each witness. The Master taxed off 319*l.*, allowing each witness one guinea a day only. This course the Master took, not in the exercise of his untrammelled discretion, but because he thought he was bound by the old scale of charges, by which one guinea was the highest allowance he could make, his discretion being limited to that sum.

Upon appeal to Field, J., at chambers, the learned Judge refused to interfere with the Master's taxation.

M'Leod (Butt with him), now moved against the decision of Field, J.—The old rule undoubtedly was that the Master could not allow more than a guinea a day in respect of a witness's attendance in Court; but rule 8 of the special allowances contained in the additional rules of Court of August, 1875, was intended to do away with the old rule, and to give the Master a discretionary power to allow any sum which he might think, under all the circumstances of the case, was reasonable. That rule is as follows—"As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed."

He cited *Smith v. Buller* (1) and *Batley v. Kynock* (2).

J. O. Matthew, contra.—There is no authority for the proposition that by the rule under discussion the old scale of charges is altered. That was never intended, and the Master is still bound to give no more than a guinea a day. This is clear when we look at rule 28 of the same set of rules. The cases cited have no bearing on the question. They relate simply to the allowance for the qualification of witnesses.

M'Leod, in reply.

LINDLEY, J.—It appears to me that the principle on which these cases should be disposed of is, not to interfere with the discretion of the Master when he has a discretion unless there be some good

(1) Law Rep. 19 Eq. 473.

(2) 44 Law J. Rep. Chanc. 565; s.c. Law Rep. 20 Eq. 632.

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ground for so doing; and the reason for taking that line is that the Masters understand these questions of taxation much better than we can do. On the other hand, if any question before a Master turns on a legal principle then the judgment of the Master is open to review. Now, applying these principles to this case, it is clear that the Master has not exercised a discretion in the matter of the amount to be allowed for the attendance of witnesses. He has taxed on the principle that the old rule is still binding on him, and that he has no discretion except up to one guinea. That raises a question of principle, and one on which I think the Master has not put a right interpretation. The effect of his interpretation is to strike out of rule 8 the words "attendance of witnesses." It appears to me this bill ought to go back to him to exercise his discretion untrammelled by the old rule, as to what is a proper sum to allow these witnesses for attendance.

LOPES, J.—The question in this case turns upon the construction to be given to rule 8 of the special allowances in the additional Rules of August, 1875. According to the old rule the Master could not have allowed the witnesses in this case, who were with truth called scientific witnesses, more than one guinea a day for their attendance in Court. But it is contended that rule 8 enables the Master to exercise a discretion, and to allow a larger sum than that if he thinks fit. He tells us he has not exercised such discretion, because he thought he was bound by the old scale of charges. I think that he is mistaken in that. It was intended by that rule that the Master should have the power of allowing any witness any sum over one guinea which he might think proper under the circumstances of the case. Rule 28 of the same set of rules does not apply, for rule 8 is inconsistent with the old rules. I think, therefore, this bill should be sent back to the Master, in order that he may exercise the discretion given him by rule 8.

Order accordingly.

Solicitors—Parkers & Clarke, for plaintiff; Waltons, Bubb & Walton, for defendant.

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[IN THE HOUSE OF LORDS.]

1878. } OOX (appellant) v. RABBITS
March 26. } (respondent).

Land Tax—38 Geo. 3. c. 5. ss. 25, 29—*4 Will. & M. c. 1—Exemption of Site of Hospital—Removal of Hospital—Continuation of Exemption.*

An hospital which was erected before the passing of 4 Will. & M. c. 1 imposing a land tax, and the site of which was exempted from that tax by the provisions of 38 Geo. 3. c. 5. ss. 25 & 29, was by a decree of the Court of Chancery removed to another site, and the old site was discharged from the charitable trusts to which it was then subject:—Held, affirming the decision of the Court of Appeal, that the removal of the hospital and secularisation of the site did not remove the exemption from land tax conferred on the site, as "land belonging to an hospital in the fourth year of William and Mary," by 38 Geo. 3. c. 5. s. 29.

This was a Special Case stated for the purpose of deciding whether or not certain land in Southwark, which was formerly the site of certain almshouses, is liable to be assessed to land tax under 38 Geo. 3. c. 5, & 42 Geo. 3. c. 116.

The Special Case was as follows:—

This is an action of trespass brought by the late Edward Harris Rabbits, and now continued by Mary Ann Rabbits, his executrix. The said Edward Harris Rabbits was the lessee of certain land and premises hereinafter mentioned, and this action was brought against the defendant, who is the collector of land tax employed by the Commissioners of Land Tax for St. George the Martyr, Southwark, for seizing the plaintiffs' goods, and the case is stated for the purpose of obtaining the opinion of the Court upon the question whether the plaintiff was liable under the circumstances set out in this case to be charged and assessed to land tax under 38 Geo. 3. c. 5, & 42 Geo. 3. c. 116.

1. In the commencement of the seventeenth century the Wardens and Commonalty of the Mystery of Fishmongers of the City of London, being a corporation commonly called "The Fishmongers' Com-

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pany," purchased the freehold of a plot of ground at Newington Butts, in the parishes of Newington and St. George the Martyr, Surrey.

2. On the 28th of April, 1615, Sir Thomas Hunt, by his will of that date, gave to the said company 20*l.* a year to build an hospital, containing houses for six poor men free of the company.

3. On the 18th of November, 1616, the company received a sum of 50*l.* from one Robert Spence towards the erecting of twelve or more almshouses for the poor of the said company.

4. On the 26th of May, 1617, at a Court of the said company, it was decided to lay out 400*l.* upon the erection of dwellings for twelve persons, including the purchase of the ground. Out of this money the plot of ground mentioned in paragraph 1 was purchased.

5. On the 2nd of October, 1618, letters patent were obtained, whereby King James I., on the company's petition, granted license to the then wardens of the company to erect and establish in the parishes of Newington and St. George, in the county of Surrey, or one of them, one hospital or almshouse for the habitation and relief of so many poor people, men and women, free of the company, as to the said wardens and assistants of the said company and their successors should seem fit to be called "St. Peter's Hospital founded by the Wardens and Commonalty of the Mistery of Fishmongers in the City of London in the parish of St. George in the county of Surrey," and the wardens and assistants of the said company for the time being, were incorporated by the name of "The Governors of St. Peter's Hospital, founded by the Wardens and Commonalty of the Mistery of Fishmongers of the City of London in the parish of St. George in the county of Surrey, and of the lands, possessions, revenues and goods thereof," with power to use a common seal, and to hold land, &c., and to make laws and statutes for the government of the hospital.

6. On the 16th of November, 1618, William Hunt, Esq., son and heir of Sir Thomas, in accomplishment of his father's will, granted to "the Governors of St. Peter's Hospital, &c.," an annuity of

20*l.* to be employed as in the said Sir Thomas Hunt's will mentioned. This annuity was granted in lieu of the annuity left by Sir Thomas.

7. The Governors of St. Peter's Hospital built on the land, bought as aforesaid, a hospital containing thirteen almshouses.

8. On the 23rd of November, 1618, at a court of the company held on that day, it was ordered that there should be placed in the hospital at Christmas then next, thirteen poor men and women, six of whom were to receive 2*s.* weekly.

9. Several other gifts have subsequently been made, under which the hospital has been maintained and increased.

10. Richard Edmonds, by his will dated the 29th of December, 1620, gave to the company a certain freehold tenement, that they might out of the rent, when sufficient had accumulated, build two almshouses to adjoin the almshouses of the said company, called St. Peter's Hospital. The testator afterwards corrected this devise by a codicil, giving the house to "the Governors of St. Peter's Hospital, &c."

11. On the 9th of October, 1626, these two almshouses were finished, and the almspeople were admitted into them and into another almshouse which had been then lately also erected by the Governors of St. Peter's Hospital.

12. Seven more almshouses were afterwards added to the hospital, which were erected by the governors at the expense of the company. The last-mentioned ten almshouses were erected by the governors on the land purchased by the company as mentioned in paragraph 1.

13. In 1636 the old hospital, as it has since been termed, containing the before-mentioned twenty-two almshouses, was completed, but it did not cover all the land purchased by the company as aforesaid.

14. On the 14th of August, 1719, one James Hulbert, by will gave all the residue of his personal estate to the company to lay out so much thereof as they should think necessary for the erecting almshouses for the maintaining twenty poor men and women for ever, and the

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other part thereof was to go towards the maintenance of such poor persons, and for keeping the said almshouses in repair, and for defraying the charges and expenses of the trust. The said James Hulbert in his lifetime by a letter addressed to the court of the company expressed a wish that his intended almshouses should be erected on a piece of ground belonging to the company, lying on the south side of St. Peter's Hospital, and that they should be governed by the same rules as were then in existence for governing such hospital. The piece of ground referred to was the remaining portion of the land purchased by the company as aforesaid, but which was not occupied by the old hospital.

15. From this bequest twenty additional almshouses were accordingly built, making the number forty-two, which were maintained by the governors and company till the removal of the hospital to Wandsworth.

16. In the year 1848 the company purchased the fee simple of a plot of ground at Wandsworth, the land tax of which was and is redeemed.

17. On the 27th of July, 1849, his Honour the Vice-Chancellor of England, by an order made in a suit instituted in the High Court of Chancery, on the information of Her Majesty's Attorney-General on the relation of John Money Wrench against the company ordered that the company should be at liberty at their own expense to take down the said forty-two almshouses, and to erect an equal number of new almshouses in lieu thereof upon the piece of ground belonging to the company at Wandsworth aforesaid, upon the terms of the company being allowed to appropriate to their own use the materials of the almshouses so to be taken down, and to appropriate and hold the site thereof discharged from the charitable trusts to which they were then subject as aforesaid.

18. The company accordingly took down the said forty-two almshouses, and erected an equal number of new almshouses in their stead upon the said ground at Wandsworth, which new almshouses have since been occupied and

used for the purpose of the said charities.

19. When the land at Newington had been cleared under the authority of the order mentioned in paragraph 17, the plaintiff having entered into an agreement with the company for a building lease, erected a messuage on a portion thereof, and on the 8th of March, 1860, the said company demised such portion to the plaintiff with the said messuage erected thereon to him for the term of seventy-two years, from the 29th of September, 1858, at a peppercorn rent for the first year, and at a yearly rent of 125*l.* for the residue of the term.

20. The land included in such lease, situate in the parish of St. George, and now in the possession of the plaintiff, is a portion of the land purchased by the company as mentioned in paragraph 1 & 4, and which, from the year 1618 to 1850, was held for the uses and purposes before mentioned, and such land formed a portion of the site of the old hospital, which was erected before 1636.

21. Neither the said land nor the buildings erected thereon, were assessed to the land tax until the almshouses were pulled down after the making of the order of the High Court of Chancery as before mentioned.

22. In the year 1852 a building agreement was entered into by the said company with one Robert Davis Rea, by which the said company agreed to grant to the said Robert Davis Rea a lease of the whole of the ground purchased by the company, as stated in paragraphs 1 and 4 (including the land afterwards occupied by the said Edward Harris Rabbits), and the said land included in such building agreement was in the year 1854 assessed to the land tax at an annual value of 600*l.*

23. The said Robert Davis Rea paid the land tax upon such valuation for the year 1854, but such payment by the said Robert Davis Rea was not made with the knowledge or by the consent of the said company.

24. The plaintiff was first charged and assessed to the land tax for and in respect of the said land in his possession

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in the year 1860. He always refused to pay the land tax which has been made yearly since that year. In the month of June, in the year of our Lord, 1871, the defendant acting as the agent and collector of the commissioners seized on

their behalf the plaintiff's goods for the purpose of enforcing payment of the sum of 227*l.* 5*s.* 10*d.* being the arrears of land tax alleged to be due up to that time. The heading of the land tax assessment is as follows:—

"1860–61.

"In the parish tithing or place of St. George, south division in the division of Southwark, in the county of Surrey."

"An assessment made for granting an aid to Her Majesty by a land tax to be raised in Great Britain for the service of the year 1860 in pursuance of an Act passed in the 38th year of the reign of King George 3 intituled 'An Act for granting an aid to His Majesty by a Land Tax to be raised in Great Britain, for the service of the year 1798, and of another Act passed in the 42nd year of the said King's reign intituled an 'Act for consolidating the provisions of the several Acts passed for the redemption and sale of the land tax into one Act, and for making further provision for the redemption and sale thereof.'"

Rentals	Names of Proprietors	Names of Occupiers	Names or Descriptions of Estates or Property	Sums assessed and exonerated	Sums assessed and not exonerated.
600 500	Fishmongers' Company Mr. Rabbits	Mr. Rabbits	Repository Houses and workshops.		22 10 18 18

25. The difference between the sums of 125*l.* and 500*l.* represents the sum at which the Commissioners assessed the annual value of the lands and houses now in the possession of the plaintiff over and above the rent reserved to the said company in respect thereof as hereinbefore stated.

26. The Act of Will. & M. c. 1, which was passed in 1692, by section 25, provided that nothing therein contained should extend to charge any hospital for or in respect of the sites of the said hospital, and the 38 Geo. 3. c. 5. s. 29, enacted that all such lands belonging to any hospital, or almshouse, or settled to any charitable or pious use, as were assessed in the fourth year of the reign of their late Majesties, King William and Queen Mary, should be liable to be charged to land tax, and that no other lands, tenements, or hereditaments, &c., then belonging to any hospital or almshouse or settled to any charitable or pious uses as aforesaid, should be charged to land tax by that Act.

27. Section 25 of the said Act, 38 Geo. 3. c. 5, provides that nothing in that Act contained shall extend to charge (*inter alia*) any hospital in England,

Wales or Berwick-upon-Tweed, for, or in respect of, the sites of the said hospital, or any of the buildings within the walls or limits of the said hospital, or to charge any hospital or almshouse in England, Wales or Berwick-upon-Tweed, for or in respect only of any rents or revenues, which on or before the said 25th of March, 1693, were payable to the said hospital or almshouse, being to be received and disbursed for the immediate support and relief of the poor of the said hospital or almshouse only. And by section 26 it is provided that no tenants that hold and enjoy any lands or houses or other grant from the said hospitals or almshouses, do claim or enjoy any freedom, exemption, or advantage by this Act, but that all the houses and lands which they so hold, shall be rated and assessed for so much as they are yearly worth over and above the rents reserved, and payable to the said hospitals or almshouses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and almshouses.

The question for the opinion of the Court is—

Whether the land in possession of the

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plaintiff is liable to be charged and assessed by the Land Tax Commissioners to the land tax.

If the Court shall answer this question in the affirmative, judgment is to be entered for the defendants, with costs.

If in the negative, then judgment is to be entered for the plaintiff for 227*l.* 5*s.* 10*d.* with costs.

The Queen's Bench Division, consisting of Cockburn, L.C.J., and Lush, J., gave judgment in favour of the defendants. A report of this judgment will be found in 46 Law J. Rep. Q.B. 207.

From this judgment the plaintiff appealed to the Court of Appeal, where the judgment was reversed by the unanimous judgment of James, L.J., Baggallay, L.J., Bramwell, L.J., and Brett, L.J. A report of this judgment will be found in 46 Law J. Rep. Q.B. 498.

The defendants now appealed from the last-mentioned decision (1).

(1) 4 Will. & M. c. 1. enacts, *inter alia*, "That nothing in this Act contained shall extend to charge any hospital for or in respect of the site of the said hospital." This is practically re-enacted by 38 Geo. 3. c. 5. s. 25, which is as follows:—

Provided that nothing in this Act contained shall extend to charge any college or hall in either of the two Universities of Oxford or Cambridge, or the Colleges of Windsor, Eton, Winton, or Westminster, or the Corporation of the Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen, or the College of Bromley, or any hospital in England, Wales, or Berwick-upon-Tweed, for or in respect of the sites of the said colleges, halls or hospitals, or any of the buildings within the walls or limits of the said colleges, halls or hospitals or to charge any of the houses or lands which on or before the five-and-twentieth day of March, 1693, did belong to the sites of any college or hall in England, Wales or Berwick-upon-Tweed, or to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas and Bethlehem Hospitals, in the City of London and borough of Southwark, or any of them, or to the Corporation of the Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen, or the College of Bromley; or shall extend to charge any other hospitals or almshouses in England, Wales, or Berwick-upon-Tweed, for or in respect only of any rents or revenues, which on or before the said five-and-

Mr. E. Clarke (Mr. G. Lyon with him), for the appellants, contended that it was the intention of the Legislature to give the exemption from land tax not to the land, but to the hospital *qua* hospital. The sites are exempted, because they are the sites of hospitals, and when the reason for the exemption ceases the exemption ceases also. In *Novello v. Toogood* (2), Abbott, C.J., in reference to the protection of an ambassador, lays down the general rule that "an exemption from the burthens borne by other subjects ought not to be granted in a case to which the reason of the exemption does not apply." The tax and exemption are personal. In *Grant v. Astle* (3), Lord Loughborough explains that the tax is on persons in respect of their occupation of land. The tax is levied on all landowners, but is suspended as to certain lands so long only as they are occupied by the hospitals. The exemption is analogous to that which excuses persons from service as sheriff or on juries so long as they are practising members of certain professions. The two sections 25 & 29 must

twentieth day of March, 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only."

Section 29. "Provided always, that all such lands, revenues or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed in the fourth of the reign of their late Majesties, King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid. And that no other lands, tenements or hereditaments, revenues or rents whatsoever, then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, shall be charged, taxed or assessed by virtue of this present Act towards the said sum to be raised in England, Wales and Berwick-upon-Tweed as aforesaid: anything herein contained to the contrary notwithstanding."

38 Geo. 3. c. 5, was made perpetual by 38 Geo. 3. c. 60.

(2) 1 B. & C. 563.

(3) 2 Dougl. 722.

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be read together, and the proviso in section 29 must be taken as limited to cases under section 25. Even though it be held that the exemption is perpetual as regards the sites of the hospitals specifically enumerated in section 25, that is not so as regards the sites of other hospitals therein generally referred to. The point is new, and has never before been the subject of express legal decision; though Willes, J., in the *Earl of Colchester v. Kewney* (4) anticipated that the question must some day be raised, and shortly gave the arguments on both sides.

The Solicitor-General and Mr. Lumley Smith, for the respondent.—If section 29 stood alone it could not be argued that the exemption was not perpetual. That section provides that all lands not charged with land tax at a certain date shall not be chargeable in future. This land, though no longer a site of a hospital within section 25, was not assessed then, and therefore is still exempt. The appellants' contention would lead to the conclusion that the lands of hospitals are exempt perpetually unless they have been the sites. The reason of the exemption has not ceased. When a hospital is removed, the new site does not acquire any exemption from land tax. The hospital must therefore either pay land tax after removal or buy land for the new site on which the land tax has been redeemed at a high price. If therefore it were held that the old site on sale lost its exemption, the charity would suffer a serious loss.

THE LORD CHANCELLOR.—The question to be decided by your Lordships on this appeal is an extremely short one, and the argument, as it appears before you, is condensed into a very narrow compass. The Court of Appeal, which consisted of four Judges, were unanimously of opinion that the property in question, which was formerly the site of a hospital, but was no longer so, having obtained its exemption from the land tax, took that exemption still; and I own

that I can see no reason whatever to differ from the decision of the Court of Appeal.

Now I think the view which has been presented on behalf of the respondent is the correct one; namely, that the intention and the operation of the Act of Parliament, though it is not perhaps in some respects clear in every word, but the intention and the effect of it, was to impose a charge at the time the Act was passed, and then to leave the charge so imposed where the charge was imposed, and as the Act passed there it remained, and where the Act was not in effect to impose a charge no charge could take place, and nothing since has been done to effect a charge.

Looking at it in that point of view, the 29th section is perfectly intelligible; and although there may, as between the 29th section and the 25th section, be a certain amount of duplication of enactment, still the object of the 29th section is obvious: "All such lands, revenues or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed before the 4th year of the reign of their late Majesties King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payments of this present Act."

Now it is admitted that the land in question—the land as to the taxability of which your Lordships have to express your opinion—does not come within this part of the 29th section, because it was not assessed in the 4th year of the reign of William and Mary; but the section then continues: "And that no other lands, tenements, hereditaments, revenues or rents whatsoever then belonging to any hospital or almshouse, or settled to any charitable or pious use as aforesaid shall be charged, taxed or assessed under the present Act towards the sum raised, nothing herein contained to the contrary notwithstanding." Now here we have other land which was then belonging to a hospital, and therefore we have an Act of Parliament declaring with regard to that other land that it shall not be charged, taxed or assessed by virtue of this present Act, and that

(4) 36 Law J. Rep. Exch. 172; s. c. Law Rep. 2 Exch. 253.

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wholly irrespective of whether it continued to be or does not continue to be land for the preservation or used for the preservation of these institutions.

This taxing must be construed strictly. You must find words to impose the tax, and if the words are not found which impose the tax, it is not to be imposed. Now it appears to me that so far from there being words imposing a tax here, you have words which it is clear declare that the tax is not to be imposed; and I find nothing to shift to some subsequent period the taxing of this property, or in effect to make this Act subservient to the purpose of imposing a tax on land which in the first instance is declared to be exempt from tax. I therefore propose to your Lordships that this appeal be dismissed with costs.

LORD O'HAGAN.—I am of the same opinion. This is a point which, although it is material, and it is certainly very short, I think is clear. We feel it our duty as a Court of construction to give effect to the terms of an Act of Parliament if that Act of Parliament is clear, simple and unequivocal in its terms, and we are not at liberty to wander beyond its terms or to contravene its intention. Now here we have an Act which is as plain and unequivocal in its terms as ever came before your Lordships. The 29th section of the Act of George the Third is not open to two constructions within itself, and I think I must not pass over the admission of the very able counsel who argued the case, that if the 29th section had stood alone he would not have argued the case. That section makes the matter clear. In the first place, it affirmatively declares the liability of certain premises to taxation, and then in negative words it emphatically relieves the other sets of premises from any liability whatever.

Now it is conceded that the premises in question here are such as are so relieved from liability, and therefore it does not seem to me possible, having that section before our eyes, that we should differ from the unanimous decision of the Court of Appeal. If it had been an appeal from my own Court, I

should have had no doubt at all in the case; but then I should have taken a different view of it. All we have heard in the way of argument is this,—there has not been any attempt to construe the 29th section according to the view of the appellants, but there has been an attempt to connect the 29th section with the 25th section, and to say that the 25th section deals with the subject-matter of the 29th section, and that therefore we are to forget the 29th section altogether, and to go back to the 25th section. Now I rather agree with the observation of the learned counsel, that if the 25th section is to be considered partial and the 29th section universal, and that we must choose between the two, that we should take the latter and more extensive section. I do not think that it is necessary for me to say more than this, that there is no conflict between those sections—absolutely no conflict whatever—and it does not follow that we as a Court of construction should fail to give our attention to the larger section.

As to the policy in the matter which has been referred to, of taxing or not taxing these institutions, it is quite reasonable to suppose that these exemptions may have been made for the purpose of relieving these charitable institutions, not merely for the time but permanently; and it is quite plain that if the construction put upon this Act by the decision of the Court of Appeal is not the correct construction, it is perfectly plain that the benefits which were intended to be accorded to these charities would be taken from them. On the whole, I approve of the decision of the Court of Appeal, and I think that this appeal should be dismissed with costs.

LORD BLACKBURN.—I am of the same opinion. The Act of William and Mary, which originally imposed this tax, gives in the 25th section an enumeration of the exemptions, and it is provided that nothing contained in this Act is to extend to charge any hospital or college (and it enumerates a considerable number of hospitals and colleges by name, ending with the college at Bromley), for or in respect of the sites of the said

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hospital, so that in general words the word hospital comes in. Then it goes on to say, "for or in respect of the sites of the said college or hospital," and then it provides that afterwards none of these colleges which it enumerates or any hospital shall be taxable. Then it goes on to provide that it is not to extend to charge any other hospital for or in respect of the rents or revenues payable to the said hospital or almshouse which are being received and disbursed for the use and relief of the poor of the said hospital and almshouse only. Then the Act of 38 George the Third was passed, making it perpetual; and the 25th section, which is the one we should remember, says: "Provided that nothing in this Act contained shall extend to any college, hall, in the universities or corporation;" and it then enumerates them all, "or any hospital for or in respect of the sites of the said hospital." Then we come down to these words, "or to charge any lands or houses which on or before the 25th of March, 1693," belonged to the sites of any college, hall or hospital or almshouse. Then the 25th section further provides that "nothing in that Act contained shall extend to charge (*inter alia*) any hospital in England, Wales or Berwick-upon-Tweed, for or in respect of the sites of the said hospital or any of the buildings within the walls or limits of the said hospital, or to charge any hospital or almshouse in England, Wales or Berwick-upon-Tweed, for or in respect only of any rents or revenues which on or before the 25th of March, 1693, were payable to the said hospital or almshouse, being to be received and disbursed for the immediate support and relief of the poor of the said hospital or almshouse only." The present hospital which you are now dealing with was not one of those enumerated hospitals. It did exist before 1693. It came within the general words no doubt, and it is said that at that time it was not liable to be assessed to the poor rate, because it was a hospital, as there stated, or site. Now the 25th section of the Act applies thus far—that is to say, to any hospital existing at the time of the Act of 38 George

the Third, whether existing in William the Third's time or not; if it existed at the time of the Act of 38 George the Third, then no such hospital shall be charged with respect to its site. The previous enactments had been to the effect that a large sum of money should be imposed upon each county, and that each county should be divided into parishes and districts, and that a charge should be made on the lands or on the persons who occupy the same; and the 25th section exempts a hospital with respect to its site. Now if the hospital is not charged, nobody else would be chargeable, because in the nature of things a college or hospital must be a site, and the land tax would not be imposed upon it; but when it ceased to be so, unless there is some other exemption, it would be as liable as the lands to be taxed under the previous enactment; but in this enactment any college or hospital is not liable. Now I confess it seems to me that the 29th section must have been passed with a view of meeting that, because it says that it is enacted that all lands, revenues and rents belonging to a hospital or almshouse as were assessed in the 4th year of their late Majesties King William and Queen Mary shall hereby be liable to be charged—that is to say, all lands belonging to any college or hospital which were not part of the site, and the moneys derived therefrom, which shall not be applicable to the relief of the poor of the said hospital and almshouse. Then it enacts in negative terms that no other lands belonging to any other hospital or almshouse, or settled to any other charitable or pious use shall be charged under the Act, or assessed towards the said sum to be raised by the Act. Now the site which is, I will take it, the site of a hospital which existed in the reign of William the Third, and which then had lands forming part of the site of the hospital cannot, according to the words of this Act, be liable. "And no other lands whatsoever then belonging to it shall be charged or assessed"—that is to say, no other than those which are already taxed. Now this hospital was not assessable in the reign of William the

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Third. If the lands are assessable in that case, if you charge the lands you charge the person occupying, and it may be and probably was, that when this land ceased to be occupied by one person it was occupied by another; but there is nothing whatever to reimpose the charge on the land. It seems to me therefore that the decision of the Court of Appeal in this case was right.

LORD GORDON concurred.

Solicitors—Simpson & Palmer, for appellant; C. O. Humphreys, for respondent.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1878. }
Feb. 27. } CLOW (*executrix*) v. HARPER.*

Arbitration—Compulsory Reference—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 3.

Where it appears that the matter in dispute in an action consists in part only of matters of account, the Court or Judge may not refer the whole matter compulsorily under 17 & 18 Vict. c. 125. s. 3.

Therefore, where in an action for breach of covenants in a lease to repair and to leave the premises in substantial repair, the defendant denies the whole of the breaches, thus raising a question as to his liability, the Court has no jurisdiction to refer the action compulsorily under the above section.—So held by COCKBURN, L.C.J., BRETT, L.J., and COTTON, L.J.; BRAMWELL, L.J., *dubitante*.

This was an action for breaches of covenants contained in a lease of certain premises by the plaintiff's testator to one Nevill, of which the defendant was assignee.

The covenants alleged to have been broken were:—

1. To repair and keep in repair.
2. To paint the outside of the premises once in three years.
3. To paint, colour, and whiten all the inside woodwork, &c., once in every seven years.
4. To deliver up the premises in good substantial repair.

The plaintiff delivered a schedule of dilapidations. By way of defence the defendant denied the breaches, alleging that he had delivered up the premises at the end of the tenancy in proper repair, and that he had duly painted according to the covenants, and denied any further liability.

Issue was joined on the 25th of January, 1878, and on the same day the plaintiff took out a summons to refer the cause to the Master under section 3 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) (1).

The summons, which was opposed by the defendant, was heard on the 28th of January, 1878, and by adjournment on the 1st of February. The Master refused the order on the ground that the case was not one which could be compulsorily referred.

From this decision the plaintiff appealed to Mr. Justice Field in chambers on the 7th of February, 1878. The learned Judge made an order "that the cause be referred to the certificate of one of the Masters of the Exchequer Division under the statute 17 & 18 Vict. c. 125, with all the powers as to certifying and amending of a Judge at Nisi Prius. The costs of the cause and the costs of the

(1) By 17 & 18 Vict. c. 125. s. 3. "If it be made to appear at any time after the issuing of the writ to the satisfaction of the Court or Judge upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way; it shall be lawful for such Court or Judge, upon such application if they or he think fit to decide such matter in a summary manner, or to order that such matter either wholly or in part be referred to an arbitrator appointed by the parties or to an officer of the Court, upon such terms as to costs and otherwise, as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge or the award or certificate of such referee shall be enforceable by the same process as the finding of a jury upon the matter referred."

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* *Coram* Cockburn, L.C.J.; Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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reference to be in the discretion of the Master."

Against this order the defendant appealed to the Exchequer Division by motion on the 18th of February, 1878. The Divisional Court refused to set aside the order of Field, J., and against this decision the present appeal was brought.

Charles Russell and R. V. Williams, for the defendant.—The 3rd section of the Common Law Procedure Act, 1854, only enables the Judge to refer matters of account; not a question of liability. The defendant wishes to have the question of liability decided by a jury. Then at the trial if a question of *quantum* arises, the Judge can refer it. This case is exactly like an action of ejectment for breach of covenants to repair.

Sills, for the plaintiff.—The plaintiff does not wish to have two trials. To go first to *Nisi Prius* would be a great expense. He has delivered a schedule of dilapidations, which is in point of fact his case, and cannot be tried before a jury. There are two questions:—whether the premises were kept in repair, and whether they were given up in repair. On each point a number of breaches are alleged, and directly one breach is proved the question becomes one of account. The 3rd section is meant to meet such a case. If there is a question of account involved, the Judge can refer the whole cause.

[Brett, L.J.—Suppose the defence included a denial of the contract, could the Judge compulsorily refer the case under section 3?]

Yes. It has always been the practice to refer actions which involve questions of account, even though there may be something besides the account to try. *Insull v. Moojen* (2); *Browne v. Emerson* (3); *Cummins v. Birkett* (4); *Angell v. Felgate* (5); *Imhof v. Sutton* (6);

(2) 3 Com. B. Rep. N.S. 359; s. c. 27 Law J. Rep. C.P. 75.

(3) 17 Com. B. Rep. 361; s. c. 26 Law J. Rep. C.P. 104.

(4) 3 Hurl. & N. 156; s. c. 27 Law J. Rep. Exch. 216.

(5) 7 Hurl. & N. 396; s. c. 31 Law J. Rep. Exch. 41.

(6) 36 Law J. Rep. C.P. 130; s. c. Law Rep. 2 C.P. 186.

The Birmingham and Staffordshire Gas Company v. Ratcliff (7).

COCKBURN, L.C.J.—I am sorry to say I am of opinion that the judgment of the Exchequer Division should be reversed. When we are told, as I believe the truth is, that the practice generally in vogue is one with which the order of the Exchequer Division is consistent, I cannot think that sitting here as a Court of Appeal, we ought to consider that a sufficient reason to induce us to desist from reversing an order consistent with that practice, if on a view of the statutory powers of reference we come to the conclusion that the Court had no power to make the order in the individual instance, and therefore not in other cases of the same character. We must see what is the true and proper construction of the statute. When we look at what it is, there appears to be but one construction. Where there are items of account to be gone into, the parties are not to be brought to an expensive form of litigation, before a jury, but a summary procedure is to be resorted to, and the Court or Judge can send the matter to an arbitrator. The 3rd section is this: "If it be made to appear, at any time after the issuing of the writ, to the satisfaction of the Court or Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part" (words corresponding to the earlier part of the section), "be referred to an arbitrator appointed by the parties, or to an officer of the Court." That shews that the Legislature meant that when the matter in dispute involves mere matter of account, then it is competent to the Court to send the whole matter for the decision of the arbitrator. But when it is only in part a matter of account and *quoad* the rest a matter of fact or law, the latter part is

(7) 40 Law J. Rep. Exch. 136; s. c. Law Rep. 6 Exch. 224.

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not a proper subject of the order, but the order must be limited to the questions of account. It is competent to the Court or Judge to look and see how much of the case they can dispose of by reference, and in case part is a matter of account, they can refer that and leave the rest to take its ordinary course.

It is not the intention of the Act to take away from the parties the right of having their cases tried by a jury when not matters of account. I do not say that a trial by jury is the best form of litigation here. If the parties are wise they will probably agree to a reference.

But the law allows a trial by jury in all cases, unless the right is taken away by statutory powers of reference. We must see if that is so here. There is a preliminary question before we come to the question of account at all. *Non constat* that the case will ever come to an enquiring into accounts. The defendants may not have broken their contract, and the question of account may not arise. Therefore we cannot take away the right of the defendant to have the cause tried, for there are questions to be disposed of which cannot be referred to an arbitrator.

It seems to me, also, when we deal with the minor question (namely, whether the order was rightly made, supposing it could have been made), we must say that it was not: whether, therefore, we give a wide or a narrow construction to the section, I think that the order should not have been made.

BRAMWELL, L.J.—As the Lord Chief Justice and my brothers are of opinion that it was not competent to the Judge to make this order, I do not wish to disagree, but I have no confident opinion on the subject, and I don't quite like to say positively that it is so. No doubt there has been a good deal of practice the other way, possibly under the paternal power which the Court exercises in chambers; possibly without looking at the Act. But I do not know whether the Act would not justify the reference of a case containing a question of account, when the defence really is, "I don't owe the money: and, if I do, I question the amount."

Therefore I cannot absolutely say there is no jurisdiction to make the order; but I think it would have been better if it had not been made, since there are the substantive questions to be decided, Are these premises out of repair? and have the covenants been broken? And I must say I do not think the case necessarily involves a second enquiry if these questions are answered in the affirmative. The surveyor examines the premises and comes and gives his evidence as to the state they were in, and gives a general statement of the amount of damage, and is cross-examined in a general way; and I do not see why every part of the action should not be properly tried by a jury.

As the defendant objected to a reference, the order had certainly better not have been made, and I must say I am sorry to see a third appeal in so trumpery a matter.

BRETT, L.J.—I am of opinion that this is an order which could not legally be made. A compulsory reference cannot legally be ordered, except in a case within the terms of the Common Law Procedure Act, and I do not think this case comes within those terms. If we are obliged to construe the Common Law Procedure Act literally, I confess I have always thought that the interpretation put on section 3 by the Lord Chief Justice is the right one. If part of a cause consists of mere matters of account and another part does not, the proper order is to refer that part which does, and not that part which does not. I believe a practice has grown up and has existed for many years at chambers, by which, if part of the action is mere matter of account, and the rest cannot be conveniently tried by a jury, an order is made referring the whole cause. I do not think it is necessary to decide whether under those circumstances the order might not be made.

But in this case there cannot be a compulsory reference, for no part of the cause is matter of mere account. The whole liability of the defendant is denied. It seems to me that, in the case of each item, a compound question arises; first, whether the defendant is liable; and,

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secondly, if so, what is the amount of his liability. There may be a question of account, but in each case there is also the question of liability. Whenever the defendant denies his liability, then, though if he were liable the case would be a matter of account, yet there cannot be a compulsory reference by a Judge before trial. At the trial, the question of compulsory reference comes under the Judicature Acts. To express myself shortly as to the present case, part may be matter of account, but no part is mere matter of account, and whenever that is the case, there can be no compulsory reference.

COTTON, L.J.—I agree with what has been said by the Lord Chief Justice and Lord Justice Brett. If we had been shewn that in other cases similar orders had been made, and had been for a series of years maintained by the Courts, I should have had considerable doubts. But it seems that in all the cases the defendant's liability was admitted as to some amount, and the question was as to the *quantum*. But here the defendant says, "I deny your right to go into the question of account at all;" and until his liability is established, there is no necessity to go into the *quantum* at all. It seems that some of the items are items of mere decoration, and not repairs. There are covenants to paint and paper once in seven years. If the defendant has done that, no question of account arises as to the painting and papering.

The first question to be decided is, whether there is any question as to *quantum*. Till that is decided, there is no matter of mere account to be settled between the parties; and I am of opinion that to justify a reference there must be some question of account independent of the question of liability. I am, therefore, of opinion that this order must be discharged. The costs of this appeal and of the former proceedings to be costs in the cause.

Order discharged.

Solicitors — Dod & Longstaffe, for plaintiff;
Harper, Broad & Batcock, for defendant.

[IN THE HOUSE OF LORDS.]

1876. { RHODES (*plaintiff in error*) v.
May 4. { FORWOOD AND PATON (*defendants in error*).

Contract—Agency—Control over Property—Sale of Subject Matter of the Agency.

An agreement was entered into between F., a broker, and R., a colliery owner, "in consideration of the services and payments to be mutually rendered," that F. should act as R.'s agent at Liverpool for the sale of his coals for seven years. It was stipulated that R. should not employ any other agent at Liverpool; that F. should not act as agent for any other principal; that the rates and terms of sales should be under R.'s control, and that if F. could not sell, or if R. could not supply a certain amount of coal within the year, either party might put an end to the agreement. Before the expiration of the seven years R. sold the colliery, whereupon F. brought an action against him for breach of the agreement:—Held, that the action was not maintainable, for that the agreement merely bound R. to employ F. as his agent for the sale of such coal as he should send to Liverpool, and was necessarily determined on his parting with the subject matter of the agency.

This was an action brought by the defendants in error, who were ship-owners, shipbrokers and general agents at Liverpool, against the plaintiff in error, who was the proprietor of the Risca Colliery in South Wales, to recover damages for the alleged breach of an agreement to employ them as his agents for the sale at Liverpool of coal from his colliery for a term of seven years, and for commission.

The agreement was dated the 24th of September, 1869, and was (so far as is material) as follows:—"In consideration of the services and payments to be mutually rendered," it is hereby agreed between the parties hereto as follows:—
1. For the term of seven years from the 1st day of November next Messrs. Paton and Forwood, or such one of them as shall continue to carry on business in the name of that firm at Liverpool, shall and

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will be the agents of Mr. Rhodes at Liverpool for the sale of the coals of all kinds produced at the Risca collieries, subject nevertheless to the determination of such agency in manner hereinafter mentioned. 2. During the continuance of such agency Mr. Rhodes will not employ any other agent for the sale of coals in the port of Liverpool, save in respect of contracts now existing, all of which are expressly exempted from this agreement. 3. That the rates at which coal is to be sold, and all special terms with respect thereto, and the purchases and amount of credit in the case of sales, other than for cash, are to be subject to the approval of Mr. Rhodes, as are also the rates to be charged for shipping or delivery of coals. 4. That Messrs. Forwood & Paton will not during the continuance of their agency act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes to be obtained for each transaction. 5. That the commission for the agency hereby created shall be at the rate of 3l. per cent. on all approved sales, to attach on the passing of the contract. . . . "6. That the agent's amounts for commission are to be settled quarterly." . . . "7. That in case during the first or any subsequent year of the agency hereby created, reckoning from the 1st of November to the 1st of November, Messrs. Forwood, Paton & Co. shall not have *bona fide* sold 50,000 tons of coal on Mr. Rhodes' account, in conformity with the terms of this contract, it shall be lawful for Mr. Rhodes, at any time prior to the 1st of May in the then ensuing year, to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect, either personally or by sending the same by registered post letter, to the office for the time being of Messrs. Forwood, Paton & Co. And in the event of Mr. Rhodes not being able to supply with due dispatch the quantity and quality of coal not exceeding 75,000 tons in all, in any one year which may have been sold on his account in conformity with the terms of their contracts (saving the case of strikes or inevitable accident), it shall be lawful for Messrs. Forwood, Paton & Co.

in like manner to determine their agency, the notice in such case to be delivered personally or sent by registered letter to the colliery office at Risca." The 8th clause provided that disputes should be settled in manner provided by the Common Law Procedure Act.

On the 1st of March, 1873, the defendant contracted to sell the Risca Colliery to Messrs. Watts & Co., who took possession on the 22nd of March, 1873, and from that date the defendant ceased to have any control over the sale of coals raised at the Risca Colliery, and from that time ceased to employ the plaintiffs.

At the trial before Denman, J., at the Spring Assizes, 1874, at Liverpool, a verdict was entered by agreement for the plaintiffs for the damages claimed, subject to be reduced or vacated, and instead thereof a verdict for the defendant or a nonsuit entered, subject to the opinion of the Court upon a special case to be stated by an arbitrator. Upon argument the Court of Exchequer, consisting of Bramwell, B., and Cleasby, B., gave judgment for the defendant. The plaintiffs appealed to the Exchequer Chamber, when this judgment was reversed by Lord Coleridge, L.C.J., and Lush, J., and Archibald, J.; Keating, J., and Quain, J., dissenting. The case was then brought up by error to the House of Lords.

Mr. Benjamin and *Mr. Patchett*, for the defendant (the plaintiff in error), contended that the contract was unilateral, and amounted to a contract by the plaintiffs to be agents, but did not bind the defendant to supply them with any goods to act upon; that the plaintiffs' construction varied the agreement in that on their construction it was as if the defendant had expressly stipulated to send coals to Liverpool; that if the defendant was not bound to send coals to Liverpool there was a cause of action; that the term mentioned amounted to no more than fixing how long the agency was to continue—that is, that for seven years, or until notice, the defendant might sell coal at Liverpool through no other agent; lastly, that in any event the plaintiffs were entitled only to nominal

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damages. They cited *Burton v. The Great Northern Railway Company* (1), and *In re The English and Scottish Marine Insurance Company; Maclure's claim* (2).

Mr. Manisty and *Mr. J. O. Bingham*, for the plaintiffs (the defendants in error), submitted the following points:—That the agreement being for a period of seven years, and not having been determined according to the terms thereof, the plaintiffs were entitled to the agency for the unexpired portion of the period; that the defendant, by ceasing to employ the plaintiffs as agents, and by disabling himself from retaining the plaintiffs as agents before the expiration of the period, committed a breach of the agreement; that the defendant was bound to supply 75,000 tons, or at least 50,000 tons, of coal per annum, and that the plaintiffs were entitled to have the damages assessed accordingly; that if not, yet the defendant was bound to supply such a quantity as would constitute a substantial performance of the agreement. They cited *Starling v. Maitland* (3), *M'Intyre v. Belcher* (4), *Churchward v. The Queen* (5).

Mr. Benjamin was not called on to reply.

THE LORD CHANCELLOR.—I do not think that any of your Lordships can have any doubt as to the decision which the House ought to give in the present case. The case itself lies in an extremely short compass. As regards its general history it may be stated thus:—There is a colliery owner in the south of *Wales* who is anxious to place the produce of his colliery in the most advantageous way, and to obtain a sale for the coal taken from it in the *Liverpool* market, as well as in other places. He enters into an agreement with certain gentlemen in *Liverpool*, the present respondents. I shall have to refer a little more parti-

cularly to the details of that agreement afterwards, but the outline of it is this—they are to become his agents for the sale of the coal sold in *Liverpool* for a period of seven years. During that time he will not employ any other agent in *Liverpool* to sell his coal, and during that time they will not act as agents, without his consent, for the sale of any other steam coal. They are to be paid a price for their services by a percentage upon the value of the coal sold, and for that price they are to undertake all the expense of an office, and of advertising and commending the coal to purchasers, which may have to be incurred in *Liverpool*.

The employment commences upon that footing, and the case finds clearly that the respondents were at a considerable expense in bringing the coal into the *Liverpool* market, and before the notice of purchasers. As a matter of course, that expense would naturally be incurred to a greater extent in the earlier part of the term of seven years than in the later part. The employment therefore during the earlier part of seven years would naturally be expected to be less remunerative than during the later part of that period. The employment went on for about three years and a half. At the end of that time the appellant sold his colliery, and therefore of necessity no more coal could come to the *Liverpool* market with regard to which he would be the principal and the respondents his agents. That of course was a very considerable hardship upon the respondents, for the reason that I have mentioned. The expense which would fall most heavily upon them would be the expense in the earlier part of the employment, and they were deprived of the commission which they might have earned during the later years, which would have been the most productive part of their employment. But although that is a hardship upon them which naturally one would regret to see occur, still the question remains what was the contract entered into between the parties, and has there been in what has been done any violation of that contract?

It is not contended that there has been

(1) 9 Exch. Rep. 507; s. c. 23 Law J. Rep. Exch. 184.

(2) 39 Law J. Rep. Chanc. 685; s. c. Law Rep. 5 Chanc. (App.) 737.

(3) 5 B. & S. 840; s. c. 32 Law J. Rep. Q.B. 1.

(4) 14 Com. B. Rep. N.S. 654; s. c. 32 Law J. Rep. C.P. 254.

(5) Law Rep. 1 Q.B. 173.

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any violation of any express term in any part of the contract. There is no express term in the contract from beginning to end that the appellant, the colliery owner, would send any coal to *Liverpool*, or any particular quantity of coal to *Liverpool*, or that he would continue for any particular length of time to send coal to *Liverpool*. As regards express contract, there is a complete absence of anything of that kind.

But then it is contended that there is an implied contract under which the appellant was bound to send coal to *Liverpool*, and that he has disabled himself from performing that implied contract by selling the colliery out of which the coal might have come. That requires your Lordships to look at the whole contract, and to discover if you can, whether there is any such implied contract as is suggested.

Now the general effect of the contract is this—Your Lordships will observe that it commences in this way—that “for the term of seven years” “*Paton & Forwood*, or such of them as shall continue to carry on business in the name of that firm at *Liverpool*, shall and will be the agents of Mr. Rhodes at *Liverpool* for the sale of the coals of all kinds produced at the *Risca* collieries.” I stop there for the purpose of saying that that obviously is, and indeed it was admitted to be, not a contract that they would be the agents of Rhodes for the sale of *Risca* of all kinds wherever the sale should take place, but that they would be the agents for the sale in *Liverpool* of such of the coal as was sold in *Liverpool*; and farther, that it is obviously a contract that they will be the agents of Rhodes for the sale of coal which is produced at the *Risca* colliery while the *Risca* colliery is his property, because if it is the property of another person they could not be the agents of Rhodes for the sale of coal which did not belong to Rhodes.

Farther than that, the contract is that they will thus be the agents of Rhodes for seven years, with this important qualification, “subject nevertheless to the determination of such agency in manner hereinafter mentioned.” You are therefore informed at the commencement that

although there is a fixed term stated—namely, seven years—means are provided in a subsequent part of the contract for terminating the agency.

Then there are two engagements, one upon the side of Rhodes and the other upon the side of Forwood, and they are the only two express engagements which I find in the contract. With regard to Rhodes, the express engagement on his part is in the second clause: “During the continuance of such agency Mr. Rhodes will not employ any other agent for the sale of coals in the port of *Liverpool* save in respect of contracts now existing, all of which are expressly exempted from this agreement.” That is all which he actually and openly contracts for. He ties his hand against having any other agent for the sale of coal in the port of *Liverpool*. The express contract on the part of Forwood, Paton & Co. is in the fourth paragraph. “Forwood, Paton & Co. will not during the continuance of their agency act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes, to be obtained for each transaction.” It is a correlative contract on their part, negative also in its aspect, that, as he will not employ any other agent, so they will not act for any other principal. Now I ask your Lordships at this point to consider, if the contract had stopped here, what would have been the result? Both parties would have been tied and bound for seven years, the one not to employ another agent, the other not to act for another principal.

Then it appears to have occurred to them, naturally enough, to consider,—but what if the agency produces no fruit to the agents? Or what if the agents are not able to act with the energy which the principal expects? Is this state of things to go on for seven years in this case? And then to deal with that your Lordships find that the seventh clause is introduced, providing that if “during the first or any subsequent year of the agency hereby created,” Forwood, Paton & Co. “shall not have *bona fide* sold 50,000 tons of coal on Mr. Rhodes’ account, in conformity with the terms of this contract” (that is to say, sold at

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prices of which the principal would approve), "it shall be lawful for Mr. Rhodes, at any time prior to the first day of May in the ensuing year, to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect." And on the other hand, "in the event of Mr. Rhodes not being able to supply with due dispatch the quantity and quality of coal exceeding" (not 50,000 tons), but "75,000 tons in all in any one year which may have been sold on his account in conformity with the terms of this contract (saving the case of strikes or inevitable accident), it shall be lawful for Messrs. Forwood, Paton & Co. in like manner to determine their agency." Therefore there is not an absolute contract to employ no other agent during seven years, and an absolute contract to act for no other principal for seven years, but a contract of that kind subject to determination in the manner mentioned, the mode of determination being that which I have read, a power to the principal to resale, if his agent cannot sell at prices approved by him 50,000 tons of coal in the year, and a power to the agent to resale if the principal cannot supply him in any year with 75,000 tons of coal, which can be sold at those prices.

That is the protection which the parties have provided for themselves with reference to the duration or the continuance of this agreement. Now I ask, the parties having provided this kind of protection for themselves, upon what principle is it that your Lordships are to introduce into and to imply into the agreement what, it is admitted, is not found expressly there, namely, an engagement that during that time the principal will not disable himself from sending coals from Liverpool by selling his colliery to any other person? This question is asked by Mr. Manisty: Can you assume that the agents intended to leave open the right to sell the colliery without any assent on their part? I should ask, in answer to that, another question. Can you assume that the principal, the colliery owner, meant to tie his hands for seven years against selling the colliery without either obtaining the con-

sent of the agents, or without paying them a gross sum, the equivalent for all the profits they might make by the continuance of the engagement during the seven years? If it was the intention that there should be an implied undertaking of that kind, how inconsistent would that have been with the express clause which I have read, the 7th clause, providing expressly in the events which are there mentioned for the determination of the agreement?

Now, as I pointed out in the course of the argument, there are really in this agreement several risks which are left altogether uncovered, and as to some of which it was very candidly admitted by the counsel for the respondents that no provision whatever was made, and that they could not say that there was even by implication any protection against those risks. I will remind your Lordships of what those risks are. On the one hand, in the first place, the colliery owner, the appellant, might sell the whole of his coal at ports other than Liverpool, and not send a single ton to Liverpool. That is admitted on the part of the respondents. They do not challenge that proposition. They say that that is an infirmity in the engagement between the parties. The agents could not have demurred or complained if every ton of this coal raised during the seven years at the Risca Colliery had been sold at Swansea, or at Southampton, or at any other port which might be suggested. In the next place, the coal might have been sent to Liverpool, but the principal might have taken a view with regard to the price to be obtained for it, which would have led him to place limits upon the coal, such as to prevent the agents selling any of it in any one particular year, and the agents might have been left in that year without any commission whatever, although having coal in stock, because the principal might have thought it expedient to hold the coal and wait for better prices. There, again, it is admitted that that was in the power of the principal, and that the agent could not have complained. Then, again, I asked the question: Supposing the colliery owner had, by reason of difficulties arising with the workers or

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otherwise, chosen to close his colliery for a year, or for several years, and to wait for better times or a more easy mode of working, could the agents have complained? It was said they could not; that the colliery owner must be the judge of that. He might have taken that course without exposing himself to any proceedings for damages.

But if that is so, if any one of these three courses might have been adopted, if all the coal after it was got out of the colliery might have been sold elsewhere, if the colliery might not have been worked at all, if the prices required to be fetched at Liverpool might have been such that the coal could not have been sold even after it went to Liverpool, if all that was in the power of the colliery owner, and it could not be contended that there is any provision in this contract against any of those risks, why is it to be assumed with regard to the other, the fourth risk, namely, the risk of the colliery owner not selling his coal elsewhere piecemeal, but selling the colliery itself to a purchaser, that there is an implied undertaking against that one risk, although it is admitted that there is no under taking at all against any of the other risks?

In point of fact an agreement of this kind, obviously, is made upon the chances of risks of the sort I have referred to, and none of which is expressed in the agreement. That which is in the minds of the parties, the principal on the one hand, and the agents on the other, is, supposing it to be convenient that the business should go on and the coal find its way to the port of Liverpool, all that we require to stipulate for is that, on the one hand, the principal should have the security that his agents will be sufficiently energetic to sell a certain quantity of coal in the year, and, on the other hand, that the agents should be able, if a sufficient quantity of coal is not put in their hands for sale, to terminate the engagement. It is obvious, now that the result is seen, that it would have been a much wiser thing if both parties, or at all events, if the agents, in place of stipulating for a mode of terminating the agreement which required to work it out, the lapse perhaps of

a year or eighteen months, had stipulated for a more speedy power of terminating the agreement, and for the power of taking coal for other people as agents, supposing the coal of the Risca Colliery was not sent to them. That, however, was for them to judge of. Your Lordships cannot reform an agreement because in the result it appears to produce consequences which possibly may not have been expected.

The simple point here appears to me to be, as it is admitted, that there is no express contract which has been violated, can your Lordships say that there is any implied contract which has been violated? I can find none. I cannot find any implied contract that the colliery owner would not sell his colliery entire. Therefore I am obliged to arrive at the conclusion that the decision of the Court of Exchequer was correct, and that judgment in the action should be given, as the Court of Exchequer gave it, for the defendant.

LORD CHELMSFORD.—The question to be determined is, whether the agreement upon which the action is brought involves an implied agreement on the part of the defendant, that he will continue to carry on the Risca Colliery, and to employ the plaintiffs as his agents at Liverpool for the sale of the coals of all kinds produced at the Risca Colliery, absolutely during seven years. It is conceded that there is no express agreement to this effect; and the question is, whether the sale of the collieries during the seven years is a breach of the agreement, the breach in the declaration being that the defendant before the expiration of the seven years disabled himself from any longer carrying out the agreement.

Mr. Justice Lush in his judgment says: "There is not a phrase or a word which implies that the agency is to cease if the defendant chooses to sell the colliery while it is a working concern. Whether this was an inadvertent omission or an intentional one, is beside the question. Probably such an event was not contemplated. It is sufficient, however, to say that it is not provided for, and therefore the contract remains binding, as it

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would have been if the defendant had continued to hold the colliery."

Now, with great respect to the learned Judge, how can an intention not in the contemplation of the parties, be implied to have existed? There is no doubt that at the time of entering into the agreement, both parties contemplated the continuance of the agreement for seven years; that the one would continue to carry on business at Liverpool, and that the other would be the possessor and continue to work the Risca Collieries; and upon this expectation they provided for the determining of the contract, in the then existing state of things, by the owner of the colliery if the agents did not sell, in any year, 50,000 tons of coal, and by the agents in case the owner did not supply 75,000 tons in any one year. This may be called the mode of actively determining the contract.

But what is there in the agreement to prevent its coming positively to a premature end, either by the agents giving up business, or the owner giving up the colliery? The mere agreement for seven years, or the provisions for the determination of it on either side, will not be sufficient, and if it had been intended that the relation of the parties should absolutely continue for seven years, it ought to have been provided for, and not being provided for, it cannot, in my opinion, be taken to have been intended.

It was conceded that the plaintiff in error was not bound to send his coals to Liverpool. By sending them elsewhere he would voluntarily disable the agreement itself; what difference, in point of effect, can there be in him disabling himself from performing it by parting with the colliery?

I agree that the judgment of the Exchequer Chamber should be reversed and judgment entered for the defendant.

LORD HATHELEY.—I entirely concur in the views which have been expressed by the noble and learned Lords who have preceded me.

It appears to me, as it did to Mr. Justice Quain in the Court of Exchequer Chamber, that when you peruse this whole agreement, you find an ordinary

agreement of agency, and of agency alone.

The plaintiffs in the original cause being engaged in business at Liverpool, and the defendant in the original cause being the owner of a colliery, the plaintiffs present themselves to him, and the first stipulation which is contained in the agreement on their part is this: that for the term of seven years they, "or such of them as shall continue to carry on business in the name of the firm at Liverpool, shall and will be the agents of Mr. Rhodes, at Liverpool, for the sale of the coals of all kinds produced at the Risca Collieries." In that part of the agreement there is no engagement by Mr. Rhodes. The engagement there is by the Messrs. Paton & Forwood, as persons who are ready to perform the duty of agency at Liverpool. In other words, they say: Here are we for seven years ready and willing to perform the duty of selling your coals produced at the Risca Collieries. That agency might be determined in the manner which has been alluded to, and which is expressed on the face of the agreement, either by the expiration of the seven years, or by the disappearance from the firm of all the then partners in it.

Then, on the other hand, Messrs. Forwood & Paton having entered into that engagement, Mr. Rhodes says: "You having said that you will be always ready and willing to act as my agents for seven years, I will not, for the time that you are so, employ any other agents at Liverpool for the sale of coals coming from the Risca Collieries." He reserves to himself the full right to sell his coals anywhere else, and he also reserves, by the third clause, the sole control over the price of the coals, the mode of effecting sales, and the terms. The sales are to be subject in fact to the approval of Mr. Rhodes in all respects. Messrs. Forwood & Paton are merely agents so long as he retains the sole control over his property in the coal, and over the disposition of it. There is no allegation on the part of the plaintiffs of anything in the shape of *mala fides* on the part of Mr. Rhodes in anything that he had done. The ordinary sales were made by him of his property at the times

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when he thought it beneficial to make such sales. And it is also not now contended that there is anything in this agreement to prevent Mr. Rhodes from selling his coals elsewhere than in the port of Liverpool, as he may think fit, of course *bona fide*, and not with any special view of evading this agreement. On the other hand, the Messrs. Forwood & Co. engage (and that was greatly relied on in the Court of Exchequer) that during the continuance of this agency they will not "act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes to be obtained for each transaction."

Now, it appears to me that when you have read as far as those four clauses, you have a very clear and complete agreement. Afterwards, it is true, there is the seventh clause, which is very important, upon the whole, in the consideration of the case, regard being had to the arguments which have been adduced on the part of the plaintiffs; still in those four clauses you have a very clear and complete agreement. Messrs. Forwood & Co., on the other hand, say: "We are standing here for seven years holding ourselves ready to act as your agents for the sale of your Risca coal, and engaging ourselves during that time to sell the same quality of coal, namely, steam coal, for nobody else." Mr. Rhodes, on the other hand, says: "As long as I have Risca coal to sell (that is the effect of it), nobody else but you shall sell it, at Liverpool, but I must have the fixing of the prices, and I must have the full power of selling it at such other ports as I may think fit." It would be a singular undertaking to introduce by implication into that agreement that he would never during a period of seven years dispose of the colliery itself. Why is there anything more reasonable in implying—on the contrary, is it not much more unreasonable to imply—such a provision as that he would deprive himself for seven years of the power of selling his colliery than that the engagement on the part of Messrs. Forwood & Co. to act as agents, was meant to continue only so long as he continued to be owner of the colliery? The latter seems to me a much more

reasonable supposition than the former. The one party says: "We are engaging to sell for you, Mr. Rhodes, your Risca coal, of course implying that whilst so acting as your agents, we are selling for you in the capacity of the owner of that coal, and when you cease to be the owner of it, we shall cease to be agents." The case has arisen in which the agency is necessarily, by the force of events, terminated; but to imply such a proposition as this from the agreement, that because other persons have said to you: "We are content to act as your agents, and will stand ready and willing for seven years to be your agents;" therefore you have engaged not to deal with your own property for that period, seems to me a far more forced interpretation than that of simply inserting a clause like that which I have referred to.

This view of the agreement is very much strengthened by the 7th clause, which shews that they did contemplate possible reasons for the parties being dissatisfied on both sides with the working of the agreement, and wishing to absolve themselves from the binding efficacy of it, that even everything else being the same, they might still wish for other reasons to determine the agreement. For that purpose experience was required to enable them to judge of its working. Accordingly they provide, if you on the one hand find by experience that we are such slow agents that we cannot dispose of 50,000L. tons of coal to your advantage, you may determine it; and if we, on the other hand, think that we are such active agents as to be able to dispose of 75,000 tons a year, and you cannot supply us with the quantity, then we may determine it.

The parties seem to me to have entered into a simple contract of agency, which necessarily determines when the subject-matter of the agency is gone. The subject-matter of the agency has disappeared without *mala fides* on either side. Therefore the contract is brought to an end by the course of events—by that happening which might necessarily have been expected to happen, and which would have the effect of putting an end to the contract. It was as entirely open to anticipation that

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the contract of agency might be concluded by that event, as that it might be concluded by the operation of the 7th clause. There are three or four other kinds of contingencies, as the noble and learned Lord on the woolsack has observed, which are unprovided for.

It appears to me that all that has happened is this: the parties meet together, and they assume as between themselves the probability of a certain state of things existing, but they do not enter into a guarantee that that state of things shall continue to exist. As was well observed (if I may say so) by the Lord Chief Justice in *Stirling v. Maitland* (3), if you find that a certain state of things, which existed at the date of the contract, is necessary in order to give the contract any effect at all, you may no doubt, acting with due care and caution in such cases, imply an agreement that that state of things shall exist, because otherwise no effect could be given to the contract. But here very full effect could, as it appears to me, be given to the contract in the way in which it has been given by the original decision of the Court of Exchequer, and I am of opinion that that decision should stand, and that the judgment of the Court of Exchequer Chamber should be reversed.

LORD PENZANCE.—I desire to say but a very few words upon this case, agreeing entirely as I do in the way in which this question has been dealt with by the noble and learned Lords who have preceded me. The case resolves itself really into a very simple one, and one which, independently of the special terms of the contract, may be, and probably is, a case that is arising in many other trades and businesses, and in many other individual cases besides the present.

A principal who wants to have a portion of his business transacted in Liverpool, or in any other town, engages an agent, and they enter into a mutual bargain, the one that he will employ no other agent, the other that he will act for no other principal. They enter into other stipulations as to prices, as to commission, and so forth, but the substance of the agreement is such as I have mentioned. Upon

such an agreement as that, surely, unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as a matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent, and the commission that he may receive. I say that in a contract of that kind there ought to be some special obligation, otherwise the natural reading of such a contract would be that, as long as the principal chooses to carry on his business, and as long as he chooses, as here, to carry on that portion of the business which consists of sales of coals at the particular port, he shall be bound to employ the person with whom he has agreed as his agent for such sales, but that he shall be at liberty, when he likes to put an end to that business, to do so.

But in this case the sort of obligation or condition which is asked by the plaintiff to be implied is of a most singular character, because he does not contend that the principal is bound to carry on the business for his, the agent's, profit. He does not contend that the principal is obliged to continue to send the coal to Liverpool; but he says: "Although it is quite true that you are not bound to carry on your business in such a way as to give me any profit whatever, because you are not bound to raise coal, and, if you do, you are not bound to send it to Liverpool, yet I maintain that there is implied somewhere in this contract an obligation that you will keep possession of this colliery." For what purpose? What possible interest has the agent in a condition, that although the principal is not bound to send coal to Liverpool at all, and so put any money into the agent's pocket, still the colliery shall remain the property of the principal? It seems to me, therefore, that the contention of the plaintiff in the present case does not go far enough. He ought to have gone at least to the extent of saying: "The nature of your bargain was such that I had an interest in it as well as you. You had an interest in selling your coal, I had an interest in obtain-

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ing my commission, and you cannot put an end to that business in Liverpool without damaging my interest." But he does not say that; he forbears to say that. He admits that the principal might, in the variety of ways that have been indicated by the noble and learned Lord on the woolsack, have so acted that the agent would have obtained no benefit whatever from the agreement. But he says: "I maintain that there is an implied condition that, although I get no benefit out of it, nevertheless you shall keep yourself possessed of the colliery." I confess I am quite unable to find any terms in this contract from which such an obligation can be implied, and I cannot conceive that the intention of the parties was, or that they would have had any interest in its being, that such obligation should be created.

I wish to say a few words upon the case of *McIntyre v. Belcher* (4). It was a case in which a medical man bought a business, and was to pay a portion of the profits that he should make from it. After he had bought the business he ceased to carry it on, and, therefore, the seller lost a portion of what was practically the agreed price for which the business was sold. The Court held that there was an implied obligation on the part of the defendant that he would go on working at the business in order to make those profits; and I think no one can deny that that was a decision quite in accordance with justice and with law. But that surely was a very different case from the present. There the bargain was for a definite payment out of the profits to be earned by the defendant as part of the price of the thing which had previously been sold to them. Here the bargain is for an agency to be carried on for the mutual benefit of Forwood & Paton, and Rhodes, the selling prices of the coals to be sold being at the sole discretion of Rhodes himself. Therefore, instead of its being a payment for something gone by, the bargain is, that if the business is carried on, Forwood & Paton shall get a certain benefit out of it. It seems to me, therefore, that that case not only does not apply in the present instance, but that the principle contained in it very well illustrates the great differ-

ence there is between the present case and all cases which the Court has held, in the language which was very aptly quoted by Mr. Manisty from Lord Chief Justice Cockburn, "that the defendant is bound to continue a state of things which is necessary to the carrying out of his own contract."

I wish to add one more word upon a suggestion which has been made. The agents here might be bound for eighteen months not to act for anybody else, notwithstanding that Rhodes had in the meantime sold the colliery. The question, whether they are so bound, does not arise in this case; but I should be sorry to affirm the proposition that when the defendant had sold the colliery, and had therefore practically entirely put an end to the agency, the plaintiffs were still bound not to act for anyone else; for I find the terms of the contract upon that subject are these, that Messrs. Forwood & Paton "will not during the continuance of their agency act as agents for the sale of any other steam coal." If the defendant by selling the colliery had put an end to the agency, it might perhaps be very successfully contended that the other party was at liberty to act for other coal proprietors. But that does not arise in the present case, and therefore I desire only to speak negatively, and not to express an affirmative opinion upon it at present.

On the whole, I think the judgment of the Court of Exchequer Chamber ought to be reversed, and the judgment of the Court of Exchequer affirmed.

LORD O'HAGAN.—With such hesitation as is made reasonable by the difference of opinion amongst the learned Judges in the Court below, I fully concur in thinking that the decision of the Court of Exchequer Chamber ought to be reversed. The question is merely as to the construction of the contract; and I can add little of value to the argument already presented to your Lordships by the noble and learned Lords who have preceded me.

The terms of the instrument appear to me fairly to indicate the intention of the parties that whatever coals might be

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sent by the defendant, at his own option, from his mine to Liverpool should be sold there by the plaintiffs, as his agents, for a proper commission; but not at all to import, according to the contention of the respondents, that the appellant should for a period of seventy years deprive himself of the power of disposing of his own property, whatever might be the inducement, the interest or the necessity. I think that the words in themselves are not naturally and fairly open to this latter construction; and the consequences of such an interpretation seem to me so unreasonable and inconvenient as to incline us to repel it, even if the latter, on the reading of the words, was in a condition of doubt.

As in most cases of the kind, we are little assisted by authority. Judicial decision on one contract can rarely help us to the understanding of another; and, dealing with that before us within itself, regarding the relative position of the parties as throwing light upon its meaning and upon their real purpose, and remembering the admission at the bar, that the appellant was at liberty to sell his coals in other markets besides that of Liverpool, I approve the view adopted by the Court of Exchequer, which is commended, as I have said, by many considerations of consistency and convenience not to be found in that in which it is opposed. I find it hard to believe that the parties meant to leave the agents at liberty at any time to escape their responsibility by selling their business (which they might have done under the very words of the contract), whilst the principal was to be bound, under all circumstances, to hold his colliery for seven years, in order that these agents might earn their commission. I think the admission of the defendant's right to sell the entire produce of his colliery in other markets, or to cease the working of it, or to put upon his coal prices making it unsaleable, and so to take all profit from the agents in Liverpool, practically involves also the admission of his right to dispose of the colliery itself with precisely the same result of loss and disappointment of the respondents. I think it difficult to hold that the appellant,

who had carefully reserved to himself control over his coal by regulating the rates of sale and the special terms of it, should have debarred himself for so long a period from exercising over his property the more important authority of realising its value, however profitable and desirable the assignment of it might be.

I have said that there is no case ruling or much affecting the question before us. But I shall refer your Lordships to a passage in the judgment of your Lordships' House in the case of *Shaw v. Lawless* (6), which indicates the hesitation felt by the noble and learned Lords who pronounced it, in assuming, without a very clear expression to that effect, the purpose of a deviser to control the right of a devisee in dealing freely with his own property.

In that case Mr. Shaw, having made a devise for life and directed the purchase of real estates, declared his desire that his executors should retain Mr. Lawless as agent in the receipt of the rents at the usual fees. The words of the will were held not to create a trust in favour of Mr. Lawless, the Lord Chancellor Cottenham observing, "What is the subject in the present case? It is the right to be employed in the receipt of the rents and the agency and management of the land of the devisee upon the usual fees. What is the necessary effect of this alleged right? It goes to exclude Shaw from the management of his estate or from the receipt of the rents themselves!" And in a previous part of his judgment he says, "When your Lordships see to what extent, and I might also say to what absurd extent, this construction of the will necessarily leads, you cannot hesitate in coming to the conclusion that it is at least very doubtful how far this could possibly have been the intention of the testator." And so in this case I more than hesitate to believe that the intention imputed to the parties by the respondents could really have been entertained by them.

Looking to these considerations and the plain words of the instrument itself, I believe the conclusion to which your Lordships have arrived is well justified,

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and will carry into effect the true purpose of the contract.

Judgment of the Court of Exchequer Chamber reversed, and judgment of the Court of Exchequer affirmed.

Solicitors—Bridges, Sawtell, Heywood & Ram, for appellant; Chester & Co., agents for Haigh, Liverpool, for respondents.

[IN THE EXCHEQUER DIVISION.]

1878. }
May 1. } BLAKE v. APPELYARD.

Costs — Counterclaim — County Courts Act, 1867, s. 5—Order XIX. rule 3.

The provisions of the County Courts Act, 1867, denying costs in an action in the Superior Court where a minimum is not recovered, do not apply to a defendant recovering on a counter-claim.

This was an appeal against an order of Field, J., directing a review of the taxation of costs.

The claim was for 21*l.* for growing cabbages sold by the plaintiff to the defendant, for 19*l.* for waggons and horses let on hire by the plaintiff to the defendant, and 30*l.* damages incurred by reason of the defendant not clearing away the cabbages from the plaintiff's field within the period agreed upon.

The defence admitted the claims of 21*l.* and 19*l.*, but denied the other breaches of contract, and set up a counter-claim for 93*l.* in respect of damage done to the cabbages by the plaintiff's harriers, in respect of loss of market through a waggon of the plaintiff's breaking down, and in respect of misrepresentation in the sale of the cabbages.

At the trial the jury found a verdict for the plaintiff for 40*l.*, and for the defendant for 10*l.*

The Master taxed the plaintiff's costs of the action, and the defendant's costs of the counter-claim; but Field, J., at chambers, made an order that he should review his taxation, "so far as regards the costs of the counter-claim, there being no certificate."

H. T. Cole (Francis with him), for the defendant.—The defendant, having suc-

ceeded on the issues involved in the counterclaim, is entitled to the costs of those issues. By Order LV. rule 1, after a trial by jury, the costs are to follow the event, unless an order to the contrary be made. There was no such order in this instance. The 5th section of the County Courts Act, 1867, does not apply.

Henry Matthews (Spearman with him), for the plaintiff.—The event referred to in Order LV. rule 1, is the event of the cause, which is in favour of the plaintiff, who has been adjudged a balance of 30*l.* in his favour. Moreover, why does not the 5th section of the County Courts Act, 1867, apply? Counter-claims are, by Order XIX. rule 3, to have the same effect as a cross-action, and if the defendant had brought a cross-action he could clearly not have obtained his costs without a Judge's certificate.

KELLY, C.B.—I am of opinion that this order must be rescinded. My brother Field seems to have treated the counter-claim as if it were *de facto* an action. But it is not an action. The 5th section of the County Courts Act only applies to a plaintiff recovering not more than certain sums, and no certificate could have been given, under the terms of the Act, that there was "sufficient reason for bringing the action in the superior Court." Such a certificate would have been false in fact. It is true that the rules provide that a counter-claim shall have the "same effect as a statement of claim in a cross-action," but this is only "so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

POLLOCK, B.—I am of the same opinion. The conflict is between the County Courts Act and Order XIX. rule 3, of the Judicature Act. But the County Courts Act does not apply to a counter-claim, because it is clear that it only contemplates the case of the litigant who has the opportunity of selecting his tribunal.

Order rescinded.

Solicitors—F. A. Snow, for plaintiff; Pickett & Mytton, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878.
Feb. 21, } BISSICKS v. THE BATH COLLIERY
28. } COMPANY (LIMITED.) *

Sheriff — Execution — Poundage and Levy Fees.

A sheriff's officer went with a warrant for executing a writ of *fi. fa.* to the execution debtor's shop, told the debtor the particulars of the warrant, and that unless payment were made a man must remain in possession. The debtor thereupon, although he had paid the debt to the creditor, paid the amount demanded, which included poundage and levy fees:—Held, that there was a sufficient seizure and levy to render poundage and levy fees payable.

This was an appeal from the Exchequer Division, reported below (46 Law J. Rep. Exch. 611).

F. M. White, for the execution debtor.—There was no seizure here, and the case is, therefore, not so strong a one as *Mortimer v. Cragg* (1). He cited *Colls v. Coates* (2).

McKellar, for the sheriff.—He cited *Impey's Sheriff*, p. 120:—"If he gets into the house, the doors being open, then begins the execution." He also referred to *Howes v. Young* (3).

Our. adv. vult.

The following judgments were delivered on the 28th of May:—

BRAMWELL, L.J.—I think that seizure is necessary to entitle the sheriff to poundage. I am quite aware that this decision will merely have the effect of making the sheriff say for the future, "I seize," but we cannot get over the current of authority that seizure is necessary.

Was there, then, a seizure in the present case? My brother Brett is

clearly of opinion that there was; my brother Cotton doubts, and so do I. But, on the whole, I think that there was one, as the officer did threaten to leave a man in possession. I think, therefore, that the appeal must be dismissed.

BRETT, L.J.—I agree that a seizure and levy are necessary, as we held in *Mortimer v. Cragg* (1), but I think that there was a seizure in this case. The sheriff's officer went with a man; he obtained entry into the house; while there the goods in it were under his control. He spoke as if he had made a seizure and treated his own acts as a seizure, and the plaintiff did so also. Although he had previously paid the judgment debt, he paid it over again because he considered the sheriff had seized, and in ordinary language he paid the sheriff out. What has been the subsequent conduct of the parties? The objection originally raised was that there had been no sale, but when the case came into Mr. Meadows White's hands, he raised the additional objection that there had been no seizure. In the reasons I have given I think there was a seizure.

COTTON, L.J.—I adhere to the doctrine of *Mortimer v. Cragg* (1)—namely, that there must be a seizure before poundage can be claimed. I have felt some doubt as to whether there was a seizure in the present case, but, on the whole, I think that there was one; for if the money had not been paid, the sheriff's officer would have left a man in possession.

Appeal dismissed.

Solicitors—Guscotte, Wadham & Daw, agents for Wadham & Co., Bristol, for the sheriff; Mead & Daubeny, agents for C. Thick, Bristol, for plaintiff.

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) *Ante*, 348.

(2) 11 Ad. & E. 826; s. c. 9 Law J. Rep. Q.B. 232.

(3) 46 Law J. Rep. Exch. 499; s. c. Law Rep. 1 Exch. Div. 146.

[IN THE COURT OF APPEAL.]

1878. } THE UNION BANK OF LONDON
Feb. 6. } v. LENANTON.*

Sale of Goods in Possession of Sheriff—Passing of Property—Ship—Transfer or Assignment of—Registration—Merchant Shipping Acts, 1854 and 1862, 17 & 18 Vict. c. 104. ss. 18, 19, 55, 56; 25 & 26 Vict. c. 63. s. 3—Bills of Sale Act (17 & 18 Vict. c. 36), s. 7.

Possession of goods by a sheriff under a writ of fieri facias does not prevent the debtor from making an effectual sale of the goods by delivery to a purchaser while the sheriff is in possession.

A ship built for a foreign owner, and not intended to be registered as a British ship, was assigned by the builder to a creditor under an agreement, not in the form prescribed by the Merchant Shipping Act, 1854. The assignment was not registered under section 19 of that Act, nor under section 7 of the Bills of Sale Act:—

Held, that the vessel was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that, therefore, the assignment was valid without registration under that Act; and also that the assignment came within the exception in section 7 of the Bills of Sale Act, by which transfers of ships are exempted from the provisions of that Act.

This was an appeal from a judgment of Pollock, B., on an interpleader issue tried by the learned Judge without a jury at last Trinity sittings in Middlesex.

The issue was to determine the right as between the plaintiffs and the defendant to the possession of a leasehold engine works and ship building yard at Cubitt Town, in Middlesex, and the buildings, fixtures and machinery thereon, and the steamship *Edhem*.

The shipbuilding yard and fixtures were formerly in the possession of Messrs. Dudgeon, shipbuilders, and the ship *Edhem* was built by them with another ship called the *Hanson* for the Turkish Government, under a contract by which the price was to be paid by instalments,

and the ship to be delivered to the purchasers at the Golden Horn. She was retained by way of lien for the last instalment of 7,000*l*.

William Dudgeon died in April, 1875, leaving by will his share in the leaseholds and the *Edhem* steamship to his brother John Dudgeon, subject to the condition that John Dudgeon should covenant to indemnify his brother's estate.

At the time of William Dudgeon's death the firm owed the plaintiffs 138,150*l*., which sum was secured by two documents, dated respectively the 21st of May, 1875. One was a memorandum of the deposit of title deeds, by which the debt was charged upon the leasehold premises comprised in the deeds, "and all buildings, machinery and other fixtures whatsoever, which already had been or which during the continuance of the security should be erected upon or affixed to the said hereditaments and premises or any of them;" the other was an equitable assignment of the right, interest or lien of John Dudgeon, or of the firm of John & William Dudgeon, in the steamship *Edhem*, as security for 7,000*l*., J. Dudgeon charging all his right and interest in the ship, and that of his firm, with the repayment of that sum, and agreeing to execute any further assurance of the ship and 7,000*l*. which the bank might require.

This agreement was not registered under the Bills of Sale Act, nor was the ship *Edhem* registered under the Merchant Shipping Act, 1854.

John Dudgeon after the death of William got into difficulties, and soon afterwards became of unsound mind. At this time a bill had been filed in Chancery by the Sultan for the *Edhem*; an administration suit had been commenced; and also a partnership suit by J. Dudgeon against the executors; and Robert Fletcher was appointed receiver in the suit on the 9th of November, 1875. In January, 1876, John Dudgeon was declared lunatic, and on the 9th of February Robert Fletcher and the two sons of John Dudgeon were appointed his committees.

A further arrangement was afterwards made between the receiver, the committees and the plaintiffs. This arrangement was embodied in a document, dated the 24th

* *Coram* Cockburn, L.C.J.; Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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of June, 1876, which, however, was not signed by the parties. The material clauses of that agreement are as follows:—

4. The said committees and the said executor will sell to the said bank all of any machinery and other fixtures now in or upon the said Iron Engine Works and the said ship yard respectively, and not charged with the repayment of any part of the said principal sum and interest, at a valuation to be made by two valuers or their umpire, one of such valuers being appointed by the committees, and the other by the said bank. Such valuation shall, as regards the said machinery and fixtures in or upon the said Iron Engine Works, proceed on the basis of the sale of a going concern, and as regards the said machinery and fixtures in or upon the said ship yard, upon the basis of an unreserved sale by public auction.

5. The said committees and the said executor will sell to the said bank all the loose tools and other implements now in or upon the said Iron Engine Works, and specified in a valuation list lately made by Mr. Frank Lewis, surveyor, at the price of 2,500*l.*

6. The said committees and the said executor will at their own expense assign absolutely to the said bank, in such manner and form as the said bank shall require, all the interest of them or either of them, or of the said J. Dudgeon or the estate of the said W. Dudgeon in the steamships *Edhem* and *Hanson* respectively, and in all payments and moneys which may be received or recovered in respect of the said ships from the Turkish Government, or from any other person or persons whatever. The said committees and the said executor will also take or concur in taking any proceedings in the suit of the *Sultan of Turkey v. The Union Bank of London* which the said bank may require for the perfection of its title to or possession of the said premises or any part thereof.

This agreement was approved by the Master in Lunacy on the 29th of June.

On the 16th of July one Wilcox, a creditor, obtained a judgment against John Dudgeon; and on the 18th of July execution was issued, and the sheriff took possession of the shipbuilding yard, fix-

tures and other plant, and also of the ship *Edhem* which was at that time in dock undergoing certain alterations, after having taken her trial trip.

On the 19th of August the plaintiffs received authority from the receiver and committee to take possession under the agreement of the 24th of June, and on the 22nd of August the plaintiffs took formal possession of everything comprised in that agreement, taking into their service the people in charge of the yard and works; the sheriff's officer remaining in possession.

On the 2nd of September, 1876, the defendant obtained a judgment against John Dudgeon for 870*l.* On the 12th of September a writ of *fi. fa.* was issued, and on the 13th a levy was made. On the 29th of September an interpleader order was obtained, and 870*l.* paid into Court to abide the event.

The question was confined to the ship *Edhem*, and the heavy moveable plant not included in the mortgage of the 21st of May, of which a schedule had been prepared; the loose tools in the shipbuilding yard, which had been paid for, being excluded from the interpleader issue by order.

At the hearing it was argued by the plaintiffs that the property in the plant not comprised in the mortgage of the 21st of May had passed to the plaintiffs by the agreement of the 24th of June, or at all events by the taking possession on the 22nd of August, which was an "acceptance and actual receipt" of everything comprised in the agreement of the 24th of June, satisfying the 17th section of the Statute of Frauds.

For the defendant it was contended, that the agreement of the 24th of June was inoperative, as not having been signed, and that the taking possession on the 22nd of August was also inoperative as an acceptance and receipt, because the sheriff was then in possession.

As to the *Edhem*, it was contended that the assignment of the vessel not being that of a British ship, ought to have been registered under the Bills of Sale Act, and that not being so registered the assignment was void.

The learned Judge gave judgment in

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favour of the plaintiffs, staying execution, that the defendant might appeal.

He now appealed accordingly.

Butt and Witt, for the defendant.—There has been no actual receipt and acceptance of the goods to take the contract out of the Statute of Frauds—*Bentall v. Burns* (1) is a parallel case. There the goods were in the possession of the London Dock Company; and it was held that acceptance of a delivering order by the vendee was not an acceptance of the goods within the statute. No property passes till the person in possession has agreed to hold the goods as agent of the vendee. That could not be here, for the sheriff's officer was not the vendor's agent for such a purpose.

[BRETT, L.J.—But suppose, without consulting the person in charge, the vendor and purchaser go down to the place where the goods are, and the vendor says, "I give you these goods," and the purchaser says, "I accept them," would not that be an actual delivery and acceptance?]

Probably.—See *Benjamin on Sales*, p. 132. But the warehouseman is the agent of the vendor. The sheriff is not; and how can a purchaser get possession while the sheriff's officer is already in possession? In *Ex parte Mutton, re Cole* (2), Bacon, V.C., speaks of the possession of the sheriff as an exclusive possession, with which no one could lawfully interfere. The goods are in "custodia legis."

[COCKBURN, L.C.J.—Custody is one thing and possession another. Does the sheriff's possession divest the possession of the owner? I should think not.]

The owner no doubt has a special property in the goods—*Giles v. Grover* (3). But though the property is not divested, the sheriff has an exclusive possession, as Lord Tenterden explains in his judgment in that case at p. 281. It is said that the order of Vice-Chancellor Malins concludes us. But that order merely gave the committee authority to sign

the agreements of the 24th of June. That has not been done, and therefore the order is inoperative. In no way therefore has the property passed to the plaintiffs.—See *Benjamin on Sales*, pp. 228, 229. As to the transfer of the ship *Edhem* (which was a "ship" at the time it was mortgaged, though not quite finished) the vessel should have been registered under the Merchant Shipping Act, 17 & 18 Vict. c. 104. pt. II. ss. 18, 19 (4). The ship be-

(4) By 17 & 18 Vict. c. 104. s. 18, it is enacted that no British ship shall be deemed to be a British ship unless she belongs wholly either to, 1, natural born British subjects, or, 2, persons made denizens by letters of denization, or naturalized by or pursuant to any Act of the Imperial Legislation, or by or pursuant to any Act or ordinance of the proper legislative authority in any British possession, or, 3, bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British possession.

By section 19. Every British ship (with certain exceptions therein specified) must be registered in manner hereinafter mentioned, "and no ship thereby required to be registered shall unless registered be recognised as a British ship; and no officer of customs shall grant a clearance or transire to any ship hereby required to be registered for the purpose of enabling her to proceed to sea as a British ship, unless the master of such ship, upon being required to do so, produces to him such certificate of registry as is hereinafter mentioned, and if such ship attempts to proceed to sea as a British ship without a clearance or transire, such officer may detain such ship until such certificate is produced to him."

By section 55. A registered ship or any share therein when disposed of to the persons qualified to be owners of British ships shall be transferred by bill of sale, and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar.

By section 57. Every bill of sale for the transfer of any registered ship or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinafter required to be made by a transferee, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall indorse on the bill of sale the fact of such entry having been made, with the date and hour thereof, and all bills of sale of any ship or shares in a ship shall be entered in the register book in the order of their production to the registrar.

By 25 & 26 Vict. c. 63. s. 3, it is declared that the

(1) 3 B. & C. 423.

(2) 41 Law J. Rep. Bankr. 57; s. c. Law Rep. 13 Eq. 178.

(3) 9 Bing. 128.

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longed to a British owner, and was assigned to the Bank, who are also British, without registration; the transfer is therefore void. But if it is not necessary to register the vessel under the Merchant Shipping Act as a British ship, the transfer should have been registered as a bill of sale under 17 & 18 Vict. c. 36. s. 7, for the two Acts are intended to supplement each other. Moreover, the assignment does not even purport to be an actual transfer of the vessel, but is merely a declaration of trust.

[COTTON, L.J.—But a document creating a trust of this kind passes an equitable interest, and is valid as a bill of sale under 25 & 26 Vict. c. 63. s. 3.]

Holl and Aspinall, for the plaintiffs, were restricted to the question as to the ship *Edhem*.—This ship is not a British ship within the meaning of the Merchant Shipping Acts. It was built by British builders, but was never intended to be owned by British owners.

[BRETT, L.J.—But when Dudgeon gave the security, he treated the vessel as his own.]

Only in his capacity of builder. The Act cannot mean that a builder of a ship in Britain is to be taken as the owner of a British ship.

[COCKBURN, L.C.J.—A ship cannot be treated as a British ship till it is registered. Does not the Act mean that a ship shall not be sold to a British owner without registration?]

The Dudgeons only parted with what interest they had, i.e., the builders' lien. The Turkish government are the true owners.

expression beneficial interest whenever used in the second part of the principal Act includes interests arising under contract or other equitable interests, and the intention of the said Act is that, without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property.

By the Bills of Sale Act (17 & 18 Vict. c. 23), s. 7, it is enacted that the term "bill of sale" under that Act shall not include (*inter alia*) "transfers or assignments of any ship or vessel, or of any share thereof."

[COCKBURN, L.C.J.—Then what right have the Dudgeons to sell?]

As between the plaintiffs and the Dudgeons, the former take the whole interest in the ship. They are estopped from denying their title. As to the Bills of Sale Act, this is clearly a "ship," and comes within the words of the exception, which are quite general.

COCKBURN, L.C.J.—I am of opinion that in this case the judgment of the Court below should be affirmed. It is clear that the Messrs. Dudgeon, and, after the death of one of them and the lunacy of the other, the executors and committee in lunacy, were indebted to the plaintiffs' bank in a very large sum. The bank desired to have security; and in consequence this agreement of the 21st of May, 1875, and the bill of sale of the ship of the 21st of May, 1875, and the agreement of the 24th of June, 1876, between the Dudgeons and the company, were executed.

The agreement of the 24th of June having been entered into, a creditor of the Messrs. Dudgeon, of the name of Wilcox, sends in an execution under a writ of *fiery facias* against the goods of the late firm of Dudgeons, and a sheriff's officer takes possession of the articles comprised under Article 4. That being the state of things, the plaintiffs, under the authority of that agreement, go upon the premises, and with the assent of the vendors or some of them, do what they can towards taking possession. They do what certainly, independently of the question of the execution, would amount to a taking possession sufficient to satisfy the Statute of Frauds, but for the execution. The question then presents itself whether the possession of these goods by the sheriff is sufficient to prevent possession being taken by the vendees. I think it is not; for I think it is a fallacy, however usual it may be in common parlance, to say that the goods are in the possession of the sheriff at all. They are in the custody of the law, and of the sheriff's officer as representing the law;—*possession* undoubtedly as against a wrongdoer who might seek to divest him of any portion of the goods so

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seized; but I think *custody* only so far as the real owner of the goods is concerned. Until those goods are sold under the authority of the law, virtually they are in his possession; at all events, as regards every one but the execution creditor or the officer of the law, who under the writ of *fi. fa.* is entitled to the custody of the goods. It must not be forgotten that the 17th section of the Statute of Frauds is an enactment especially providing for the protection not of sellers but of buyers. It requires that there shall be actual receipt of the whole or part of the goods before the seller is entitled to say to the buyer, "You have bought of me; complete your contract." If the buyer does anything which virtually amounts to a receipt, I am quite of opinion that he is within the protection of the statute; and if the buyer goes to the spot, and with the assent of the seller takes possession, either actually or constructively, of the goods, it amounts to a receipt.

The only thing which I see any doubt about is as to the assignment of the *Edhem*. That professes to be an assignment by way of bill of sale; but the bill of sale has not been registered. Therefore if the bill of sale come within the Bills of Sale Act, then the assignment would be bad for want of registration. But I think the exception in the Bills of Sale Act clearly shews that it was not intended to apply to this ship.

Then comes the question whether the Shipping Act is satisfied, or whether this was a vessel which required to be registered under that Act as a British ship; and if so, whether (the vessel not being registered), a bill of sale purporting to pass the property in the vessel will do. I had some doubt myself, I confess, inasmuch as the Act of Parliament expressly requires that a British ship shall be registered, and then goes on to deal with the mode of passing property in a British ship by sale—whether it virtually amounts to this, that before you can pass the property in a British ship, you must necessarily register her with a view to bring her into the operation of that 57th section which requires that a transfer should be registered. But I do not think

it at all necessary to decide on that ground. For the purposes of the present contention, I must say that I do not think this was a British ship at all—I mean within the contemplation of the Act of Parliament. She was built, it is true, by a British owner; and on looking at the contract between the British owner and the foreign purchaser for the manufacture and transfer of the vessel, it appears to me impossible to say that the property in that ship was to pass from the builder to the foreign owner until she was actually delivered at the spot where the delivery was to take place, to the Turkish Government. It is specially provided for, that the Turkish Government should have the ship delivered at a particular place for a certain sum of money. Therefore in a sense being the property of a British owner, she was a British ship, but not within the contemplation of the statute. The statute was intended to apply to ships being permanently the property of a British owner. That was not the case here; for as soon as she crossed the sea she was intended to be transferred to a foreign owner, and never intended from that hour to be a British ship. Therefore I do not think that she comes within the Act of Parliament which has reference to British ships.

Therefore, I concur with the rest of the Court in thinking that the judgment of Baron Pollock in the Court below was right, and that the judgment must be affirmed.

BRAMWELL, L.J.—I am of the same opinion. The first question that was argued before us was whether the property in the articles named in section 4 passed by virtue of the contract *and* that which took place when the agents of the Bank went down to take possession. I say "*and*," because as there was a taking possession, such as it was, no doubt the plaintiffs are entitled to add it to the agreement. I doubt very much whether the same answer ought not to have been given, if there had been no taking possession.

Now, I am of opinion here, that both these parties intended that the property

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should pass, or at all events that all the articles in paragraph 4 should pass, although it was necessary to take some steps to ascertain the precise amount which was to be paid. That being so, the Messrs. Dudgeon, the executors and committee, and the plaintiffs, having agreed that they should take and have possession, and as they did take and have possession, I cannot but agree that the property did pass. It is quite clear with regard to the property mentioned in paragraph 4.

Then the question arises also whether there was a good contract under the Statute of Frauds. I will not deal with the point which was dealt with by my Lord, except to say this, that it does seem to me impossible to suppose that an execution debtor cannot make an effectual sale of his goods to a purchaser because they are in the possession of the sheriff. If he can make an effectual sale, and if there can be—of course not a delivery to him, in one sense—but an actual acceptance of the goods within the Statute of Frauds, why it took place here.

But I am also clearly of opinion that the delivery and acceptance of the goods in article 5 of the contract, and the payment in respect of them, was a sufficient acceptance of part, and part payment sufficient to satisfy the requirements of the Statute of Frauds, even if they were not otherwise satisfied. A case precisely in point is *Scott v. The Eastern Counties Railway Company* (5).

There is no doubt here that the whole of the obligations on one side were the whole of the considerations on the other side; and this is one indivisible agreement.

The only remaining question is as to the ship *Edhem*. As to that ship, I am of opinion (and I am certain there is some authority for it, although I have not been able to find it) that the property in an unregistered ship may pass otherwise, and indeed must pass otherwise than by the bill of sale required by the statute. If you look at the words of the Shipping Act, you will find almost that it necessarily must be so.

Now, the 17 & 18 Vict. c. 104. s. 19, says, "Every British ship must be registered in manner hereinbefore mentioned," with an exception within which this case does not come. If it stood there you might think it was obligatory upon the person who was the owner of a British ship, but we find it was not so. There is no penalty imposed for not doing it, that is to say, a man is not punished or sent to prison for it, or indicted; but "No ship hereby required to be registered shall, unless registered, be recognised as a British ship, and no officer of customs shall grant a clearance," and so forth. The consequence of non-registering is that you do not get the benefits of your British ownership. Now, just see what follows:—The statute does not say, "No ship, or share therein, shall be transferred, except by bill of sale;" but "A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships shall be transferred by bill of sale." That is only applicable to the case where the ship was a registered ship. This was not a registered ship, and even if there was some obligation upon people to register, which I think it is clear there was not, the statute does not say because that obligation has not been observed the ship may not be assigned. Moreover, it ought to be remembered that the whole of this is one piece of legislation, because it proceeds to say, "Every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship, or share comprised in such bill of sale, and shall indorse the fact of such entry having been made," and so on, "and all bills of sale of any ship, or shares in a ship, shall be entered in the register book in the order of their production to the registrar." I rather think that the consequence of not doing that is that a subsequent transferor or incumbrancer takes precedence, that is, whoever gets first on the register takes

(5) 12 Mee. & W. 33; s. c. 13 Law J. Rep. Exch. 14.

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precedence. Therefore I am of opinion here that the Dudgeons were not bound to register; and further, if they were bound to register, there is no prohibition of the assignment otherwise than by bill of sale, because that is only applicable to registered ships, and there is no prohibition of assignment of unregistered ships. Further, and in addition to that, Lord Justice Cotton pointed out that, under the 3rd section of the 25 & 26 Vict. c. 63, it is clear that the plaintiffs would be entitled to an equitable interest in this ship without registration. That interest might be transferred to them otherwise than by statutory bill of sale under the sections I have referred to, and without registration. So much for that point.

Then I think the last point that was made was that this transfer was void under the Bills of Sale Act, and we were asked to read the exception in the Bills of Sale Act, as though the words were "transfer or assignment of a ship, pursuant to the Merchant Shipping Act." I am of opinion that we cannot so read it; really it is difficult to give a reason why we cannot, except to say no reason has been given why we should. No doubt the words used are something like the words used in the Merchant Shipping Act; but they are general words, which it seems must have been intended to have some sweeping effect. It may be asked why sales of ships in general should not have been mentioned. The answer to that is, that the Bills of Sale Act (a much lauded Act, and a very good one I dare say, but one which I generally find applied to the purposes of mischief rather than to the prevention of it) — deals with *documents*. You may make a verbal transfer of anything without being within the Bills of Sale Act. Therefore, the language in the statute is properly limited to the case of a document such as is there described. I have now dealt with all the questions raised by the defendant's counsel, and I am of opinion that they ought to be answered unfavourably to the defendants, and that this judgment should be affirmed.

BRETT, L.J.—In this case judgment has passed for the plaintiffs on the

interpleader issue. The question is, whether the property was in the bank, as against the execution creditor; and the property, both in the *Edhem* and in the other goods, is said to have passed to the bank by virtue of and under a contract. The first question raised is, whether there is a contract which can be relied upon by the plaintiffs in this case between them and the Dudgeons. That depends upon whether there is a sufficient contract within the Statute of Frauds, that is, one which can be looked at, notwithstanding the requirements of the Statute of Frauds. The contract is in writing, but it is not signed, therefore, so far, it has not complied with the Statute of Frauds. Then the question comes to be, whether there is something which will allow us to look at the contract, notwithstanding it is not signed.

Now the first point which presents itself in order to determine that point is whether the contract, with regard to sections 4 and 5, is one or several. I am inclined to think myself, for the reasons given by Lord Justice Bramwell, that the contract is one. The true test is whether the consideration is one or divisible. But I entirely agree with my Lord Chief Justice, that, even supposing article 4 to contain a separate contract, there was a sufficient actual taking of possession by the bank here to enable us to look at the contract in compliance with the Statute of Frauds. The vendor gave authority to the vendee to go down and take possession of all that he could give him, and that is the same to my mind as if the vendor had gone down with the vendee. The vendee goes down, he finds there certain servants of the vendor, he takes those servants into his own pay, he himself being actually present, or his agent, and tells them to hold the goods for him, that being done with the consent of the vendor; and the servants do accept that employment, and remain at the place. Therefore it seems to me that it is the same thing as if the vendor and vendee had gone down together, and both being there, the vendor had said to the vendee, "Now take these goods, they are yours," and the vendee had said, "Very well, I will take them,

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they are mine;" the only objection to that is, that it is said the sheriff is in possession, and therefore this vendor could not give possession to this vendee, and the vendee could not take possession. Now, for the purpose of satisfying the Statute of Frauds, it seems to me that the presence of the sheriff, and his holding the custody, does not prevent it from being as between the vendor and the vendee a sufficient actual taking possession by the vendee, so as to bind the contract under the Statute of Frauds. That is all we need determine upon that point. It seems to me that we are entitled to look at the contract, notwithstanding the Statute of Frauds.

Now, with regard to the ship, I think there are two reasons why one may hold that the property in the ship passed also. I treat that document as intending to pass the property in the ship. If so, what was the ship? The ship at the time was finished. She was a ship. That is now admitted. She belonged solely to British owners, but she never was intended to be registered as a British ship, and for that reason I should agree with my Lord Chief Justice, that not being registered, you might fairly say that it was not a ship which was ever intended to be brought within the Shipping Act at all. But supposing that be not sufficient, as a fact she was not registered, and it seems to me that the only transfer which is forbidden without registration by the Merchant Shipping Act, is a transfer of a registered ship. If it were not for that statute, no registration of the transfer would be necessary, and the only transaction which would otherwise be good but which is forbidden to be good by section 55 of the Merchant Shipping Act, is the transfer of a registered ship. Therefore, it seems to me that in either view this transaction was not made void or insufficient by reason of the Merchant Shipping Act. Then it is said that if so, it is not available by reason of the Bills of Sale Act; and if the Bills of Sale Act had been continuous with the Merchant Shipping Act, so that you could have said that every ship which is not to be dealt with under the one Act must be dealt with under the other, then

the ship would go under the Bills of Sale Act. But the Bills of Sale Act is not continuous with the Merchant Shipping Act. The Bills of Sale Act excepts all ships; that is, whether British ships or foreign ships, or whether registered ships or not registered ships. Therefore, although the ship is not registered, and although the transfer is not within the Merchant Shipping Act, yet it is a ship, and is excepted from the Bills of Sale Act. Therefore, a ship unregistered is a thing the transfer of which is not dealt with, either by the Merchant Shipping Act or the Bills of Sale Act, and goes according to the Common Law, and the transfer is good, although there has been no registration at all. I think on every point of view the appeal must fail, and the judgment of the Court below must be affirmed.

COTTON, L.J.—I am of opinion that the appeal must fail. I will first deal with the ship, because there are considerations affecting the other points which do not affect the ship.

The first question is this, whether, putting aside the Bills of Sale Act, the bank had a good and valid title to the ship. The instrument under which they claim is the instrument of the 24th of May, 1875, and that recites what is supposed to be the interest of the Dudgeons, the builders; not stating it, in my opinion, correctly, for it deals with them as having only a lien or charge upon the ship. [His Lordship here read the material part of the agreement.]

Now, in Equity that would be a good contract, not transferring the property of the ship, but giving the plaintiffs a right in equity to say that whatever interest the firm of Dudgeons had in the ship, should be transferred to them as a security for their debt.

Now I do not propose to enter into the question whether this is a ship which, under the Act of 1854, ought to have been transferred by a duly registered Bill of Sale, but in the Act of 1862 there is an express proviso, giving a ship-owner in equity a right to transfer his interest in his ship by an instrument or contract not sufficient to pass the legal

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title. It is this: "Without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property," so that, independently of the question whether the *Edhem* was a British ship within the meaning of the Merchant Shipping Act, as to which I agree with the rest of the Court, the point as to the validity of the charge is especially met by the section I have referred to. Here there was an equitable interest in the ship, granted by contract to the bank by Messrs. Dudgeon. Even assuming that the *Edhem* was a British ship, that contract would have been effectual, independent of the Bills of Sale Act, to give them a title to the ship at the time when the execution of the 13th of September was issued. Then the question arises still, does the Bills of Sale Act make that title of no effect as against the execution creditor? It would be a bill of sale within the Act unless it is taken out of the Act by the exception contained in the interpretation clause. Although the Bills of Sale Act in terms deals with bills of sale, assignments and transfers, a contract effectual in equity, giving the person a right to the thing in specie, is an assignment or transfer within the meaning of the Act. The exception is, "This Act is not to include the following documents, that is to say, transfers or assignments of any ship or vessel, or any share thereof." Does this document come within that exception? I am of opinion that it does. The argument is this, that we must read those words as "transfers or assignments of any ship or vessel duly registered under this Act relating to British ships." But there are no such words to be found. The Act is not to include "transfers or assignments of any ship or vessel or any share thereof." In that exception you must extend the word "assignment" to that which does not purport to be a transfer of the legal estate, but which it is in Equity, so as to give the mortgagee a right to have a

transfer, and it is in no way limited so as to exclude anything which you may call a transfer or assignment of any British vessel. My opinion, therefore, is that the transfer is not within the Bills of Sale Act, and that it is effectual so as to give the Bank a title as against Lenanton.

Now we come to the other things which have been claimed. It seems to me that the only question that can arise is, as regards those things not expressly comprised in the mortgage which were not included in the valuation list. My opinion entirely agrees with that expressed by the other members of the Court, that the property effectually passed by the contract. There was no written contract, but assuming that the contract was one which, notwithstanding the Statute of Frauds, was valid, it was a contract that related to certain specific things, viz. all things on the premises which were not effectually covered by the mortgage. It passed them all, and to obviate the question under the Statute of Frauds (for, although the sheriff was in possession, there was an interest which the owner of the property could sell), the parties acting on behalf of the lunatic give authority to the bank to go down and take possession. The bank having taken possession under that authority, order the persons in charge to hold the property for them, and it appears that was a most effectual attornment. The bank therefore held possession of the things subject only to the execution; they did hold possession of that which was the subject of the sale, and therefore there was a receipt by the purchasers, so as to prevent a difficulty arising under the Statute of Frauds.

Judgment affirmed.

Solicitors — Lyne & Holman, for plaintiffs;
Pritchard & Sons, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878.
 Jan. 22. } MIRABITA v. THE IMPERIAL
 Feb. 18, 22. } OTTOMAN BANK.*

Sale of Goods—Goods shipped on account of Vendee—Bill of Lading to Vendor's Order or Assigns—Passing of Property.

The plaintiff contracted to purchase a certain quantity of goods from P. & Co. P. & Co. purchased the goods from O., whom they paid, and shipped them from Cyprus to London for and on account of the defendants, and delivered the invoice to the plaintiff.

They drew a bill on the plaintiff's firm in London to the order of O. O. discounted it with the defendants, and forwarded it to the defendants' London agents, together with bills of lading drawn to the order or assigns of P. & Co., with instructions that the plaintiff's London firm would be ready to accept and pay it at maturity against delivery of the bills of lading.

The bill being presented to the plaintiff, he refused to accept it without receiving the bills of lading.

Thereupon the defendants took possession of the cargo, and, notwithstanding that the plaintiff offered to pay the bill of exchange, refused to deliver to him the bill of lading without payment of the bill, together with the freight and charges; and eventually sold the cargo for less than its value.

On a special case, the arbitrator found as a matter of fact that the parties had intended that the property should pass to the plaintiff on shipment of the goods:—

Held, that such finding was justified by the facts; that the property had passed to the plaintiff, on the tender of payment of the bill of exchange, and that as the defendants had no title to the goods, the plaintiff could maintain an action against them for the conversion thereof.

This was an appeal from a judgment of the Exchequer Division, upon a Special Case stated by an arbitrator for the opinion of the Court.

The action was brought for damages

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

for the wrongful conversion by the defendants of a certain cargo of terra umber, shipped on account of the plaintiff from Larnaca, in Cyprus, to London.

The material facts as shewn by the Special Case are as follows:—

The plaintiff is a merchant at Malta and Constantinople.

The defendants are a banking company at Constantinople, with agencies in London and at Larnaca, in Cyprus.

On the 26th of June, 1873, the plaintiff entered into a contract with Messrs. Phatsea, Pappa & Co., merchants in Cyprus, for the purchase of a quantity of terra umber.

Phatsea & Co. chartered a British ship by the order and on account of the plaintiff, which took on board 600 tons of umber at Larnaca; and the plaintiff sent to Phatsea, Pappa & Co. 150*l.* for advances to be made to the ship.

On the 9th of October the captain signed four bills of lading for the cargo, shewing the goods to be shipped by Phatsea, Pappa & Co., and making them deliverable to order or assigns, and handed the bills of lading to Phatsea, Pappa & Co.

The plaintiff, at the request of Messrs. Phatsea, Pappa & Co., insured the vessel in London.

The ship sailed from Larnaca on the 9th of October, 1873.

Having received the bills of lading, Messrs. Phatsea, Pappa & Co. drew a bill of exchange for 280*l.* on the plaintiff, and endorsed and handed it with the bills of lading, which they had previously endorsed in blank, to Mr. Corkji, a merchant in Cyprus, from whom they had bought the umber. They had already paid for the umber, and the bill was endorsed for Mr. Corkji's accommodation.

Mr. Corkji discounted the said bill of exchange at the Larnaca agency of the plaintiff's bank, and with the bill handed to them the bills of lading, saying that they were to be sent on to Constantinople, where the plaintiff was residing, and given up to the plaintiff on payment by him of the bill of exchange at maturity.

Shortly afterwards Mr. Pappa handed

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to the plaintiff the charter-party and an invoice of the goods, describing them as shipped by order and on account of the plaintiff.

The plaintiff having refused to accept the bill without receiving the bills of lading, the documents were sent back to the Larnaca agency, and eventually a new arrangement was made, by which the old bill was to be given up, and a new bill for 254*l.* 11*s.* was to be drawn by Messrs. Phatsea, Pappa & Co. to the order of Mr. Corkji, on Messrs. Mirabita Brothers, the plaintiffs' firm, in London at two months' date.

A new bill of exchange was accordingly drawn, dated the 9th of October, 1873, and was sent by Messrs. Phatsea and Pappa to Mr. Corkji, who handed it to the Larnaca agency of the defendants' bank, saying that it was to be sent with the bills of lading to London, where Mirabita Brothers would be ready to accept and pay the bill of exchange at maturity against delivery of the bills of lading.

The documents were accordingly forwarded to the defendants' agency in London, and at the same time Messrs. Phatsea & Pappa gave the plaintiff a letter addressed to the captain of the vessel, authorising him to deliver the cargo to the plaintiff if the bills of lading had not come to hand.

The vessel arrived at Gravesend on the 3rd of December. The captain gave notice of his arrival to the plaintiff's agent, who ordered the vessel to Mill-wall Docks.

The same day the bill of exchange and bills of lading arrived in London, and the bill of exchange was left at the office of Mirabita Brothers, with notice that the bills of lading would be given up on payment of the draft.

Mr. Ferdinand Mirabita, one of the London firm, returned the bill to the bank, saying that he was ready to pay the bill at maturity, but would not then accept it.

The defendants' manager in London then telegraphed to the Larnaca agency that the Mirabita Brothers refused to accept the bill; and the manager at Larnaca, with the consent of Mr. Corkji

and Messrs. Phatsea & Pappa, telegraphed back instructions to the agency in London to keep the bill of lading and sequester the cargo for payment of the draft and charge.

On the 8th of December, by the order of the defendants, the ship's brokers entered the cargo at the custom-house in the defendants' name.

On the 12th of February Mr. Ferdinand Mirabita offered to pay the bill and receive the bills of lading, but the defendants' manager refused to accept payment of the bill, saying that the defendants had taken possession of the cargo, and had made themselves liable for freight.

The plaintiff thereupon communicated with Messrs. Corkji and Phatsea & Pappa, who informed the manager of the Larnaca agency of what had occurred, and said that they were willing to defray any claim for expenses incurred by the defendants.

The manager of the Larnaca branch then telegraphed to the defendants in London that payment of the draft only was required before delivery of the bills of lading.

The defendants however persisted in their demand for payment of the amount of the bill, together with expenses, and a guarantee for freight on the part of the plaintiff.

The plaintiff offered to pay the amount of the draft, and to guarantee the freight, but the defendants refused to come to terms.

Eventually the defendants landed the cargo; and, after heavy charges for demurrage, landing and other expenses had been incurred, sold the cargo without any authority from the plaintiff for a sum which was not sufficient to pay the amount of the bill of exchange, freight and expenses.

The cargo was worth in the market more than the amount of the bill of exchange and the freight and other expenses which the plaintiff must have paid to get possession of it; and if he had obtained possession of the cargo, he would have made a profit therefrom.

The arbitrator found as a fact that it was the intention of Messrs. Phatsea,

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Pappa & Co. and of the plaintiff that the property in the cargo of umber should pass to the plaintiff upon its shipment, subject to a lien on the same for payment of the price; and their intention that the property in the cargo should be vested in the plaintiff continued from the time of shipment until the arrival of the ship in England.

It was agreed that the Court should be at liberty to draw inferences of fact, and to disregard the above finding if a jury would not have been justified in coming to such a conclusion upon the facts stated.

The question for the opinion of the Court was whether the plaintiff was entitled to recover damages from the defendants for their dealing with the cargo as above mentioned.

The Exchequer Division (consisting of Cleasby, B., and Huddleston, B.) decided in favour of the plaintiff, holding that the property in the umber had passed to him on tender by him of payment of the bill of exchange, and that therefore he was entitled to bring an action against the defendants for their wrongful dealing with the goods.

Against this decision the defendants now appealed.

Henry Matthews and A. Wilson, for the defendants.—The question is whether the plaintiff had such property in the umber at the time of the alleged conversion as to enable him to bring his action against the defendants. It may be allowed that it was the intention of Pappa only to retain such control over the goods as would enforce payment. It was intended that the plaintiff should have had the bills of lading at Constantinople. If that arrangement had been carried out, the property would have passed. But a new arrangement was made, and the passing of the property was delayed. There is no case in which the vendor has reserved a "*jus disponendi*," as the vendor did in this case, where it has been held that the property passed. The contract here was not for the delivery of a particular cargo of umber, but only of a certain quantity.

Prima facie, delivery to the carrier would be delivery to the vendee; but it is not so where the vendor reserves a "*jus disponendi*," for that shews that he does not intend to appropriate the particular cargo at once—*Waite v. Baker* (1); *Benjamin on Sales*, p. 288; *Turner v. The Trustees of Liverpool Docks* (2); *Van Casteel v. Booker* (3); *Ellershaw v. Mag-niac* (4); *Shepherd v. Harrison* (5); where see the judgment of Cairns, L.C. If the property has not passed to the plaintiff, it is clear that he cannot obtain damages against the defendants—*Ogg v. Shuter* (6); *Gabarrow v. Kreeft* (7); *Jenkyns v. Brown* (8).

Meadows White and Archibald, for the plaintiff.—The question in this case is that which was not decided in *Ogg v. Shuter* (6), namely, what was the effect of the plaintiff offering to accept the draft and pay the money. *Waite v. Baker* (1) does not decide this case, for the bill of lading in that case was not endorsed. *Turner v. The Liverpool Dock Trustees* (2) shews that where the bill of lading makes the goods deliverable to the shipper's order or assigns a *jus disponendi* is reserved—see *Benjamin on Sales*, pp. 265, 299. But here the property passed by the letter, which shewed the intention, and the tender of payment by the plaintiff. See the notes to *Coggs v. Bernard* (9), *Ratcliff v. Davies* (10). In *Shepherd v. Harrison* (5), *Van Casteel v. Booker* (3), *Ogg v. Shuter* (6), and *Jenkyns v. Brown* (8), there was nothing to shew an intention that the property should pass at once. The *jus disponendi*

(1) 2 Exch. Rep. 1; s. c. 17 Law J. Rep. Exch. 307.

(2) 6 Exch. Rep. 543; s. c. 20 Law J. Rep. Exch. 393.

(3) 2 Exch. Rep. 691; s. c. 18 Law J. Rep. Exch. 9.

(4) 6 Exch. Rep. 570, n.

(5) 38 Law J. Rep. Q.B. 105, 177, and 40 Law J. Rep. Q.B. 148; s. c. Law Rep. 4 Q.B. 197, 493, and 5 H.L. Cas. 116.

(6) 45 Law J. Rep. C.P. 44; s. c. Law Rep. 1 C.P. Div. 147.

(7) 44 Law J. Rep. Exch. 238; s. c. Law Rep. 10 Exch. 274, *sub nom. Gabarron v. Kreeft*.

(8) 14 Q.B. Rep. 496; s. c. 19 Law J. Rep. Q.B. 286.

(9) 2 Sm. L.C. 218.

(10) Cro. Jac. 244.

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was reserved, and the passing of the property was at no time completed. The intention of the parties is always a question for the jury—*Brown v. Hare* (11)—and the arbitrator has found in the plaintiff's favour. As to the effect of the intention of the parties in passing the property, see *Wood v. Bell* (12), *Joyce v. Swan* (13).

Wilson, in reply.—Property passes not by intentions, but by acts. It can only pass by deed, or by delivery, or by contract for valuable consideration. In none of these ways did the property pass here.

Cur. adv. vult.

On Feb. 22 the following judgments were delivered:—

BRAMWELL, L.J.—This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the bargain made between the plaintiff and Phatsea & Co. the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber or bills of lading of them until payment of the bill of exchange. No question arises as to the defendants' rights; for it was admitted, and properly admitted, that the defendants did wrong in refusing the amount of the bill and selling the umber. On the other hand, there is no contract between the plaintiffs and defendants; so that in the result this case is reduced to this—When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, or right thereto, as to entitle him to maintain this action? It is argued that he had not, and the reason given is that as the umber bought was not specific and ascertained, and as on shipment the shippers took a bill of lading to order and gave an interest in it to Corkji, who transferred it to the defendants, no property passed. And for

this a long series of authorities, beginning with *Waite v. Baker* (1) and ending with *Ogg v. Shuter* (6), is cited. It is almost superfluous to say that by these authorities we are bound, that I pay them unlimited respect, and, I may add, I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a "*jus disponendi*." Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor. This appears from *Waite v. Baker* (1) and *Gabarrow v. Kreeft* (7), and to some extent from *Ellershaw v. Magniac* (4). In the first case Parke, B., expressly says that the vendee Baker could, under the circumstances, maintain an action against Lethbridge for having sold the barley to Waite. This property or power exists then, and therefore if the vendors of the umber had sold it to the defendants this action could not be maintained. But in that case the defendants would have acquired a right, while, as we have said, it is admitted that no right in this case can be relied on. We think it is not necessary to inquire whether what the shipper possesses is a property, strictly so-called, in the goods or a *jus disponendi*; because we think whichever it is, the result must be the same, for the following reasons:—That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the contract they are at his risk; if lost or damaged he must bear the loss. If specially good, and above the average quality which the seller was bound to deliver, the benefit is the vendee's. If he pays, and the vendor receives the price, not having transferred the property nor created any right over it in another, the property vests. It is found in this case that, as far as intention went, the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted, the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any

(11) 4 Hurl. & N. 822; s. c. 29 Law J. Rep. Exch. 6.

(12) 5 E. & B. 772; s. c. 25 Law J. Rep. Q.B. 148; in error, s. c. 6 E. & B. 355; s. c. 25 Law J. Rep. Q.B. 321.

(13) 17 Com. B. Rep. N.S. 84.

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delivery. None might have been made; the defendants might have wrongfully withheld the bill of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether the vendor's right was a right of property or a "*jus disponendi*." For whichever it was, it was their intention and that of the plaintiff that it should cease on the plaintiff paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here. There is nothing in the authorities inconsistent with this. The only case that may be thought to seem so is *Waite v. Baker* (1), where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he chose to exact. Parke, B., says: "There is no pretence for saying that Lethbridge agreed that the property should pass." There was nothing that amounted to an appropriation in the sense of that term which alone would pass the property. There was no agreement between the two parties that the specific cargo should become the property of the defendant, the vendee. Here all the evidence shews that there was such agreement. The arbitrator says it existed in fact at the time of shipment, but the subsequent conduct of both parties shews it. What seems decisive is this—the plaintiff must have a right against some one. Has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, and he has done everything he was bound to do, treating the altered agreement as governing. No action therefore would lie against him. It must, then, be the defendants who are in the wrong. I think they are; that the property was to pass on payment, and consequently on tender of payment

of the bill of exchange; that the bill of lading was handed to the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange; that therefore the plaintiff can maintain this action, and the judgment should be affirmed, for the reasons given by Baron Cleasby. I would add this, that I agree with the reasoning of the Court below, and further make this remark—I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the coming into operation of the Judicature Acts. I have this further to add, that Lord Justice Cotton has favoured me with a perusal of what he has written on the subject, and I entirely agree with it.

COTTON, L.J.—In this case the vendor, on shipping the goods, the subject of the contract, took a bill of lading to his order, and dealt with that bill of lading in this way—In order to secure the bill of exchange which he drew, and although he negotiated that bill of exchange, the person who took it to the Ottoman Bank took it solely for the purpose of securing the bill of exchange, and in fact the vendor agreed, and so far as he could transferred to the purchaser his right to insist that on payment of the bill of exchange the bill of lading should be handed over.

I mention these facts for the purpose of adding that the action was begun long before the Judicature Acts, and therefore it is simply to be dealt with as a legal question. And we cannot consider here how far the plaintiff has the right in equity to insist that he occupies the same position as the vendors, and to insist that, as against the pledgee of the bill of lading, the plaintiff, as transferee of the right, has a good equitable title, even if he have not a legal title. In fact the present case simply turns on this question, whether the property in the goods in question has, under the circumstances, passed to the plaintiff. Now I quite agree with the judgment of Lord Justice Bramwell, but as a number of cases were cited in argument which it was contended were adverse to the decision upon which we rely, I thought it better to give the reasons which I con-

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sider are applicable to the principle of those decisions, and the principle applicable to such cases as this. What, then, is the principle of these cases? Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract—that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by terms of the bill of lading) shipment on board a ship of a chattel for the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser. When the vendor, on shipment, takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Waite v. Baker* (1), *Ellershaw v. Mag-niac* (4) and *Gabarrow v. Kreeft* (7), in each of which cases the vendors had dealt with the bills of lading for their own benefit, the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as where he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender the property in the goods does

not pass to the purchaser; and so it was decided in *Turner v. The Liverpool Dock* (2), *Shepherd v. Harrison* (5) and *Ogg v. Shuter* (6). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which according to the intention of the parties is necessary to transfer the property is done; and in my opinion, under such circumstances the property does, on payment or tender of the price, pass to the purchaser.

Apply these principles to the present case. Pappa, the vendor, did not attempt to make use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract. He dealt with it only for the purpose of securing payment of the price. It is expressly stated in paragraph B of this case that Mr. Corkji, who had acted for Pappa, discounted the said bill of exchange at the Larnaca agency of the defendants' bank, and, with the bill of exchange, handed them the bills of lading, saying they were to be sent to Constantinople, and given up to the plaintiff on payment by him of the bill of exchange at maturity.

Under these circumstances there was an appropriation by the vendor of the cargo, subject only to payment of the price. This was tendered, and as it is conceded that the defendants were wrong in claiming anything more. The plaintiff, the purchaser, had done or offered to do all that was incumbent on him to make the appropriation absolute, and the property vested in him.

BRETT, L.J., concurred with the judgment of Lord Justice Cotton.

Judgment affirmed.

Solicitors—Stocken & Jupp, for plaintiff; Clements, for defendants.

1878. }
Feb. 23. } OTTAWAY v. HAMILTON.
March 5. }

*Husband and Wife—Divorce Suit by
Wife—Costs of Suit—Necessaries.*

Where a suit has been reasonably instituted in the Divorce Court by a wife against her husband for a divorce, on the ground of cruelty and adultery, the husband is liable to the wife's solicitor for the fair and reasonable costs, as between solicitor and client, which have been incurred in the prosecution of such suit, although they may be costs which the Registrar of the Divorce Court has disallowed in taxing the wife's costs of such suit, as between party and party.

This was an action to recover the amount of certain costs of the plaintiff, as the solicitor of the defendant's wife, in prosecuting a suit which had been instituted in the Divorce Court on behalf of the wife against her husband, the defendant, for a dissolution of the marriage, on the ground of the defendant's adultery and cruelty.

A decree *nisi* for the dissolution of the marriage had been obtained, and the same had afterwards been made absolute, and the wife's costs had been taxed by the Registrar of the Divorce Court and paid by the defendant; but the costs now sought to be recovered were the extra costs, as between solicitor and client, and included, *inter alia*, the costs of detectives who had been employed to prove the case against the husband, which the Registrar of the Divorce Court had disallowed as between party and party.

The action was tried at Westminster, during last Hilary Sittings, before Denman, J., without a jury, when the question as to the right to recover was reserved for argument on further consideration, it being agreed that the amount recoverable (if any) should be settled by a referee on the principle to be laid down by the Judge. The question was accordingly argued by

Waddy (Ottaway with him), for the plaintiff, and

J. C. Matthew, for the defendant, when the following authorities were referred to,

viz.—Brown v. Ackroyd (1), *Turner v. Hookes* (2), *Rice v. Shepherd* (3), *Re Hooper*; *Baylis v. Watkins* (4), *Dickens v. Dickens* (5), *Stocken v. Patrick* (6), and *Wilson v. Ford* (7).

Our. adv. vult.

On the 5th of March the learned Judge delivered the following judgment:—

DENMAN, J.—This was an action brought by the plaintiff, a solicitor, for 263*l.* 10*s.*, alleged to be due from the defendant under the following circumstances:—

In 1875 the plaintiff was retained by the defendant's wife to institute proceedings against the defendant in the Divorce Court for a divorce, on the grounds of cruelty and adultery. On the 30th of June, 1876, a decree *nisi* was made for the dissolution of the marriage, which was made absolute on the 23rd of January, 1877. The costs of the wife against the defendant, as between party and party, had been taxed upon the application of the wife, but the costs for which the plaintiff sued the defendant in this action had been disallowed, and the plaintiff sought to recover them as costs, which would be properly allowed as between attorney and client, and as such being necessities supplied to the wife. It was agreed at the trial that I should reserve judgment upon the facts admitted, and, after argument upon those facts, decide which, if any, of the different classes of costs sought to be recovered were recoverable, the amount due to be determined by a referee agreed upon, according to the principle laid down by me.

The facts admitted at the trial were as follows:—

The first bill of costs sent in by the plaintiff amounted to 544*l.* 1*s.* 11*d.*—of this sum 275*l.* 16*s.* 2*d.* was taxed off and

(1) 6 E. & B. 819; s. c. 25 Law J. Rep. Q.B. 193.

(2) 10 Ad. & E. 47.

(3) 12 Com. B. Rep. N.S. 332.

(4) 33 Law J. Rep. Chanc. 300.

(5) 2 Sw. & Tr. 103; s. c. 28 Law J. Rep. Prob. & M. 94.

(6) 29 Law Times, 507.

(7) 37 Law J. Rep. Exch. 60; s. c. Law Rep. 3 Exch. 63.

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269l. 5s. 9d. paid. A supplemental bill was afterwards brought in for 201l. 2s., which contained a great number of items for expenses incurred in the payment of detectives and others in obtaining information relating to acts of adultery alleged to have been committed by the defendant in divers places.

The Registrar, being of opinion that he had no power to allow these, as between party and party, struck his pen through the whole of them in red ink, and taxed the later items of the bill at 53l. 18s. 6d. upon 88l. 11s. 10d. claimed, and so leaving untaxed, but struck out, items amounting to 112l. 10s. 2d. A third bill was brought in for costs incurred in the rectification of the settlements after the decree *nisi* and before the decree absolute. This bill was for 101l. 9s. 1d., and was taxed down to 74l. 16s. 6d. and paid. The bill on which the action was brought was for the items struck out without regular taxation in the supplementary bill, and for the items taxed off in the first and third bills, and was wholly in respect of work done and payments made before the decree *nisi*.

Soon after the decree *nisi* in February, 1876, an order for alimony, *pendente lite*, was made for payment, at the rate of 188l. per annum, for the wife and children, commencing from the 6th of December, 1875, the date of citation. This sum was paid up to the 6th of February, 1877, when an order to pay permanent alimony was made. On the 25th of July, 1876, a further order for payment of an allowance of 100l. per annum for the maintenance of the two youngest children was made, and on the 6th of February an order was made to vary the trusts of the settlement, and for permanent alimony of 300l. a year and 50l. for the maintenance of one of the children.

The last item in the bills of costs was dated the 2nd of January, 1877. The plaintiff contended that he was entitled to sue the husband for these costs as extra costs, as between solicitor and client, for which a solicitor can sue his client, entirely without reference to the amount which may be recovered as between party and party, and that the costs in question were recoverable against the

husband as necessities supplied to the wife.

On the other side it was argued that the costs in question could not be so recovered—first, on the ground that they had actually been taxed by the proper tribunal and disallowed; secondly, that at all events they were the proper subject of taxation in the Divorce Court and could not be sued for at common law; and thirdly, on the ground that as to some parts at least they were not costs incurred in order to obtain necessary protection for the wife, but only in a proceeding for a divorce as distinguished from a proceeding for her necessary protection. The case most strongly relied upon for the plaintiff was that of *Stocken v. Patrick* (6), in which a wife having good ground for instituting a suit for a separation on the ground of cruelty, and the solicitor having brought a suit for a divorce, on the ground of adultery and cruelty, which was ultimately compromised by an agreement for a deed of separation, the solicitor was held entitled to sue for his costs, as between solicitor and client, including the costs, as between solicitor and client of the divorce suit.

On the argument I felt considerable doubt whether this case could be looked upon as an authority to the extent that it would authorise the solicitor to sue for costs incurred solely in and about the prosecution of that branch of the suit which went to establish the adultery of the husband; but, upon considering the judgment of the Lord Chief Baron carefully, I think it is an authority to that effect. This and the other cases cited by Mr. Waddy seem to me to go the full length of establishing that where the suit is reasonably instituted in the Divorce Court, for a separation on the ground of cruelty and adultery, or of cruelty only, there the solicitor can sue the husband for the costs, as between solicitor and client, which he has incurred on behalf of the wife. I think, therefore, that the only direction which I can give to the gentleman who has been agreed upon as the referee to settle the amount, if any, due to the plaintiff is that he is to be guided by what he considers to have been rea-

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reasonable or unreasonable in the amount and character of the costs incurred. In considering this question I do not think that I am warranted, by the authorities, in telling him to be guided by the fact that any part of these costs have or have not been allowed as party and party costs in the Divorce Court. To do so would I think be to overrule *Brown v. Ackroyd* (1) cited for the plaintiff, and *Rice v. Shepherd* (3), in both of which it was held that the Common Law right of the solicitor was not to be limited by the statutory right given under the Divorce Acts. This is also strongly laid down by the Lord Chief Baron in *Stocken v. Patrick* (6), and is in accordance with *Wilson v. Ford* (7). As pointed out by Mr. Waddy, the plaintiff's rights, as against the defendant, are not in any way correlative to or limited by the wife's rights as against her husband, and it would be unjust to hold that everything which the Registrar of the Divorce Court might hold not to fall within the definition of party and party costs, as adopted in that Court, should therefore be held incapable of being recovered as costs between solicitor and client, if reasonably and fairly incurred in the prosecution of a proceeding itself reasonably instituted for the protection of the wife. This I think is the only test, and by this test the bill must be considered by the referee. If he comes to the conclusion that any of the costs sued for, which have been disallowed by the Registrar, are fair and reasonable costs, as between solicitor and client, he should allow them as due to the plaintiff; if any appear to him to be unreasonable he should disallow them, and the judgment will stand for the amount allowed.

Judgment for plaintiff accordingly.

Solicitors—Plaintiff, in person; Mead & Daubeny, for defendant.

[IN THE DIVISIONAL COURT FOR THE Q.B., O.P. AND EXCH. DIVISIONS.]

1878. } HIGGS v. SCHREDER.
April 8. }

Solicitor—23 & 24 Vict. c. 127. s. 28—Costs—Charge on Property recovered—Jurisdiction.

An order declaring a solicitor entitled to a charge for his costs under the Solicitors Act, 23 & 24 Vict. c. 127. s. 28, on a judgment recovered in an action which he was employed to prosecute must not be made by any other Judge than the Judge who tried the action.

This was an appeal from an order of Field, J., at chambers, by which Mr. Quilter was declared entitled to a charge on the judgment recovered in this action in respect of his taxed costs, pursuant to 23 & 24 Vict. c. 127. s. 28. Mr. Quilter acted as the plaintiff's solicitor in this action, which was tried before Hawkins, J., in Middlesex, during the last Hilary Sittings, and resulted in a verdict and judgment for the plaintiff for 57l. 6s., the amount claimed.

St. Leger Daniels, for the plaintiff, in support of the appeal.—The learned Judge was not the Judge who tried the action, and he had therefore no jurisdiction to make the order. The words of the 28th section of 23 & 24 Vict. c. 127 (the section under which the order was made), are, "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any Court of justice, it shall be lawful for the Court, or Judge before whom any such suit, matter or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered," &c. It was held in *Heinrich v. Sutton, in re Fidley* (1) that an order under this enactment must be made in the branch of the Court to which the suit is attached. The Court here called on

O. O. Scott, to support the order.—The learned Judge at chambers had jurisdiction.

Higgs v. Schröder, Div. Court.

tion. In *Wilson v. Hood, in re Seaman*, (2), Bramwell, B., said: "The words, 'Court or Judge,' must mean the Court or the Judge who himself represents the Court, and cannot apply to the Judge at *Nisi Prius*, who may know nothing of the facts—as, for instance, when the cause is referred, or the facts are stated in the form of a special case."

Lord Coleridge, C.J.—I am of opinion that my brother Field had no jurisdiction to make this order, and that it was therefore improperly made. The statute expressly gives the jurisdiction to make the order to "the Court or Judge before whom any such suit, matter or proceeding has been heard or shall be depending." Now in the present case the cause was heard before Mr. Justice Hawkins; and it appears to me most reasonable as well as plain, from the language of the enactment, that the Judge who heard the case is the person who is to make the order, and that therefore the application for the order in the present case should have been made to Mr. Justice Hawkins, and not to Mr. Justice Field.

Huddleston, B., concurred.

Order set aside.

Solicitors—W. R. Philp, for plaintiff; C. Quilter, for defendant.

1878. }
Feb. 18. } CLARK v. CHAMBERS.
April 15. }

Negligence—Obstruction of Highway by Dangerous Instrument—Injury immediately caused by Act of third Person—Remoteness of Damage.

A person placing a dangerous obstruction in a highway or in a private road over which persons have a right of way, is bound to take all necessary precautions to protect

persons exercising their right of way; and if he neglects to do so, is liable for the consequences.

The defendant as occupier of certain premises used by him as a place for athletic sports, erected a barrier across a private road, upon which his premises abutted, and in which he had no interest beyond the right of way, to prevent vehicles from coming up as far as his grounds and overlooking the sports. The barrier consisted of spiked hurdles placed across either side of the roadway, the space between them, sufficient for a vehicle to pass, being ordinarily left open, as there were other premises beyond to which the road led. When sports were going on, the defendant closed this opening by means of a pole across, from one hurdle to the other.

It was admitted that what the defendant did in erecting the barrier was unauthorised and wrongful; and it was found by the jury that the use of the spiked hurdles in the road was dangerous to the safety of persons using it.

The plaintiff on a dark night was lawfully on the road coming from one of the houses beyond the barrier, and knowing of the opening ordinarily left, passed along the middle of the road, feeling his way through it, and, as he thought, between the hurdles. He then turned on to the footpath and almost immediately came into collision with one of the hurdles which some person unauthorised by the defendant, had removed and placed there; the result being the loss of an eye into which the spike entered. There was no ground for imputing any negligence to the plaintiff contributing to the accident: the night was too dark for the obstruction on the footpath to be seen:—

Held, that the defendant having unlawfully placed a dangerous obstruction in the road was liable if injury occurred to an innocent party lawfully using the road, his unlawful act being the primary cause of the evil, although the immediate cause of the injury was the act of some other person.

This was an action tried before Cockburn, L.C.J., at the Hilary Sittings in Middlesex. The facts of the case and findings of the jury appear sufficiently from the judgment. The questions of

(2) 3 Hurl. & C. 148; s. c. 33 Law J. Rep. Exch 204.

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law arising at the trial were reserved by the Lord Chief Justice for further consideration, and were argued before him and Manisty, J., on February 18, by

W. Willis and Glyn, for the plaintiff, and

Hannen, for the defendant.

The following cases, in addition to those noticed in the judgment, were cited in argument:—*Ionides v. The Universal Marine Insurance Company* (1); *Corby v. Hill* (2); *Hoey v. Felton* (3); *Blagrove v. The Bristol Waterworks Company* (4); *Barber v. Lissiter* (5).

Our. adv. vult.

The judgment of Cockburn, L.C.J., and Manisty, J., was (on April 15) delivered by—

COCKBURN, L.C.J.—This is a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time..

The defendant is in the occupation of premises, which abut on a private road, leading to certain other premises as well as to his. It consisted of a carriage road and a footway. The soil of both is the property of a different owner; the defendant has no interest in it beyond the right of way to and from his premises.

The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose for their own amusement.

His customers finding themselves annoyed by persons coming along the road in question in carts and vehicles, and stationing themselves opposite to his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds.

(1) 14 Com. B. Rep. N.S. 259; s. c. 32 Law J. Rep. C.P. 170.

(2) 4 Com. B. Rep. N.S. 556; s. c. 27 Law J. Rep. C.P. 318.

(3) 11 Com. B. Rep. N.S. 142; s. c. 31 Law J. Rep. C.P. 105.

(4) 1 Hurl. & N. 269; s. c. 26 Law J. Rep. Exch. 57.

(5) 7 Com. B. Rep. N.S. 175; s. c. 29 Law J. Rep. C.P. 161.

This barrier consisted of a hurdle set up lengthways next to the footpath, then two wooden barriers armed with spikes, commonly called chevaux de frise, then there was left an open space through which a vehicle could pass; then came another large hurdle set up lengthways which blocked up the rest of the road. At ordinary times the space between the two divisions of the barrier was left open for vehicles to pass, which might be going to any of the other premises to which the road in question led. But at the times when the sports were going on a pole attached by suitable apparatus was carried across from the one part of the barrier to the other, and so the road was effectually blocked.

Amongst the houses and grounds to which this private road led, was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred, the plaintiff, who occupied premises in the immediate neighbourhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but being aware of the barrier and the opening in it, they found the opening, the pole not being set across it, and passed through it in safety. But, on his return, later in the evening, the plaintiff was not equally fortunate. It appears that in the course of that day, or the day previous, some one had removed one of the chevaux de frise hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff, feeling his way, passed safely through the opening in the centre of the barrier; having done which, being wholly unaware, it being much too dark to see, that there was any obstruction on the footpath, he turned on to the latter, intending to walk along it the rest of the way. He had advanced only two or three steps when his eye came into collision with one of the spikes, the effect of which was, that the eye was forced out of its socket. It did not appear by whom the chevaux de frise hurdle had been thus removed; but it was expressly found by the jury that this was not done by the defendant, or by his authority. The question is, whether the

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defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier across the road was unauthorised and wrongful, and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the chevaux de frise in the road was dangerous to the safety of persons using it.

The ground of defence in point of law, taken at the trial, and on the argument on the rule, was that, although if the injury had resulted from the use of the chevaux de frise hurdle as placed by the defendant on the road, the defendant on the facts as admitted or as found by the jury might have been liable, yet as the immediate cause of the accident was not the act of the defendant, but that of the person, whosoever he may have been, who removed the spiked hurdle from where the defendant had fixed it, and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that, as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position. The first is the case of *Scott v. Shepherd* (6). In that case the defendant threw a lighted squib into a market-house where several persons were assembled. It fell upon a standing, the owner of which in self-defence took it up and threw it across the market-house. It fell upon another standing, the owner of which in self-defence took it up and threw it to another part of the market-house; and, in its course, it struck the plaintiff and exploded, and put out his eye. The defendant was held liable, although without the intervention of a third person, the squib would not have injured the plaintiff.

(6) 3 Wils. 403; s. c. 2 W. Black. 892.

In *Dixon v. Bell* (7) the defendant having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but as it turned out, did not do effectually. The girl brought it home, and thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable "as by this want of care," says Lord Ellenborough, that is, by leaving the gun without drawing the charge, or seeing that the priming had been properly removed, "the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable."

In *Ilott v. Wilkes* (8), the well known case as to spring guns, it became unnecessary to determine how far a person setting spring guns, would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff having had notice that spring guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Mr. Justice Bayley and Mr. Justice Holroyd appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be attained and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that, if instead of injuring the plaintiff, the gun which he caused to go off, had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable.

In *Jordin v. Orump* (9) the use of dog-spears was held not illegal, but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury

(7) 5 M. & S. 198.

(8) 3 B. & Ald. 304.

(9) 8 Mee. & W. 782; s. c. 11 Law J. Rep. Exch. 74.

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to a human being, the result might have been different.

In *Illidge v. Goodwin* (10) the defendant's cart and horse were left standing in the street without anyone to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C.J., ruled that even if this were believed, it would not avail as a defence. "If," he says, "a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done."

Lynch v. Nurdin (11) is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says, "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, &c., committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two,

but unquestionably against the first." And then by way of illustration, the Lord Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a playground where schoolboys were at play, and one of the boys in play letting it off and wounding another. "I think it will not be doubted," says Lord Denman, "that the gamekeeper must answer in damages to the wounded party." "This," he adds, "might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support in *Illidge v. Goodwin* (10)." It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here.

In *Daniels v. Potter* (12) the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendant's men were lowering casks into it, as the plaintiff contended without proper care having been taken to secure it: the flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up as a defence that its fall had been caused by some children playing with it. But the only question left to the jury by Tindal, C.J., was, whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party, causing the injury, be a defence.

The cases of *Hughes v. Macfie* and *Abbott v. Macfie* (13), two actions arising out of the same circumstances, and tried in the Passage Court at Liverpool, though at variance with some of the foregoing, so far as relates to the effect of the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, are in accordance with them as respects the defendant's liability for his own act, where that act is

(10) 5 Car. & P. 192.

(11) 1 Q.B. Rep. 29; s. c. 10 Law J. Rep. Q.B. 73.

(12) 4 Car. & P. 262.

(13) 2 Hurl. & C. 744; s. c. 33 Law J. Rep. Exch. 177.

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the primary cause, though the act of another may have led to the immediate result.

The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and having reared it against the wall, nearly upright, with its lower face, on which there were cross bars, towards the street, had gone away. The plaintiff in one of the actions, a child of five years old, got upon the cross-bars of the flap, and in jumping off them, brought down the flap on himself and another child, the plaintiff in the other action, and both were injured. It was held that, while the plaintiff, whose act had caused the flap to fall, could not recover, the other plaintiff who had been injured could, provided he had not been injured playing with the other, so as to be a joint actor with him.

Bird v. Holbrook (14) is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling-house, and which was subject to depredations, had set in it, without notice, a spring gun for the protection of his property. The plaintiff, who was not aware that a spring gun was set in the garden, in order to catch a pea-fowl, the property of a neighbour, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it rendered the latter liable for the consequences. In the course of the discussion a similar case of *Jay v. Whitfield*, at p. 644, was mentioned, tried before Chief Baron Richards, in which a plaintiff, who had trespassed upon premises in order to cut a stick, and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

(14) 4 Bing. 628; s. c. 6 Law J. Rep. C.P. 146.

In *Hill v. The New River Company* (15) the defendants created a nuisance in a public highway by allowing a stream of water to spout up open and unfenced in the road. The plaintiff's horses, passing along the road with his carriage, took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell, and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company.

In *Burrows v. The March Gas and Coke Company* (16) it was held in the Exchequer Chamber, affirming a judgment of the Court of Exchequer, that, where through a breach of contract by the defendants, in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon the servant of a gasfitter at work on the premises having gone into the part of the premises where the escape had occurred with a lighted candle, and examining the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were liable, though the explosion had been immediately caused by the imprudence of the gasfitter's man in examining the pipe with a lighted candle in his hand. In *Collins v. The Middle Level Commissioners* (17) the defendants were bound under an Act of Parliament to construct a cut with proper walls, gates and sluices to keep out the waters of a tidal river, and also a culvert under the cut, to carry off the drainage of the lands lying east of the cut, and to keep

(15) 7 B. & S. 303.

(16) 41 Law J. Rep. Exch. 46; s. c. Law Rep. 7 Exch. 96.

(17) 38 Law J. Rep. C.P. 236; s. c. Law Rep. 4 C.P. 279.

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the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, reopened the culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says Mr. Justice Montague Smith, "cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Mr. Justice Brett, "was the negligence of the defendants; and it is not competent to them to say that they are absolved from the consequence of their wrongful act by what the plaintiff or some one else did. . . . I do not see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing part of the injury."

The case of *Harrison v. The Great Northern Railway Company* (18) belongs to the same class. The defendants were bound under an Act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain Commissioners, appointed under an Act of Parliament, were bound to maintain the navigation of the river Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way, and caused the damage of which the plaintiff

(18) 3 Hurl. & C. 231; s. c. 33 Law J. Rep. Exch. 266.

complained. It was found that the bank of the delph was not in a proper condition; but it was also found—(and it was on this that the defendants relied as a defence)—that the breaking of the bank had been caused by the water in it having been penned back owing to the neglect of the Commissioners to maintain in a proper state certain works which it was their duty to keep up under their Act. Nevertheless, the defendants were held liable.

These authorities would appear to be sufficient to maintain the plaintiff's right of action under the circumstances of the case. It must, however, be admitted that in one or two recent cases the Courts have shewn a disposition to confine the liability arising from unlawful acts, negligence or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which in the ordinary course of things were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence or omissions. In *Greenland v. Chaplin* (19) Chief Baron Pollock says, "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated."

Acting on this principle, the Court of Common Pleas, in a recent case of *Sharp v. Powell* (20), held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating through which water flowing down the gutter passed into the sewer had become frozen

(19) 5 Exch. Rep. 243; s. c. 19 Law J. Rep. Exch. 293.

(20) 41 Law J. Rep. C.P. 95; s. c. Law Rep. 7 C.P. 253.

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over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street, and became frozen, rendering the street slippery. The plaintiff's horse coming along, fell in consequence, and was injured. It was held that as there was nothing to shew that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act, he was not responsible for what had happened. Bovill, C.J., there said, "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action;" and Grove, J., said, "I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated or for which he is responsible. The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have

been inclined to think that the defendant would have been responsible for the consequences which had resulted." And Keating, J., said, "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. . . . The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shewn to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant."

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case; but we doubt its applicability to the present case, which appears to us to come within the principle of *Scott v. Shepherd* (6) and *Dixon v. Bell* (7), and the other cases to which we have referred. At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the ways as a likely thing to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. Thus, if the obstruction be to the carriage way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, where-soever placed, it may, as was the case here, become a source of damage from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that if a person places a dangerous obstruction in a highway or in a private road, over which persons have a right of way, he is bound to take all

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necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences.

It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan v. Atterton* (21) was cited before us as a strong authority in favour of the defendant. The defendant had there exposed in a public market-place a machine for crushing oil-cake without its being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff—a boy of four years of age—returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle. The plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and, the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable,—first, because there was no negligence on the part of the defendant, or if there was negligence, it was too remote; and, secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons—and amongst them children—have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character; and not the less so, because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion.

(21) 4 Hurl. & C. 388; s. c. 35 Law J. Rep. Exch. 161; s. c. Law Rep. 1 Exch. 239.

But, be this as it may, the case cannot govern the present. For the decision proceeded expressly on the grounds that there had been no default in the defendant. Here it cannot be disputed that the act of the defendant was unlawful.

On the whole we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Solicitors—J. C. Button & Co., for plaintiff; T. H. Williams, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. { THE GUARDIANS OF TENTERDEN
March 1. { POOR LAW UNION (*appellants*)
v. THE GUARDIANS OF ST. MART,
ISLINGTON (*respondents*).

Poor Law — Settlement — Illegitimate Pauper—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35.

[For the report of the above case, see 47 Law J. Rep. M.C. 81.]

[IN THE EXCHEQUER DIVISION.]

1878. } BARNES (*appellant*) v. CHIPP
May 3. } (*respondent*).

Sale of Food and Drugs Act, 1875, ss. 14 & 20—Conditions precedent to Summary Conviction—Analysis by Public Analyst—Notification by Purchaser to Seller.

[For the report of the above case, see 47 Law J. Rep. M.C. 85.]

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878. { THE QUEEN on the prosecution
 Jan. 28. { of J. B. SAUNDERS v. THE POST-
 MASTER-GENERAL.*

Telegraph Company—Purchase of Undertaking by Government—Compensation to Officers—Annual Emolument.

By the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8, sub-sec. 7, officers who have been for a fixed period in the employment of a telegraph company whose undertaking has been purchased by the Postmaster-General under the provisions of the Act, and who have been in receipt of a yearly salary, or of remuneration not less than 50*l.* a year, are entitled, in the event of their receiving no offer of an appointment from the Postmaster-General in the telegraphic department of equal value to that held under the company, to an annuity by way of compensation for loss of their office, equal to a certain proportion of the annual emolument derived by them from their office.

S. was an officer of a telegraph company whose undertaking had been purchased by the Postmaster-General, and was entitled, so far as salary and term of office were concerned, to compensation under the Telegraph Act, 1868. It was part of his duty, when required, to travel on the company's business. When he so travelled, his ordinary salary ran on, but his additional expenses were paid by the company, who agreed that he should receive certain fixed weekly sums in lieu of making him bring in an account of his expenditure, and then repaying him:—

Held, that the amount saved by S. out of the sums so paid to him for travelling expenses was to be taken into consideration in calculating the annual emolument derived by him from his office.

This was an appeal by the Postmaster-General from the decision of the Queen's Bench Division, reported 45 Law J. Rep. Q.B. 609.

Gorst and Oasserley, for the defendant, objected that the mandamus was bad,

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

since it directed the Postmaster-General to "assess" the compensation due to the prosecutor, but withdrew the objection and argued the general question.

Sir H. James and Charles, contra, were not called on to argue.

BRAMWELL, L.J.—I think the Postmaster-General has behaved very liberally here, as there is a flaw in the mandamus. Though I do not like to give an opinion on what is not properly before us, I will, for the purpose of saving the great expense to which the parties would otherwise be put, give judgment on the real point in the case.

I must say that the case is a very plain one. The object of the statute was to indemnify a man from the loss of the emoluments he derived from his office; I can use no other words. The next question is, what is an emolument? I am of opinion that it includes what he can save out of his allowance for travelling expenses, taking into account his whole living and expenditure. We know that continually people say that they have so much salary and save so much out of what is allowed for their expenses, and no one thinks that they have been acting wrongfully. Suppose a man had 400*l.* a year and paid for his own travelling, could you say that his emoluments were 400*l.*? Surely you would first deduct what he had to expend for travelling. I think that the judgment below was right and must be affirmed.

BRETT, L.J.—The dispute in the Court below was on the construction of the Act, and the decision was treated as binding on the Postmaster-General by his bringing this appeal, and it is right that we should treat this as an appeal on the same footing, namely, that the only question is the construction of the Act and its application to this case. I think that the plaintiff is entitled to remuneration in respect of his lost emoluments, or, as another part of the Act puts it, "the value of his appointment." If a person receives a salary only, then the "value of his appointment" is the salary. If he received his salary subject to finding materials, &c., no one would say that the

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measure of value was the whole salary. It would be the salary less the cost of the material. If he received a salary and something more, the measure must be the salary, and anything he saves out of that extra sum.

COTTON, L.J., concurred.

Judgment affirmed.

Solicitors—R. W. Childs & Batten, agents for John Taunton, Taunton, for prosecutor; W. H. Ashurst, for the Postmaster-General.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
May 4. }

HALKETT v. EMMOTT.

Bill of Sale—Certificate—Evidence of Registration—Statute 17 & 18 Vict. c. 36. s. 1.

It is incumbent on a claimant, under a bill of sale, to shew that the document filed is a true copy of the original instrument.

A certificate of the registration of a bill of sale, without production of an authenticated or office copy of the bill of sale certified to have been registered, is not sufficient.

This was an interpleader issue tried in the Clerkenwell County Court, in order to determine the right to certain personal chattels.

The following are the material facts:—The plaintiff held a bill of sale on certain property belonging to one Marchant, and which had been seized by the defendant as execution creditor. At the trial, the plaintiff, for the purpose of establishing his title, put in the bill of sale, and a certificate that a bill of sale to him had been registered with an affidavit. No authenticated or office copy of the affidavit certified to have been filed, nor of the bill of sale certified to have been registered, was however produced; and the County Court Judge thereupon barred the claim with costs. A rule nisi

was subsequently obtained to set aside the verdict and judgment of the County Court Judge, and to have them entered for the plaintiff.

Bigham appeared to shew cause against the rule.—“The Bills of Sale Act, 1854, s. 1, requires that every bill of sale of personal chattels . . . or a true copy thereof, shall, together with an affidavit of the time of such bill being made or given . . . be filed with the officer acting as clerk of docquets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale;” otherwise the bill shall, as against execution creditors, be “null and void.” The claimant must shew that the conditions imposed by the statute have been complied with. The certificate that an affidavit was filed, without any office copy of the affidavit, cannot be evidence that the affidavit actually filed complies with the requirements of the statute. Neither is it sufficient for the claimant to shew that a bill of sale by the grantor had been registered. Evidence should have been produced to shew that the bill of sale, certified to have been registered, was a true copy of the original instrument. He cited *Mason v. Wood* (1) and *Grindell v. Brendon* (2).

Jelf in support of the rule.—The whole question here is as to the party on whom the onus of proof lies. The maxim *omnia præsumuntur rite esse acta* applies, and sufficient *prima facie* evidence was given to support the claimant's title. The *ratio decidendi* in *Mason v. Wood* (1) is in favour of the claimant, because that case was decided on the ground that there was no statement in the certificate that the affidavit had been filed. Here there was express mention in the certificate that the affidavit had been filed at the time of the registration of the bill of sale.

MELLOR, J.—I think that some of the objections to bills of sale, on the ground of misdescription, have been carried too

(1) 45 Law J. Rep. C.P. 76; s. c. Law Rep. 1 C.P. Div. 63.

(2) 6 Com. B. Rep. N.S. 698; s. c. 28 Law J. Rep. C.P. 333.

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far. The object of the statute was good, namely, to prevent uncertainty to assignees and others, but that object has, it seems to me, been rather carried to excess. I quite yield to the principle that where a particular duty is cast on officers of the Court, it will be presumed that such duty was properly performed. Here the security was conditional, and it was necessary that the party relying on the bill of sale should prove that the statutory conditions have been fulfilled. I entertain no doubt that, in this case, the County Court Judge rightly held that the evidence adduced by the claimant was insufficient to support his title under the Bills of Sale Act.

LUSH, J.—I regret to say I have come to the same conclusion. The objection is such a highly technical one that I should have been glad to have ordered a new trial had I the power to do so. The question which we have to decide is whether the certificate produced was *prima facie* evidence of the due registration of the bill of sale. I think there is no doubt that it was not. It may be presumed that the affidavit was good in point of form, but the objection raised was not so much to the affidavit itself as to the fact that no proof was given that the document filed was a true copy of the original bill of sale. I am inclined to think it was not necessary that the office copy of the affidavit should have been produced, but I am clearly of opinion that a certified copy of the document registered should have been forthcoming.

Rule discharged with costs.

Solicitors—R. Jones & Co., for claimant; Chester, Urquhart & Co., agents for Boddington & Ball, Manchester, for execution creditor.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1877. }
Dec. 11, 12, } HOOPER AND ANOTHER v.
13, 18. } BOURNE AND OTHERS.*

Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), section 127—"Superfluous Lands"—Adjoining Owner—Railway Company—Lands acquired by Agreement—Mines and Minerals under "Superfluous Lands."

Land bona fide acquired by a railway company under their Act for the permanent purposes of their undertaking, which at the expiration of the time limited for the sale of "superfluous lands" is not required for use at the moment, yet will, through the growing traffic or other causes, be required for use within a reasonable time, is not "superfluous land" within section 127 of the Lands Clauses Consolidation Act, 1845.

Lands which might, if necessary, have been acquired compulsorily by a railway company, but which were in fact acquired by them by agreement, are in respect of the Lands Clauses Consolidation Act, 1845, section 127, in the same position as if they had been acquired compulsorily.

Mines and minerals expressly granted to a railway company with land which has become "superfluous" under section 127 of the Lands Clauses Consolidation Act, 1845, do not pass to the adjoining owner.

This was an appeal of the plaintiffs from the decision of the Queen's Bench Division (see 46 Law J. Rep. Q.B. 509) on a Special Case stated by an arbitrator in the form of an action of ejectment, brought by the plaintiffs as adjoining owners, to recover three several parcels of land, containing about thirteen acres, in the parish of Westbury, in the county of Wilts, which were alleged by the plaintiffs to be "superfluous lands" within the provisions of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. s. 127, which is incorporated with the special Acts referred to in the case.

The land in question was originally acquired under the powers of the Wilts,

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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Somerset and Weymouth Railway, as constituted and amended by the several Acts referred to in the case. No notice to treat was ever given to the owners in respect of such lands; but by an agreement of the 1st of March, 1848, made between the trustees of the Rev. John Hooper and Elizabeth his wife, and the Wilts, Somerset and Weymouth Railway Company, the land in question, with other land then in two parcels, and containing together nineteen acres, with all mines thereunder, were contracted to be sold to the Wilts, Somerset and Weymouth Railway Company for 3,208*l.*, which was to be in full satisfaction of all works of accommodation, and of all severance or other damage. And the said lands were, on the 28th of March, 1848, duly conveyed to the said company, their successors and assigns, with a cottage, tenement and outhouse erected on one of the said pieces or parcels of land, together with all mines and minerals thereunder, for the sum agreed upon, which was to be in full satisfaction of all compensation to which they might otherwise have been entitled in respect of severance from other lands of the vendors. Shortly after the completion of the purchase the said company took possession of the lands so conveyed, and upon part thereof, being about six acres, constructed the line of railway, station and other works known as the Westbury Station. They also set out and made upon part of the said land a road, called "the Station Road," for the purposes of access to the passenger station, which is and always has been since used for the purposes of the said station. They also made a well in the year 1848, on a portion of the land, for supplying a tank erected on the premises with water for engine purposes. The company being then apparently unable to carry out the original purpose of the purchase, but desiring to render the residue of the land productive, let it to a tenant from year to year for agricultural purposes, but subject to the right of the company to resume possession, on a two months' notice at any time, whenever it might be required for any purpose connected with the railway. All this was done by the Somerset, Wilts and Wey-

mouth Railway Company before it was dissolved, and the undertaking transferred to the Great Western Railway Company by the Act of 1851, as stated in the case. Subsequently to the transfer to the Great Western Railway Company of the undertaking it was found that the well, which had been made as before stated by the Wilts, Somerset and Weymouth Railway Company, gave an insufficient supply of water, and thereupon a reservoir, eighty feet long, forty feet wide and thirteen feet deep, was made on the other portion of the land, which was and is supplied with water from the natural drainage of the surrounding lands, and is connected with the well by pipes for the supply of the engines and use for railway purposes. The cottage also was occupied by one of the railway servants. A smithy was erected by the Great Western Railway Company in 1872 for the use of the railway; and on the 18th of August, 1871, the land formerly demised for agricultural purposes was let to the Westbury Iron Company, Limited, together with a license to get the minerals on and under such land, but determinable upon twenty-eight days' notice, by the Great Western Railway Company, and it was agreed that the working and removing of the iron ore should be done to the satisfaction of the company's engineer, and that all holes made thereon should be filled up and resoiled. The Iron Company has been since and is now in possession of the land under such letting and license. It is further expressly found by the Special Case, that since the year 1868 the traffic at the Westbury Station has much increased, and that during that time the said three pieces of land have been and still are required for the purpose of constructing additional sidings upon them to accommodate the increased traffic. It further appears that the want of such additional accommodation had been the subject of much discussion by the district officers of the railway having the supervision of the traffic at that station, but owing to financial reasons, and the necessity of applying the funds of the company to other works, nothing has yet been done to supply additional accommodation at the Westbury Station. It also

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appears that nineteen acres of land, purchased as aforesaid, were included in the plans and books of reference deposited with the clerk of the peace for the county of Wilts, and all but seven and a half acres were included within the limits of deviation marked thereon. The time originally limited by the Wilts, Somerset and Weymouth Amendment Act for the completion of the works of the railway, had been by order of the railway commissioners, dated the 12th of April, 1848, duly extended to the 3rd day of August, 1853.

The plaintiffs contended that the land in question was superfluous land within section 127 of the Lands Clauses Consolidation Act, 1845, and was vested in the plaintiffs.

The defendants contended that the land was acquired by the company under a voluntary agreement, and not under the compulsory powers of their Act, and consequently section 127 did not apply; and secondly, that if it had been acquired compulsorily it was not and never had been superfluous land within the meaning of that section.

The Court to have the powers of a jury as to drawing inferences of fact.

Cole and Merewether, for the plaintiffs.

Bowen and Moulton, for the defendants.

[The nature of the arguments appears sufficiently from the judgments. The following cases were cited—*Betts v. The Great Eastern Railway Company* (1); *The Great Western Railway Company v. May* (2); *Lands Clauses Consolidation Act, 1845*, ss. 6, 12, 13, 16, 18, 127, 128; *Railway Clauses Consolidation Act, 1845*, s. 45; *The City of Glasgow Union Railway Company v. The Caledonian Railway Company* (3); *Horne v. The Lymington Railway Company* (4); *Carrington v. The Wycombe Railway Company* (5); *The*

Great Western Railway Company v. Bennett (6); *The Great Western Railway Company v. Smith* (7).]

BRAMWELL, L.J.—One very great difficulty I have had in this case is that it is impossible not to consider the action an objectionable one. I think even if the plaintiff were right it would be very much better for him to have been willing to pay the railway company a fair price for the land, and to have had the case settled. It is difficult to feel sure on the one hand that one is resisting any bias caused by this consideration, and on the other hand one cannot help doubting whether in struggling against it one may not have an undue prepossession in favour of the plaintiffs.

I think in this case that sections 12 and 13 of the Lands Clauses Consolidation Act, 1845, and section 45 of the Railways Clauses Consolidation Act, 1845, do not apply, as the land in dispute was not wanted for extraordinary purposes. It is not necessary, therefore to give any definition of what is meant by those sections, but one may say generally that they seem addressed rather to provide for the case where additional lands are wanted, not those which are required for what may be termed the necessary creation of the railway. I think also that section 127 of the latter Act and the following sections apply to lands acquired as these were, and are not restricted to cases where lands have been acquired under what are termed the compulsory powers of the Act. There is so such limitation in terms, and the only way in which it can be attempted to be put in is to read the introductory words as though they were not "under the provisions," but "by virtue of the powers." I can see no reason why there should be any such limitation. It seems to me that the object of the Act is as applicable to lands acquired by negotiation—where there is power to take—as to lands which are not so acquired. I do not know where the

(1) 43 Law J. Rep. Exch. 4; s. c. Law Rep. 8 Exch. 294.

(2) 43 Law J. Rep. Q.B. 233; s. c. Law Rep. 7 H.L. 283.

(3) Law Rep. 2 Sc. App. 160.

(4) 31 Law Times N.S. 167.

(5) 37 Law J. Rep. Chanc. 213; s. c. Law Rep. 3 Chanc. 377.

(6) 36 Law J. Rep. Q.B. 133; s. c. Law Rep. 2 H.L. 27.

(7) 2 Chanc. Div. 235; s. c. on appeal, 45 Law J. Rep. Chanc. 235; s. c. Law Rep. 3 App. Cas. 165.

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line could be drawn. The company intimate that they want certain lands, and an agreement is come to as to what they should take and what they should pay. If that agreement had not been come to, it would have been necessary for the company to have given notice to treat. Suppose an agreement had then been arrived at, would not that be within the Act? And if so, how does the case differ from this? Let us go a step further. The claim is sent in; it is not agreed to; notice is given to summon a jury; the parties come before the jury; they say, "we are happy to inform you that we shall not need your services as we are agreed." Is not the case there the same as in the others? It seems to me that if the power to take compulsorily exists, you really cannot draw any distinction between the case of lands taken by agreement, the party who comes to the agreement knowing that if he does not agree he can be compelled to give up his lands, and the case where the compulsion is actually resorted to. These lands, therefore, were acquired by the original promoters "under the provisions of" this and the special Act.

The question then comes in, whether these lands are "superfluous lands," which by section 127 "within ten years after the time limited by the special Act for the completion of the works the promoters of the undertaking shall absolutely sell and dispose of." Now we have it laid down for us, upon authority which would bind us even if we were not inclined to agree to it, in *May v. The Great Western Railway Company* (2), that the point of time to be considered is the last day of the ten years, and if the land is not required then it is superfluous, although it may have been required before, and may by some supervening matter be required afterwards. I think one recognises the law so laid down fully and entirely. But what we have here to consider is, what is meant by the word "required." Now one requirement undoubtedly is, where the land has been actually occupied by the railway or its works, and is in use. I cannot help thinking that another one would be where land is not actually in use, but where

there is a definite known time, not absurdly far off, but within a reasonable interval, at which the land will be required. I will illustrate what I mean in this way:—Suppose that in the present case a *bona fide* contract had been entered into with the sub-contractor that he should begin certain works in September, 1863, upon these lands. Is it conceivable that we should say that on August 10th of the same year the land was not required by the company for the purposes of their undertaking? See what preposterous consequences would follow. If the works had been begun on the 1st of August, then it would be said that they were lands required within the ten years for the purposes of the Act, but if they were not begun until the end of August it would be said that they were superfluous. I cannot think that the lands might be confiscated, or forfeited, or whatever you please to call it, by the delay of the contractor in his undertaking to commence those works. I am satisfied, therefore, that "lands required" at any rate include two classes, namely, lands in actual use and lands as to which it is *bona fide* intended at a definite and assignable time within reasonable limits that they shall be put to the use for the purposes of the railway company. But, further, I think that there is a third class of cases where lands may properly be said to be required. I mean the case in which the company can say, "we do not want the lands for use at the present moment because we have no use for them; but we know, we can tell from the growing traffic on the line and other circumstances, that within a reasonable time, which, however, we are unable to specify, we shall want those lands." Now I do not profess to have given a precise or accurate definition or description of the idea I intend to convey. I somewhat fear lest I may be expressing myself more largely than I intend. To guard myself against this I would say the lands would not be "required," because some one might say, "I cannot say but that at some time they might be required;" but it would be a different matter if a competent person *bona fide* expressing an opinion as to the desirability or not of keeping the lands for the purpose of the

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railway were to say, "We do not indeed want the lands now, nor can we tell how soon we shall, but we do know that in a short time, say five or six years, we shall want those lands." In such a case, I think, the lands would be "required" within the meaning of the section. If it were not so, see what would ensue. The company would say, "We do not want the land now, but we shall want it ere long for sidings; we would rather not let our capital lie idle by making sidings and buildings we shall not want for some years, but lest we should lose the land, we will make the sidings and erect the buildings." If the contention for the plaintiff is correct, that would not do. He would say, "You are not acting *bona fide* but colourably," and he would urge the same thing although the company actually used the sidings, saying that they were only making believe. To my mind it would be a case of gross injustice if a railway company could not make provision for a certain and near future. In considering cases of this sort it must always be remembered that there may be practically an impossibility in getting back lands which have once gone out of the hands of the company. Having come to the conclusion I have as to the meaning of the word "required," I would make one remark. The plaintiffs' counsel argued, and I do not say that his argument was not a very cogent one, that the ten years are given for ascertaining all this. That is not quite so, for the period of ten years was given not only for that purpose, but also for the purpose of disposing of the land which must be effected during that time. The words of the Act are strong and striking, and but for the obvious inconvenience, unreasonableness and injustice of the conclusion to which it would lead, I should probably think that the plaintiffs' interpretation of them was conclusive.

The question then is, whether we ought to say that this land was within any of those classes I have enumerated on the 10th of August, 1863. It certainly was not in use, and we should be drawing an erroneous inference if we were to say that it was at that day land which it was known would be wanted

within a definite and assigned time. Was it, then, within the third class? I confess that I feel great difficulty in considering that matter, and it is impossible that it should be otherwise, for we are called upon by the defendants to say that the land was, on the 10th of August, 1863, required for the purposes of the railway, and yet years had gone by after that date and nothing was done to apply it to any use. But we must deal with the case as it is presented to us, and the learned arbitrator has found that "since the year 1868 the railway traffic at Westbury Station has very much increased, and during that period of time the three pieces of land have been and still are required for the purpose of constructing additional sidings upon them to accommodate the increased traffic." Now it seems to me that we are bound to consider the case as though this was the year 1868, and as though the company had then laid down additional sidings there, and were using the land. The question is the same. The argument for the plaintiffs then comes to this, that though things were so, and the land was covered with sidings for the purposes of the railway, still this could have been land not required on the 10th of August, 1863. If these sidings &c., were necessary in consequence of some circumstance which could not have been foreseen in August, 1863, such as a new railway coming to meet the old one, I agree, but in the present case the Court below have found that the lands were required in August, 1863, and whatever embarrassment I may feel as to the time which had elapsed, still I cannot say that they are wrong, and, therefore, I think that their judgment must be affirmed on the same grounds as they put it. This conclusion I found upon what I consider to be the correct interpretation of what was said by Lord Cairns, L.C., and Lord Hatherley, by Cockburn, L.C.J., and Blackburn, J., in *The Great Western Railway Company v. May* (2).

There is a point which should be noticed. It is clear that the mines in this case belong to the defendants, for they at all events have not been purchased under the powers of the Act. It was ingeniously suggested that as the mines and

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land were all taken together, and the mines were not required for the purposes of the Act, the land was not. I am of opinion that the land was acquired for the purposes of the Act, but the mines not, and that the fact that both were taken together does not affect the question.

There are two other points to which I wish to refer. The plaintiffs claim to be adjoining owners of one piece of land, between which and their land the railway runs. I am satisfied that you cannot cross the line to find the adjoining owner; the railway company is the adjoining owner on that side. The real adjoining owners within the section are those who adjoin the land on the same side of the line.

The other point is this. One other piece of this land contains a reservoir, which is filled by the drainage from the rest of the piece. The reservoir is *bona fide* used for the purposes of the railway. It is true that the rest of the piece is let for agricultural purposes, but I dare say that if the tenant insisted on stopping the drainage he would be turned out; and if the company had given up that piece of land they would be at the mercy of the owner, who could divert all the water. I should have, therefore, great difficulty in saying that this piece is not required for the purposes of the railway.

BRETT, L.J.—I also am of opinion that the judgment ought to be for the defendants, the railway company. In order that the plaintiffs may succeed in this action, it seems to me that they were bound to shew that on the last day of the ten years this was superfluous land, and that they were the adjoining owners. It has been pointed out in the case of *The Great Western Railway Company v. May* (2) that the time to which we are to direct our attention is the last day of the ten years; but it has been further pointed out in that case what is the meaning of the term "superfluous land;" and Lord Cairns there said that you must determine what is meant, by considering what are the synonyms of the phrase within the Act of Parliament itself; and so, in order that the plaintiffs may shew that there were superfluous

lands on the last day of the ten years, they must shew that they were acquired by the promoters under the provisions of the general or special Act, and then must further shew that on the last day they were not, within the meaning of the Act, required for the purposes of the undertaking.

The plaintiffs therefore, in the first place, undertook to shew that these lands were acquired by the promoters under the provisions of the general or special Act. This was denied by the defendants for several reasons. The defendants said that the lands were acquired for extraordinary purposes, and alleged that land so acquired cannot be considered as land acquired by the promoters "under the provisions" of the general or special Act. It seems to me that land acquired for extraordinary purposes may be properly said to be acquired by the promoters under the provisions of the general or special Act; but there is some doubt whether you can treat lands acquired for extraordinary purposes as lands which pass over to the adjacent owner, or as to which there is the right of pre-emption, not because they are not lands acquired by the promoters of the undertaking, but because there are provisions in the statute which shew that that conclusion was not to be applied to such lands. It is, however, unnecessary to determine the point here, because I think that these lands are not shewn on the facts as found to have been lands acquired for extraordinary purposes.

With regard to the question whether these lands were acquired by the promoters of the undertaking under the provisions of the Act, it seems to me that they were so acquired, although there was no notice to treat. These were lands within the book of reference and upon the deposited plans. They were acquired by the company by agreement with the owner, and, although there was no notice to treat, they were obviously taken for the purposes of the undertaking. The necessity of the notice to treat, according to the Lands Clauses Act, 1845, only arises, in my judgment, when the company have to take lands by compulsion, and where the

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company can, after they have passed their Act, get lands by agreement; if they acquire the lands for the purpose of the Act, they acquire them under and by virtue of the provisions of the Act. It is only the Act which enables them to take the lands for the purpose of the railway, and therefore the objection that there was no notice to treat fails, in my opinion, and so far the plaintiff succeeds.

Then we have to consider whether on the last day of the ten years it can be properly said that these lands were required for the purposes of the undertaking. In *The Great Western Railway Company v. May* (2), Cairns, L.C., said this: "It appears to me that the problem which in every case has to be solved is this—Can you at the moment of time thus indicated by Parliament predicate of any land in the occupation of a railway company, that it is at that moment superfluous land?" It was argued on the part of the plaintiffs that the meaning of that sentence was, "Could the officers or directors of the company at that moment predicate, and did they predicate &c.?" I cannot think that that is the meaning. It seems to me that the meaning is this: "Can the tribunal which has to try the case, and at the time the case is tried say that, if all the facts which were existing on the last day of the ten years had been known to a reasonably skilful and careful person, that person could have reasonably said at that time that the lands in question would, by the ordinary development of the railway or neighbourhood, be required to be actually applied to the purposes of the railway within a reasonable time?" (9). And in order that the Court may be able to determine that question, they have a right to receive evidence of facts, or evidence which has become known since that last day. Still there must always be the question to be answered which I have stated. In stating that question, I have guarded it by using the expression, "ordinary development of the railway or neighbourhood," and for this reason, that I think that you must not bring into the consideration any facts which may arise after the last day, which were not consequent on "the

ordinary development of the railway or neighbourhood." If, for instance, after the last day of the ten years, and before the trial of the cause, some great manufactory were established in the neighbourhood, which would bring a large population there, that must not be taken into account, because it could not have been properly foreseen as a matter of ordinary development. So if a new railway were, at the end of the ten years, projected by a new company to join the existing railway, and so create a great junction, that would be an accidental circumstance and not a matter of ordinary development, and must not therefore be taken into account.

Considering, then, the matter in the light of the question which is to be put, I think you would have a right to consider as matter of evidence the state of things in 1868; and it might have been proved in evidence at the trial that in 1868 not only was this land required, but the fact of the necessity for it was then present to the minds of the directors; that I apprehend the tribunal has a right to have given in evidence. Now it seems to me that according to the finding of the arbitrator, we are bound to take it that from the year 1868 the land has actually been required, and the officials in 1868 knew that they would require it. The question then comes, what has the tribunal the right to infer as to the state of things in 1863 from the proved state of facts in 1868? Now there were considerations on both sides to be taken into account. There was the fact that from 1863 to 1868 nothing was done, nor since to the date of the action. There was the fact of the great size of the land. Those facts were in favour of the plaintiffs, but then there was in favour of the defendants a finding of the arbitrator, which is conclusive, that in 1868 there was the actual necessity for the land, and knowledge of that necessity. Then there was the fact that there was a power, in the lease granted by the defendants, to resume possession immediately on notice. There were, therefore, facts on both sides. These were taken into consideration by the Queen's Bench Division, as appears from the judgment

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of Mr. Justice Manisty, and the Court came to the conclusion that a person in 1863, at the end of the ten years, if he had known all the facts then existing, might have reasonably foreseen and stated that by the ordinary development of the railway and neighbourhood this land would be required to be applied within a reasonable time. With that finding the question for us seems to me to be—can we say that finding upon a review of those facts is wrong? I am of opinion that we cannot say it is wrong, and therefore we ought not to overrule it; but, further, I incline to think that the finding was a right one.

That determines the whole case in favour of the defendants; but I agree with my Lord, that we ought to determine some subsidiary points. With regard to the question of mines, I agree with my Lord, that even though the surface of this land, or the land without the minerals, may be said to have been properly required for the purposes of the undertaking, I cannot think that the mines were so required. They are, in my opinion, a property which cannot be said, under the circumstances of this case or on the findings, to have been required for the purposes of the undertaking at all, under the provisions of the Act; and therefore it seems to me that in any point of view the plaintiffs could not recover the mines.

Then with regard to the plaintiffs being the adjacent owners, it seems to me that the question is, whether persons seeking to maintain the right which the plaintiffs are insisting on now can shew that on the last day of the ten years they were the adjoining owners, because that is the time when by virtue of the statute, if at all, the lands are to pass to them. With regard to those lands of the plaintiffs which are severed from the lands they desire to acquire by the railroad, it seems to me that at the last day of the ten years they cannot be called the adjacent owners, because the railway was so. They may have had the right of pre-emption—I say nothing about that.

On the whole case our judgment must be for the defendants.

COTTON, L.J.—This case has been so fully dealt with by my Lords, that I should not have added anything if it were not that some of the questions that arise are of considerable importance. I will, however, confine my remarks to the more material parts of the case.

The plaintiffs claim this land on the ground that it vested in them, under section 127 of the Lands Clauses Act, as owners of the adjoining land. I will not discuss the question as to whether they are “adjoining” owners, but will assume that they are so. Now it is for the plaintiffs to prove their case, and to shew that these lands come within the block of sections relating to superfluous lands. On the part of the defendants it was argued that those sections might very reasonably apply to lands taken compulsorily, but could not apply to lands taken by agreement. I cannot agree with that contention, if by lands taken by agreement is meant lands which could have been taken under the compulsory powers, but which in fact were not so taken. Every one knows that a very large portion of the land which a railway company is entitled to take under its compulsory powers is in fact not so taken, but the landowner, knowing that compulsory powers can be put in force as regards that land, treats with the company with the expectation of getting as good a price, or thinking it is not reasonable to litigate the question or put the company to the necessity of putting in force its compulsory powers; and it would have been the easiest thing in the world to have used the words, “land acquired under compulsory powers,” in the 127th section, if that was the meaning of the Legislature. I take it that the sections must apply to all lands, whether actually obtained by agreement or compulsion, if they be such as the railway company could properly acquire under their compulsory powers, that is, lands required for the purpose of the undertaking authorised by the Special Act, and which are within the parliamentary plans and book of reference. Various cases have been referred to in support of the contention of the defend-

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ants on this point, but there are no decisions which support it. The strongest case, apparently, was *The City of Glasgow Union Railway Company v. The Caledonian Railway Company* (3); but that turned on the provisions of the Lands Clauses (Scotland) Act as to lands taken for extraordinary purposes; and the observations of Lord Hatherley, which appear to favour the defendants, must be looked at in view of that fact. I have already, in pointing out that the lands in this case were taken under the provisions of the Act relating to the ordinary requirements of the undertaking, shewn that they were not taken for extraordinary purposes.

Now comes the question which involves partly a question of law and partly one of fact. Was this land "required" for the purposes of the undertaking? We have got this guide certainly, and so far I agree with the plaintiffs, that the period of time when we are to decide aye or no whether the lands were then required for the purposes of the Act is the last day of the ten years. It is not enough to say that at some period before that, these lands were required for some purpose within the Act, if that purpose has come to an end. It was contended for the plaintiffs that the Act requires that the land must have been actually in use at the end of the ten years if it was not to be forfeited. I cannot accede to that. It is quite sufficient to my mind if, having regard to the ordinary and natural development of the traffic of the line, the lands are such that it cannot be said of them at the end of the ten years that they are not required for the purposes of the undertaking. I use advisedly the language that that is the time with reference to which you must ascertain that fact—required or not required—because in my opinion it is not necessary that anything should be done by the railway company to fix once for all their determination whether or no they are lands to be required. If the company came to the determination that the lands were required wrongly, it would not save them, and the want of such determina-

tion in my opinion could not be a ground for deciding against them. The question of fact, are these lands which it can be said are required or not required, must be decided whenever the claim is raised; and though the tribunal must decide that with reference to the last day of the ten years, still they may do so in the light of subsequent occurrences. Take, for example, what occurred in *Moody v. Corbett* (8). There, after the ten years, the railway company had put up lands for sale. That was a circumstance which might certainly be taken into consideration, and which the landowner very properly pressed, and would, as Blackburn, J., remarked, be decisive, unless explained. But if that is so, why should you not consider other like circumstances which may favour the railway company? Here in consequence of the plaintiffs having elected to postpone their claim until after the occurrence of facts, which if they had prosecuted their suit sooner would not have been before the Court, those facts must necessarily be for the consideration of the Court.

What are those facts? They are no doubt not conclusive, but they are facts. On the part of the landowner the letting of the land by the company is urged; but when we see that there is a proviso enabling them to resume possession at any time, that tells for the company. On the other side there is the finding of the arbitrator, that from 1868 the land was required for the purpose of constructing additional sidings, and that that was known then to the railway officials. There is also an explanation why the sidings were not made, it was owing to the company being embarrassed for want of funds. That being so, although the length of time raises no doubt a difficulty in the way of the railway company's contention, there is evidence which might properly go to a jury for the purpose of saying that these lands were lands which in the ordinary development of the railway would be in 1863

(8) 5 B. & S. 859; s. c. 34 Law J. Rep. Q.B. 166; in error 7 B. & S. 544; s. c. 35 Law J. Rep. Q.B. 161.

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required for the purpose of the under taking. I am not therefore prepared in any way to dissent from the finding which the Queen's Bench Division have arrived at.

Judgment affirmed (9).

Solicitors—Field, Roscoe & Co., for plaintiffs;
R. R. Nelson, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
May 21. } COVERDALE v. CHARLTON.

Trespass—Title—Possessory Right—Highway—Right to let Adjacent Strips for Pasture—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 149—Vesting of Streets in Urban Authority—Private Way—Possession against Wrong-doer.

By the Public Health Act, 1875, highways (not being turnpike roads) are, in urban districts, vested in and put under the control of the urban authority for the district, which in some places is the local board.

In 1771 the Commissioners, under an Enclosure Act, set out E. and C. as private roads. In 1818 E. became a public road, and as such has since been repaired by the parish. C. has always continued to be a private way. Until 1863 the surveyor of highways, and subsequently the local board (to whom the office of surveyors of highways was then transferred, and who in 1875 became the urban authority for the district under the Public Health Act), were accustomed, year by year, to let the right of pasturage on the sides of E. and C., though several persons in the neighbourhood had insisted on the right to put cattle in both places without making any payment.

In February, 1876, the local board let to the plaintiff the right of herbage on the sides of both E. and C. for a term, notwithstanding which the defendant insisted, during the continuance of the term, on turning out his cattle to graze on the sides of both roads. The plaintiff thereupon

brought an action for trespass against the defendant:—

Held, that the action was maintainable so far as related to the sides of E., which, by virtue of section 149 of the Public Health Act, 1875, had become vested in the local board in such a way as to confer the right of pasture; but that the plaintiff's claim failed as regarded C., the local board having no title, and there being no such actual or conclusive possession on the part of the plaintiff as would enable him to maintain an action for trespass against the defendant.

This was an action to try the right of the plaintiff, as against the defendant, to the herbage or pasturage in and about the sides of certain roads in Cottingham, a parish or township in the East Riding of Yorkshire, and to recover damages from the defendant for the infringement of such right and for trespass to the said herbage. Upon the action coming on for trial at the Leeds Summer Assizes before Denman, J., it was agreed that a special case should be stated, the material parts of which are as follows:—

In the year 1766 a public Act was passed, entitled, "An Act for dividing, enclosing and draining certain lands, grounds and common pastures, in the parish of Cottingham, in the East Riding of the county of York."

The Commissioners appointed by, or under, the said Act, made their award on the 24th of August, 1771, and thereby set out and appointed certain public and private roads within the said parish (including Endyke and Cold Harbour Lanes, hereinafter mentioned).

Endyke Lane was originally set out by the said award as a private road, but since 1818 has been a public road, and as such it has since that date been repaired by the parish. Cold Harbour Lane, which in the award was described as the North Call Road, was set out as a private road, and has since continued so to be.

The Commissioners, by their award, awarded the herbage of the said roads to the surveyors of highways for the township of Cottingham, but it was conceded both by the plaintiff and the defendant that no such power was given to the

(9) See the judgments in *Betts v. The Great Eastern Railway Company*, post, page 461.

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Commissioners, and that that portion of the award was invalid. Cottingham is, and has always been, for the purpose of maintaining its highways, a distinct and separate area, commonly called the parish of Cottingham.

Always, down to the year 1863, so far back as the memory of living witnesses extended, the surveyors of highways for the parish of Cottingham, and from the year 1863 down to the commencement of this suit the local board for the district of Cottingham, to whom the office of surveyors of highways was then transferred, and who are now an urban authority under the Public Health Act, 1875, have in every year agreed with various persons for the letting to them, between the months of April or May and November, of certain rights of herbage or pasturage in and about the sides of certain roads within the said parish, including Endyke and Cold Harbour Lanes, and continuously, since the year 1831 down to the commencement of this action, money payments have in each year been received by the surveyors, and by the local board, and applied to the repairs of roads within the parish; and (with certain exceptions not material) the persons with whom such agreements have been made have had the enjoyment of the herbage under the said agreements.

For thirty years, and upwards, before the commencement of this action different persons living in the neighbourhood had from time to time during the period when the said alleged right of herbage was let put horses or other cattle, generally in small numbers, into the said roads (including Endyke and Cold Harbour Lanes) to eat the herbage therein, without making any agreement with the said surveyors or local board. Some of the persons, on payment being demanded from them, have refused it, and have persisted in taking the herbage without payment after such refusal. Since 1863 (when the local board came into existence), the number of persons taking the herbage without payment has increased, and many of them have refused to pay when payment was demanded. From 1863 till about five years before the commencement of this suit, the number

of persons who took the herbage without payment averaged twenty, or thereabouts, in each year, but this number has somewhat diminished during the last five years.

It was from time to time brought to the knowledge of the surveyors and local board that there were persons who, during the period that the said alleged right of herbage was let, were depasturing the herbage with their cattle without payment, and the surveyors from time to time, and the local board during the whole time it has existed, have employed a person called a rinder, with instructions to impound any cattle that were found in or about the sides of the said roads insufficiently attended, but beyond this they have not interfered, save as hereinafter mentioned.

Proceedings have from time to time been taken before the justices in petty sessions by the surveyors and local board respectively, and by the lessees of the alleged right of herbage, under the provisions of the Highway Acts, from time to time in force, namely, 5 & 6 Will. 4. c. 50. s. 74, and 27 & 28 Vict. c. 101. s. 25, but the justices have uniformly dismissed the proceedings whenever it appeared that the cattle were under the control of an attendant.

The plaintiff, to whom before 1876 the alleged right of herbage in certain of the said roads had been several times let (but not from 1871 to 1875 inclusive), had from time to time warned off those whom he found taking the herbage without his permission; otherwise, except as hereinbefore mentioned, it did not appear that there had been any interference with those who were from time to time depasturing the herbage of the said roads without any payment.

On the 19th of April, 1876, the local board entered into an agreement in writing with the plaintiff, under which the local board agreed for a certain rent to let to the plaintiff the right of herbage or pasturage for cattle (except sheep) in and about the sides of some of the roads (including Endyke and Cold Harbour Lanes) until the 23rd of November then next. The day after the execution of the said agreement the

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plaintiff commenced depasturing the herbage with his cattle on the sides of the roads that had been assigned to him under the said agreement, and thenceforth until the commencement of this suit he regularly continued to do so.

On the 25th of April, 1876, three horses and eight head of other cattle belonging to the defendant were turned into Endyke Lane aforesaid, under the care of defendant's servants, and grazed there upon the sides of the said road; and on the following day the same number of horses and other cattle of the defendant were turned into Cold Harbour Lane under the care of the same servant, and grazed there upon the sides of the said roads.

The defendant knew that the said alleged right of herbage in and about the sides of the said roads had been let by the local board to the plaintiff, but refused to remove his cattle or to discontinue turning them out to graze upon the sides of the said roads. No actual obstruction of the plaintiff's cattle was caused on either day on which the alleged trespasses took place.

The defendant had himself in the year 1875 been a lessee under the local board of the alleged right of herbage in certain of the said roads, but not in any of those let in 1876 to the plaintiff, and the defendant had refused to pay the local board for the right of herbage so let to him, upon the ground that persons had depastured such herbage without his permission. Save under such letting, it did not appear that the defendant had ever before the 25th of April, 1876, put any of his horses or other cattle to graze in any of the said roads.

It was agreed between the plaintiff and defendant that if the judgment of the Court be for the plaintiff the amount of the damages was to be one shilling.

The question for the opinion of the Court was whether the plaintiff was entitled to recover.

Wills, for the plaintiff.—One of these roads is a street, and as such is vested in the urban authority; that is to say, the local board, who acted within their powers in letting the right of pasturage.

See 38 & 39 Vict. c. 55. s. 4 (1). Moreover, there was, independently of the statute, such a possession on the part of the plaintiff of the sides of both these roads as entitled him to maintain an action for trespass. In *Catteris v. Cooper* (2) it was held that the mere prior occupancy of land, however recent, gives a good title to the occupier, whereby he may recover against all the world, except such as can prove an older and better title in themselves. And possession for a limited purpose—e.g., by one who has only *vesturam terras* or *herbagium terras*—is sufficient to enable a party to maintain trespass—*Crosby v. Wadsworth* (3), *Coke's Littleton*, 4 b. He also cited *Heath v. Milward* (4), and *Every v. Smith* (5).

Cyril Dodd, for the defendant.—No title can be claimed for the plaintiff to the right of the pasturage in either of these roads; for the Public Health Act, 1875, s. 147,

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, the term street includes *inter alia* "Any highway not being a turnpike road." By section 6 the urban authority in local government districts, having no part of their area situated within a borough, and not coincident in area with a borough or Improvement Act district, is the local board. By section 144, "Every urban authority shall, within their district, exclusively of any other power, execute the office and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties and liabilities of surveyor or surveyors of highways," &c. By section 149, "All streets being, or which at any time become, highways, repairable by the inhabitants at large within any urban district, and the pavements, stones and other materials thereof, and all buildings, implements and other things provided for the purposes thereof, shall vest in, and be under the control of, the urban authority. The urban authority shall from time to time cause all such streets to be levelled, &c., as occasion may require. They may from time to time cause the soil of any such street to be raised, lowered or altered, as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers. Any person who, without the consent of the urban authority, wilfully displaces or takes up, or who injures the pavement . . . or the trees in any such street," is liable to a penalty, in addition to which "he shall also be liable, in the case of any injury to trees, to pay to the local authority such amount of compensation as the Court may award."

(2) 4 Taunt. 547.

(3) 6 East 602.

(4) 2 Bing. N.C. 98.

(5) 26 Law J. Rep. Exch. 344.

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does not transfer the freehold to the local board. The agreement with the plaintiff was therefore void. The rights and office of surveyor of highways have been transferred to and vested in the local board, but not so as to vest in them the herbage. If the contention of the other side be well founded the supposed rights of adjoining landowners will be seriously prejudiced. There was a similar clause in the Public Health Act, 1848 (11 & 12 Vict. c. 63. s. 68), but no such right as the present has ever been claimed before. All that the Legislature intended was to vest the management of streets in the urban authority for the purpose of preserving the rights of the public. Again, in order to maintain an action for trespass, it must be shewn that there is an actual or constructive possession, and that such possession is exclusive—*Omyyn's Digest*, Tit. Trespass (b. 3), p. 390. Accordingly, trespass will not lie for entering into a pew, because the possession of the church is in the parson (1 Term Rep. 430). Here there was neither actual nor exclusive possession. It was the case of two persons each asserting a right, and each doing an act in assertion of that right, but there was no legal title, and therefore no actual possession on the part of either—See observations of Maule, J., in *Jones v. Chapman* (6).

Wills replied.

COCKBURN, L.C.J.—I think this case differs materially as regards these two ways, which in the one instance is admittedly a highway, and in the other is admittedly a private way. The two ways stand therefore on altogether different considerations. With regard to the first, namely, that which is admittedly a highway, the question turns upon the construction of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149, read by the light of the interpretation clause (sec. 4), with reference to the definition of the word "street." Now in the latter section the term "street" is made, *inter alia*, to include "any highway not being a turnpike road." This, therefore, being a

highway, and not being a turnpike road, is a street within the meaning of the Public Health Act, 1875. By the 149th section it is provided that all streets shall vest in, and be under the control of, the urban authority, who under the 144th section are empowered within their district, exclusive of any other power, to execute the office of the surveyor of highways, and the urban authority in this case is, by virtue of section 5, the local board. It is certainly somewhat startling to find that under the term "urban district" a district thoroughly rural may be included, and that under the term "street" we may be called upon to deal with a grass lane; but having regard to the sections to which I have already alluded, no other conclusion could be arrived at on that point. Now what we have to consider is, in what sense the term "vest" is to be used. It has been suggested on the part of the defendant that by this expression a mere power of dealing with the highway for certain purposes was intended to be conferred, but I think that such a construction would be too narrow. In my judgment the true construction of the 149th section, as applied here, is that the whole of the grass is so thoroughly placed under the control of the local board that it might be converted into a metalled street. There is nothing, so far as I can see, to limit the operation of the section or to justify us in holding that it was merely intended to vest the surface in the urban authority. It may be that this interpretation of the statute will inflict some hardship on the owners of the soil on each side of the road, infringing as it does upon the presumption ordinary in such cases, namely, that the property of the soil is in the adjacent owners—"usque ad medium filum viæ"—though in this particular case, the road in question having been set out under an Inclosure Act, it is suggested by Mr. Wills that the soil would, if it belonged to any private person at all, belong to the lord of the manor. However that may be, I think it is perfectly clear that the Legislature have vested the soil in the local board, and the Legislature is of course in such matters omnipotent. Therefore, the soil being

(6) 2 Exch. Rep. at page 821; s. c. 18 Law J. Rep. Exch. at page 460.

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vested in the local board they can depasture this land to any person they choose, and as regards this way, the plaintiff acquired an exclusive right of pasturage.

Now the case is altogether different with reference to the road which admittedly is not a public highway, and not therefore within section 149. Mr. Wills has argued that though the local board may have failed to establish their right to deal with this land as they have done, nevertheless the plaintiff having acquired possession is entitled to hold it against a wrongdoer, which the defendant must be taken to be, he not having set up any title. This way was set out of a large common, over which old commoners were accustomed to turn out their cattle, and they continued to do so after the way was made and allotted under an Inclosure Act. Defendant, however, does not now claim any right or title to do this, but says that he has as good right as anybody else. We must look therefore at the case with reference to the alleged possession. Now I start with this proposition—that as the local board had no right in the soil, nor the power to grant the pasturage to anybody, the plaintiff could acquire no right from those who had no title to give, and his possession was no better than theirs could be. Moreover, what does his possession come to? He has turned out some cattle over the ground to graze, but does this turning out of cattle give him possession of the whole pasture? Can he say under such circumstances that he has as a matter of grant possession of the whole? I think he cannot say so. He has turned out cattle, and may have got *quasi* possession of land under a title which proves to be worthless, but that act on his part cannot give him such exclusive possession as will entitle him to maintain an action against any other person who has acted similarly.

As regards the private way therefore the plaintiff's claim fails, but the plaintiff is entitled to judgment on that portion of the claim which relates to the highway.

MELLOR, J.—I am of the same opinion, but though I confess I should have been glad if the facts had been a little more

fully set out, I think there is a real distinction between these two ways. With regard to the one admitted to be vested in the local board as the urban authority, I cannot agree that the vesting was of such a limited nature as has been contended on behalf of the defendant. [His Lordship read section 149.] The words are too strong to come to any other conclusion than that the soil vested, and that being so, the local board had the right to confer the exclusive pasture. This right the local board exercised in favour of the plaintiff, who accordingly had the right to maintain an action of trespass against one who, like the defendant, had no superior right to his own.

Then comes the nice question, which has reference only to the private way, as to whether there was such a possession on the part of the plaintiff as entitled him to maintain an action for trespass. I do not at all doubt the authorities which were cited during the argument by the plaintiff's counsel, but they all refer to a right of ownership or possession. There was no such here, and one of the difficulties is that the commissioners who purported to assign the right to herbage under the powers conferred upon them under the Inclosure Act had in reality no such powers given them, and therefore acted *ultra vires*. The position of this private way and the rights relating to it have been therefore left just as they existed before the Act passed. The way being made under an Inclosure Act for the inclosure of commons, the soil belonged to the lord of the manor, and the latter was the only person who could interfere with the pasture. It is quite true that when the right was given to the plaintiff it was specifically given. But no exclusive possession was granted; all that the local board professed to let to the plaintiff was a right of pasturage, and not the land itself. He had, therefore, no possession of the land, but only affected to exercise the right of pasture for his cattle. This right the local board had no power to grant at all, and the plaintiff was therefore a mere licensee. Therefore when the defendant, denying the power of the local board to make an agreement of this kind, turns out his cattle, the question is

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whether the plaintiff can maintain trespass. I think he cannot, and that our judgment should, as regards the private way, be in favour of the defendant.

As regards the highway, I have already given my reasons for deciding in favour of the plaintiff.

Judgment for the plaintiff as regards the public way; for the defendant as regards the private way.

Solicitors—Henry Stirke, agent for J. S. Moss, Hull, for plaintiff; J. L. Morris, agent for Spurr, Hull, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878.	}	LAMB v. WALKER.
Jan. 12.		
Feb. 22.		
May 13.		

Action for Injury to Land from Mines of Adjoining Owner—Damage, when to be Estimated—Recovery of Prospective Damage—Right to Support of Adjacent Land.

Where injury has been occasioned to land and buildings by mining operations under the land of an adjoining owner, the plaintiff is entitled to recover, in an action founded upon such injury, compensation, not only for the damage that has actually occurred at the time of action brought, but also for the prospective damage resulting from the defendant's act. As the cause of action was complete at the moment that the first damage accrued to him, the plaintiff must recover once for all in one and the same action for all damage past, present and future, resulting from that one cause of action—for the reason that no occurrence of damage subsequently, as the result of the original act of the defendant, would give a fresh cause of action.—So held, *per* MELLOR, J., and MANISTY, J.; COCKBURN, L.C.J., dissentiente.

Per COCKBURN, L.C.J.—There being no abstract right to the support of the adjacent land, the act of the excavating owner is only tortious when it produces and to the extent to which it produces actual damage.

On the one hand, therefore, the defendant is not liable for damage which has not occurred, and which never may occur; and on the other, each fresh interference with the enjoyment of property, on the occurrence of subsequent damage, is a wrong done, and creates a further cause of action, of which the plaintiff can avail himself.

This was an action brought by the owner of certain lands in the county of Durham, against the defendant, a mine owner, for damage to his reversion caused by the sinking of the surface by reason of mining operations carried on by defendant under adjacent land of his own and also under some of plaintiff's land.

The paragraphs 4, 5, and 6, in the statement of claim, referred to in the judgments, were as follows:—

"4. The defendant has wrongfully excavated under the plaintiff's said land, and has taken away and disposed of coals and minerals of the plaintiff under the plaintiff's said land of the value of 100l.

"5. The plaintiff's said land was of right supported by the said adjoining land. The defendant by mining under the said adjoining land has withdrawn support to which the plaintiff was entitled.

"6. The plaintiff was also entitled to have the said public-house, cottages and buildings, supported by the said adjoining land. The defendant by mining under the same has withdrawn such support to which the plaintiff was so entitled."

The defendant paid 150l. into court.

The action was by a master's order referred to a civil engineer as special referee; and he made the following report:—

1. The plaintiff is entitled to recover from the defendant in respect of the causes of action mentioned in the 4th paragraph of the statement of claim, and admitted by the defendant, the sum of ¼d. only.

2. I estimate the damage actually sustained by the plaintiff at the date of the commencement of the action by reason of the wrongful acts of the defendant complained of by the plaintiff in the 5th and 6th paragraphs of the statement of claim at the sum of 400l.

3. I estimate the future damage which

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will be sustained by the plaintiff by reason of the wrongful acts of the defendant complained of in the 5th and 6th paragraphs of the statement of claim at the sum of 150*l.*

A summons having been taken out by the plaintiff calling on the defendant to shew cause why the plaintiff should not be at liberty to sign judgment for 400*l.* 0*s.* 4*d.*, pursuant to the report of the special referee, the same was referred to the Court, who granted a rule calling on the plaintiff to shew cause why in the event of his not accepting judgment for 250*l.* over and above the sum paid into Court, the damages given by the certificate and report of the referee should not be reduced to such sum as the Court might think fit—and also for a new trial.

A new trial was refused by Cockburn, L.C.J., and Manisty, J., but the question whether the plaintiff could legally recover in this action the amount of future damage, which the referee found would be sustained by reason of the defendant's acts was re-argued before Cockburn, L.C.J., Mellor, J., and Manisty, J.

Cave, for the plaintiff, shewed cause.—The question here is whether the plaintiff, who has suffered certain damage for which he has an undoubted right to be compensated, is entitled in this action to recover once for all for prospective damage; or whether he ought to wait till such further damage occurs, it being then competent to him to bring a fresh action. *Nicklin v. Williams* (1) really decides this point; the facts were similar to those in the present case. Parke, B., says, "there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong." It is only the dicta in this case that have been overruled in *Backhouse v. Bonomi* (2), but, as Lord Westbury says, the decision of the case is beyond question.

[COCKBURN, L.C.J.—The House of Lords

says that the wrong of taking away the strata is not actionable till damage occurs. The judgment of Willes, J., in the Exchequer Chamber in *Bonomi v. Backhouse* (3) states the principle that actual damage having been once sustained, no second or fresh action can be brought for subsequently accruing damage. If the plaintiff here had to bring a series of actions, it would be almost impossible to say for what damage the previous compensation had been given, e.g., cracks in a house growing larger.

[COCKBURN, L.C.J.—As a fact, is there not a limit to the subsidence from removal of strata?]

Yes, the time varies; but a scientific witness could calculate it.

[COCKBURN, L.C.J.—If the damage is small, when must he bring the action?]

Within six years; otherwise he will lose his right; but as it is one continuing act causing damage, he must have the damages estimated and recovered once for all. An analogy is the case of an action for personal injuries, in which the future state of the individual is estimated. *Stroyan v. Knowles* and *Hamer v. Knowles* (4) are authorities in favour of the plaintiff's contention. He cited also *Roberts v. Read* (5); *Gillon v. Boddington* (6); *Mayne on Damages*, 3rd edit., p. 85.

Gainsford Bruce, contra.—It is clear from the decision in *Backhouse v. Bonomi* (2), that no action can be brought until damage accrues; but here the plaintiff is seeking to recover in respect of damage which has not yet happened.

[COCKBURN, L.C.J.—And which never may happen.]

Once admit that damage is an ingredient in the cause of action, and then it is reasonable to say that in an action a plaintiff can only recover to the extent of that damage. Take the case of a house, the north wall of which falls to-day; the south wall seven years hence; it is contended

(3) E., B. & E. at p. 654; s. c. 28 *Law J. Rep. Q.B.* at p. 379.

(4) 6 *Hurl. & N.* 454; s. c. 30 *Law J. Rep. Exch.* 102.

(5) 16 *East* 215.

(6) *Ry. & M.* 161.

(1) 10 *Exch. Rep.* 259; s. c. 23 *Law J. Rep. Exch.* 335.

(2) 9 *H.L. Cas.* 503; s. c. 34 *Law J. Rep. Q.B.* 181.

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that an action could then be brought in respect of the south wall, because not till then had the damage combined with the wrongful act so as to perfect the right of action. The difficulty of assessing prospective damage is against the plaintiff's contention; and this is pointed out in the judgments in the Exchequer Chamber in *Bonomi v. Backhouse* (3). In *Stroyan v. Knowles* (4), the workings were unlawful, and in the other cases cited it will be found that there had been an actionable wrong committed. Here the defendant's act was perfectly lawful, and plaintiff could not object until damage accrued to him from it.

Cave, in reply.—In *Hodsoll v. Stallebrass* (7), the master suing for injury to his apprentice was allowed to recover damages for the loss of service during the remainder of the term, on the express ground that the action was founded on the unlawful act and the damage combined. Generally, where an action will only lie with special damage, it has always been held that prospective damage must be sued for—*Lord Townsend v. Hughes* (8); *Buller's Nisi Prius*, p. 7, as to libel. [COCKBURN, L.C.J.—These mining matters are all new, and have to be considered as peculiar interests.]

Our. adv. vult.

On May 13th, the Court being divided in opinion, the following judgments were delivered:—

MANISTY, J.—The plaintiff, by his statement of claim, alleged that his reversionary estate in certain land and buildings, occupied by his tenants, had been impaired and injured, first, by the defendant excavating and getting coal underneath his (the plaintiff's) land and buildings, and second, by the defendant's mining under his own land adjoining the plaintiff's land, and thereby withdrawing the support to which the plaintiff's land and buildings were entitled, whereby the plaintiff's land sank and gave way, and his buildings were weakened, cracked and otherwise injured, and his estates in the said land and

(7) 11 Ad. & E. 301; s. c. 9 Law J. Rep. Q.B. 132.

(8) 2 Mod. 150.

buildings were impaired. The 4th, 5th, and 6th paragraphs of the plaintiff's statement of claim are in these terms—[The learned Judge then read them]. It is unnecessary to say anything about the first ground of complaint, because the damages in respect of it are found to be nominal.

The defendant brought into Court the sum of 150*l.*, and by his statement of defence alleged that it was enough to satisfy the claim of the plaintiff. The plaintiff replied, denying that 150*l.* was enough to satisfy his claim, upon which issue was joined, and that was the only issue to be tried.

By an order made by Master Manley Smith on the 19th of April, 1877, it was ordered that the action should be tried before Mr. Jacob Higson, of Manchester, civil engineer, as special referee, and that order was made a rule of this Court. On the 18th of August, 1877, Mr. Higson made his certificate and report as follows—[The learned Judge then read the report as above].

It is noteworthy that the Referee finds as a fact that further damage to the extent of the 150*l.* now in question will be sustained by the plaintiff by reason of the wrongful acts of the defendant complained of in the 5th and 6th paragraphs of the statement of claim. On the 11th of September, 1877, the plaintiff took out a summons, calling upon the defendant to shew cause why he should not be at liberty to sign judgment for 400*l.* and one farthing, pursuant to Mr. Higson's certificate and report, and costs to be taxed. That summons was referred to this Court. On the 6th of November, 1877, a rule was granted by this Court calling upon the plaintiff to shew cause why, in the event of his not accepting judgment for 250*l.* over and above the sum paid into Court, the damages given by the certificate and report of Mr. Higson, should not be reduced to such sum as the Court might think fit; or why the trial should not be set aside and a new trial had on the ground that the damages are excessive and contrary to the weight of evidence.

The case was argued on the 12th of

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January, 1878, before the Lord Chief Justice and myself, and we then declined to set aside the trial and grant a new trial, and we took time to consider whether the plaintiff was in point of law entitled to recover the sum of 150*l.*, the amount of future damage which the Referee finds will be sustained by the plaintiff by reason of the defendant's acts.

That question was again argued before the Lord Chief Justice, Mr. Justice Mellor and myself, and we took time to consider our judgment. I am of opinion that the plaintiff is entitled to recover the 150*l.*, and that consequently the rule to reduce the damages should be discharged, and the plaintiff should be at liberty to sign judgment for 400*l.* and one farthing, and taxed costs.

The defendant by paying money into Court generally, has admitted all the material statements contained in the plaintiff's statement of claim. But it was contended on his behalf, that as his mining operations in his own land were not, *per se*, wrongful acts, the plaintiff's only cause of action was the consequential damage done to the plaintiff's property up to the time of the commencement of the action. It was contended on the part of the plaintiff that although he had no cause of action against the defendant until his land and buildings were injured, nevertheless so soon as they were injured by the withdrawal by the defendant of the support to which they were entitled, he had a good cause of action, and that he could only recover damages once for all. It was further contended on his behalf that the true measure of his damages was the extent to which his reversionary estate was impaired or rendered less valuable by reason of the defendant's alleged wrongful act. I am of opinion that the plaintiff's contention is correct.

The cases relied upon by the defendant only decided that without "consequential damage" there was no cause of action. But there is no authority, so far as I know, for the proposition that damage, *per se*, and apart from a wrongful act, can constitute a cause of action.

The plaintiff's right was to have his land and buildings supported by the sub-

jacent and adjacent soil or strata, and so long as they were in fact supported he had no cause of action; but so soon as the support which was left was proved to be insufficient and injury to the plaintiff's property ensued, then the defendant's act in withdrawing the necessary support became wrongful. *Dammum* and *injuria* concurred, and the plaintiff's cause of action then accrued. That point is, as it seems to me, concluded by the judgment of the House of Lords in *Backhouse v. Bonomi* (2).

But it is said on the part of the defendant that assuming this to be so, the true measure of the damage recoverable in this action is the injury actually done to the plaintiff's land and buildings up to the time of the commencement of the action, and that his remedy for subsequent injury is by bringing actions from time to time as and when further injury accrues.

I am of opinion, both upon principle and authority, that such is not the law; see *Nicklin v. Williams* (1), as explained and approved (upon this point) by the Exchequer Chamber in *Bonomi v. Backhouse* (3), and by the House of Lords in *Backhouse v. Bonomi* (2). See also *Hamer v. Knowles* (4). It is a well settled rule of law, that damages resulting from one and the same cause must be assessed and recovered once for all, and it seems to me, that in the present case there is but one and the same cause of action; namely, that which I have already mentioned.

It may be said that it would be more just and equitable, in a case like the present, that the plaintiff should only be entitled to recover the amount of damage actually done to his property up to the time of bringing his action, leaving him to recover subsequent damage (if any) by a subsequent action, or, if need be, by a series of subsequent actions.

The same might have been said in many cases in which however the contrary principle has for a very long time been, and, as I think, wisely, acted upon.

Take for instance the case of the wrongful obstruction of light by means of the erection of a new building lawful in itself. In that case it might be said the

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plaintiff ought only to be allowed to recover the damage sustained up to the time of the commencement of his action because possibly the obstruction may be removed, and therefore it would be unjust to permit the plaintiff to recover prospective damage, unless and until it is actually incurred. If that principle were adopted, one consequence would be that the statute of limitation would cease to be operative and a plaintiff might lie by until after the expiration of six years without bringing any action, and then not only bring an action for the damage sustained during the period of six years next before action brought, but he would be entitled to bring a series of subsequent actions for the damage subsequently accruing.

Again, take the case of slander actionable only by reason of special damage. The speaking of the defamatory words is *damnum absque injuria*, and consequently not actionable without special damage. Just as the removal of the necessary support in the present case was *damnum absque injuria* and not actionable until the plaintiff's property was injured, but I should suppose it would not be suggested that in such a case the plaintiff could only recover the damage actually sustained up to the time of bringing his action, and that for subsequent damage he might bring a subsequent action, or a series of subsequent actions.

The fact is that the principle hitherto acted upon, namely, that a plaintiff must recover once for all by one and the same action all damage past, present and future, resulting from one and the same cause of action, may not always ensure perfect justice, but, as a rule, it is in my opinion a wholesome principle, and I doubt whether any better could be devised.

It may be that in some exceptional cases, such, for instance, as injury sustained by a passenger owing to the negligence of the carrier, some useful change might be made in the law. If so, that is a matter for the legislature. As the law stands, the passenger must recover once for all, because there is only one cause of action, and it seems to me that anything more disastrous than that of allowing a

series of actions to be brought for damage arising from time to time in respect of the same cause of action could not well be conceived.

If in the present case the reversioner must resort to successive actions for injury to his reversion, so must his several tenants for injury to their possession, and the consequence to the defendant would, I should think, be very much worse than that of having the damages assessed once for all in one and the same action. In my opinion the plaintiff is entitled to judgment for 400*l.* and one farthing and costs.

MELLOR, J.—The facts of this case are set out in the judgment of my brother Manisty, and it is not necessary for me to repeat them.

If I thought that the present case was not concluded by authority, and that we were at liberty to consider whether a better or more equitable rule might not be found in the reasons relied upon by the Lord Chief Justice, as leading to the conclusion at which he has arrived, I might hesitate as to the judgment I might form, but I think this case is concluded by authority, and that I am not at liberty to treat the question as an open one.

The plaintiff in this action complained that he was damaged in respect of his reversionary interest in certain land and buildings, not only by mining excavations made by the defendant under his (the plaintiff's) premises, but also by mining excavations by the defendant made in his own land adjoining, the effect of which was to cause actual damage to the lands and houses to which the plaintiff was so entitled as reversioner, and it is with regard to the latter head of damage, that the question upon which we differ arises.

It cannot be disputed since the case of *Backhouse v. Bonomi* (2) that the owner of land and minerals adjoining the land or lands and houses of another person cannot be prevented from the fullest exercise of his rights of property and dominion in his own land, so long as in the exercise of those rights he does not injuriously affect the corresponding right of the owner of the adjoining property, and no cause of action can arise to

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the owner of land by the exercise of such rights of ownership by an adjoining owner on his own property, until some actual damage has been thereby occasioned to his property.

In the language of Lord Wensleydale in *Backhouse v. Bonomi* (2), "The plaintiff's right is not in the nature of an easement, but the right is to the enjoyment of his own property, and the obligation is cast upon the owner of the neighbouring property not to interrupt that enjoyment."

The act of the defendant in this case, therefore, only became wrongful when it interrupted the enjoyment by the plaintiff of his own property. The *damnum* and *injuria* combined as soon as the act of the defendant became wrongful. It is extremely important to ascertain at this point what it was which constituted the cause of action on the part of the plaintiff. The act done by the defendant, so long as he confined his excavations to his own property, was a lawful exercise of his right, but as soon as he, in the otherwise lawful exercise of his right, excavated in his own land to an extent and in a manner which caused actual damage to the plaintiff's property, then the act *ipso facto* became tortious, and the plaintiff became entitled to maintain his action.

It appears to me that it is not correct to say that the action is for damage only, because it will not lie until actual damage occurs. It is still the combination of the *injuria* and *damnum* which gives the right of action to the plaintiff, and the defendant becomes liable at once to the plaintiff for all the injurious consequences, whether present or future, which result from the acts of the defendant so become tortious, and whether he will bring his action immediately upon the manifestation of damage or wait for further development of it, is at his option; but whether he elects to bring his action immediately or prefers to wait for the complete development of the mischief, subject to the risk arising under the Statute of Limitations, he can only, as it appears to me, have one action and one recovery for all the damage occasioned by the defendant's wrongful acts.

This result is clearly established by the

case of *Nicklin v. Williams* (1), which, although it must be considered as overruled by the case of *Backhouse v. Bonomi* (2), so far as it decided that under circumstances exactly like the present the cause of action really arose in respect of injury to the right of the plaintiff to have his premises supported by the land of the defendant independently of actual damage thereto, still is, as it appears to me, a conclusive authority on the point of difference in this case; and Parke, B., in delivering the judgment of the Court upon the argument on the demurrer in that case, said, "For this wrong the plaintiff would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong."

The question in that case was distinctly raised by the new assignment, and was whether, on fresh damage, arising after an agreement by way of accord and satisfaction had been made, a new cause of action could arise. That the case of *Nicklin v. Williams* (1) was rightly decided so far as it affects the matter now in controversy, appears from the judgment of the House of Lords in *Backhouse v. Bonomi* (2), in which the Lord Chancellor, Lord Westbury, referring to it, says, "With regard to *Nicklin v. Williams* (1), the decision of that case is beyond all question, some of the dicta which have been relied upon by the counsel in that case are not necessary for the decision that was there pronounced."

I cannot see any distinction between the present case and that. In the present case the tortious act which occasioned the damage is identical in character with that in *Nicklin v. Williams* (1), and compensation for the resulting damage must be obtained by one and the same recovery. It might, in the present case, be a convenient course to wait and see whether further damage will actually result in-

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stead of assessing it as probable; but I can only answer that the same suggestion has frequently arisen and been constantly overruled as being inconsistent with an elementary rule of law. In *Bonomi v. Backhouse* (9), Wightman, J., said, "The plaintiffs can only recover to the extent of the damage they have actually sustained, which may include not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage;" and Coleridge, J., at p. 641, said, "Where a right of action is thus vested, and the action is brought for the act alleged to have occasioned the injury, the damages given by the jury for that act must be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise hereafter, as well as those which have arisen. For the right of action is satisfied by one recovery." And in the same case in error, Willes, J., delivering the judgment of the Court of Error (10), commenting on *Nicklin v. Williams* (1), said, "For before the former action was commenced, it is obvious that actual damage had been sustained; in which case another principle applies, namely, that no second or fresh action can under such circumstances be brought for subsequently accruing damage; all the damage consequent upon the unlawful act is in contemplation of law satisfied by one judgment or accord."

I am unable to see anything in the present case to take it out of the rule so clearly established, namely, that there can only be one recovery for all the damage resulting from the same wrongful act, whether it be all then manifest or is only likely to result from it; as it appears to me you cannot divide the injurious consequences into sections, and refer each new damage as it occurs to some new tortious act by the defendant, there being in fact only one tortious act committed; and to stop at a given point, and so divide the damage already accrued from the damage which may be still further developed, would be a violation of the

rule as to one recovery or one award to which I have referred.

If I am right in what I have said that in every cause of action there must combine an *injuria* and a *damnum*, then I cannot doubt that the arbitrator was right in assessing not only the actual manifest damage, but also in assessing the future damage within the 5th and 6th paragraphs of the plaintiff's claim, and that consequently the plaintiff is entitled to the judgment of the Court.

COCKBURN, L.C.J.—This is a case of considerable importance as a corollary on the leading case of *Backhouse v. Bonomi* (2), and which, as it seems to me, depends in a great measure on the effect to be given to the decision in that case.

Taking the view I do of that decision, I am unable to concur in holding that the plaintiff is entitled to recover in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant in respect of prospective damage, that is to say, anticipated damage expected to occur, but which has not actually occurred, and which never may arise.

The fundamental principle on which the decision in *Backhouse v. Bonomi* (2) proceeds is, that no cause of action arises in respect of what a man does on his own land, until actual damage arises therefrom to the property of the adjoining owner.

According to that decision there is no abstract right of support, independently of acquired easement, from adjacent strata, and the removal of such strata constitutes in itself no wrong. No wrong arises to A. from the excavation of B. on his own soil, though the stability of A.'s adjoining land may be thereby endangered, unless and until A. sustains actual damage therefrom. And the reason is that the law does not recognise any right in A. to the support of the adjacent soil, otherwise than as involved in the larger proposition that he is entitled to the enjoyment of his own property undiminished and unaltered by any use which B. may make of his. B. may use his own property as he pleases provided, in so doing, he does not do actual damage to his neighbour's

(9) E. B. & E. 638; s. c. 27 Law J. Rep. Q.B. at page 387.

(10) E. B. & E. 658; s. c. 28 Law J. Rep. Q.B. 381.

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property, or diminish or disturb his neighbour's enjoyment of it.

This view of the law, ably expounded in the judgment of Mr. Justice Wightman when the case of *Bonomi v. Backhouse* (9) was in the Court of Queen's Bench, was fully adopted and made the basis of their judgments by Lords Cranworth, Wensleydale and Chelmsford, in the House of Lords (2), and is quite consistent with the reasoning of Willes, J., in delivering the judgment of the Exchequer Chamber (3). The learned Judge there speaks of the right of action as arising from the damage, not from the act of the adjoining owner on his own land, observing that the law favours the right of dominion by every one upon his own land, and his using it for the most beneficial purpose to himself.

The language of Lord Cranworth is express on the point. He says, "I think the error in the view which has sometimes been taken on this subject is this: It has been supposed that the right of the party whose land is interfered with, is a right to what is called the pillars or the support. In truth his right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with, he has nothing of which to complain. That seems to be the principle on which this case ought to be disposed of." The language of Lord Wensleydale was to the like effect. He says, "The plaintiff's right was to the enjoyment of his own property, and the obligation cast on the owner of the neighbouring property was not to interrupt that enjoyment." Lord Chelmsford concurred in what had been said.

In this view the mere withdrawal of the support afforded by the adjacent or subjacent strata, by the excavation of the adjoining soil, gives of itself no right of action to the adjoining owner, not even though, from the knowledge of the fact of such excavation having been made, and the apprehension of possible consequential damage, or even the certainty that such damage must result, the value of the property should be prejudicially affected. Hence also, if, by the substitution of artificial for the natural support, the excavating owner can avert the mischief which

would otherwise arise, no wrong is done and no cause of action occurs. In both cases the owner has only done what he pleased with his own; in neither has there been any actual interference with his neighbour's enjoyment of his property. It is true that the case might have admitted of a different view—a view quite as much in accordance with legal principle, and which had been previously adopted by text writers, and indeed by the Court, as in *Humphries v. Brogden* (11) and other cases, namely, that the owner of adjoining property was entitled, as an incident of property, to the support of the adjoining soil; and that if that support was withdrawn, and his property was thereby endangered and its value consequently lessened, there was both *injuria* and *damnum*, and therefore a right of action. But this view involved the difficulty and embarrassment which in *Bonomi v. Backhouse* (3) it was sought to avoid, arising from the operation of the Statute of Limitations; or, independently of any assumption of the right of support, it might be said that a man who by thus dealing with his own property diminishes, from the possibility of future damage, the value of his neighbours, violates thereby the maxim, "*Sic utere tuo ut alienum non lædas*"—a maxim which our law has adopted with regard to the enjoyment of adjoining properties—though here again the same difficulty would occur; a cause of action having once arisen, though possibly unknown to the party whose right was affected, the statute would begin to run.

But such was not the view taken in the judgments of the Exchequer Chamber and the House of Lords in *Backhouse v. Bonomi* (2), judgments by which we of course are bound. The decisions—decisions of the two highest Courts—in that case, establish conclusively and incontrovertibly that it is not the withdrawal of the support previously afforded by the adjacent strata, a support to which, according to the view there taken, the adjoining owner has abstractedly no right, but the actual disturbance of his enjoyment of his property which constitutes a

(11) 12 Q.B. Rep. 789; s. c. 20 Law J. Rep. Q.B. 10.

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wrong and gives a legal ground of complaint. The effect of the decision is that there is no abstract right to the support of the soil; consequently that the withdrawal of the support does not create a wrong—an *injuria absque damno*: it is only when the *damnum* presents itself that that which has been done becomes wrongful. The *injuria* is the effect of the *damnum*. The act of the excavating owner is not tortious *in se*, it is tortious only when it produces, and, as it seems to me to follow logically, to the extent to which it produces, actual damage. This being so, it appears to me not only logically, but practically, inconsistent with this principle to hold that, because an adjoining owner has sustained actual damage, to a limited extent, from excavation of adjoining soil, he can recover in the same action, not only in respect of damage actually sustained, but also in respect of prospective damage which has not yet arisen, and which possibly never may arise at all. If permitted to do so, he would thus be enabled to recover compensation in respect of a wrong which he has not yet sustained, a wrong as yet undeveloped, and which has not yet in the legal view of the matter come into existence, a proceeding at variance with all principle. Equally at variance with principle is it, when it is borne in mind that it is only by reason of, and to the extent of, realised damage that the act of the defendant becomes wrongful, to hold him responsible for that which though it may possibly become wrong hereafter, as yet is not so. Moreover the defendant has, I apprehend, at any time before the damage has actually occurred, a perfect right to have recourse to any artificial means of which he can avail himself to prevent its occurrence. What if some damage having occurred, so as to give the plaintiff a cause of action, the defendant were to have recourse to some possible means to arrest the further progress of the mischief, would the plaintiff be entitled, notwithstanding this, to recover in respect of the damage which might otherwise have arisen, but which has thus been averted? Can the plaintiff by bringing his action, immediately on the happening of a slight amount of damage, and claiming therein

for prospective damage, which it is assumed will happen at some future time, thereby deprive the defendant of his right to prevent such future damage by recourse to artificial means? The law, beyond all question, allows him to avert all liability on account of possible damage in respect of the entire amount of damage which may result from his operations. If, finding that some damage has arisen, possibly contrary to his expectations, he seeks to prevent further mischief, I am at a loss to see on what principle he is to be prevented from taking measures to do so. Yet such would be the effect of this decision.

Of course I do not lose sight of the rule that damages resulting from one and the same cause of action must be assessed and recovered once and for all. But the rule seems to me to have no application in the present case, it being in my view of the effect of *Backhouse v. Bonomi* (2), a mistake to say that the plaintiff had a right to the support of the adjacent strata, and that the removal of these constituted a violation of this right, by reason of which, when damage supervened, a cause of action arose. The plaintiff, as I read the judgment in *Backhouse v. Bonomi* (2), had no right to the support of the strata. His only right was his undisturbed enjoyment of his own property; and it was only when and so far as that enjoyment was interfered with, that he sustained a wrong. It is not enough to say that the value of the plaintiff's property has been diminished by the withdrawal of the support. It is not the diminished value of the property which makes the withdrawal of the support wrongful; otherwise any appreciable diminution in the value, consequent on the removal of the support, from prospective damage which might properly be anticipated to result from it, would constitute, independently of actual damage, a *damnum* in respect of which a plaintiff could recover, a position which according to *Backhouse v. Bonomi* (2) certainly cannot be maintained.

It being thus the present and actual interruption of the plaintiff's enjoyment, and not the removal of the support which constitutes the wrong, and gives a cause

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of action, it must, as it seems to me, follow that a present interruption can only give a cause of action to the extent to which it has gone. It cannot constitute a cause of action in respect of a future interruption which has not yet occurred. The subsidence of a hundred yards which takes place to-day is one thing. The subsidence of another hundred yards which takes place twelve months later is not the effect of the first. It is in no way connected with it except as far as both are the effect of a common cause. Both, it is true, spring from the same cause, namely, the excavation of the subjacent strata; but as the excavation and the consequent removal of the support is not in itself wrongful, or a cause of action, the damage which happens at one time, and that which happens at another, though arising physically from the same cause, cannot be said to arise from a common cause, or, consequently, from a common cause of action. Each fresh interference with the enjoyment of property is, as it arises, a wrong done, and creates a further cause of action. It is not damage referable to a cause of action antecedent to itself. The rule relied on does not, therefore, seem to me to apply to such a case.

My brother Mellor puts the argument in favour of the opposite view in a very striking form. He says that the removal of the adjacent strata, though not tortious till damage occurs, becomes so as soon as it does, so as to embrace all the damage which may at any time arise from it. I readily admit that if this construction is to be put on the decision of the House of Lords, the consequence contended for follows. But the language used by Lords Cranworth and Wensleydale does not appear to me to admit of such a construction. According to it, the plaintiff had no right to the support, and the removal of it never could be tortious. It is only the means by which a wrong becomes committed. The wrong consists in causing the plaintiff's premises to fall, consequently it extends only so far as the actual damage goes. Hence each fresh damage becomes a fresh wrong and fresh cause of action.

In a matter depending, as I think this

does, on legal principles, considerations of convenience or inconvenience can scarcely be admitted. At the same time I am not insensible to the inconvenience which may result to a defendant from being exposed to successive actions as fresh damage may arise. But independently of the fact that in many instances he may, by recourse to artificial means, prevent further subsidence, there are other considerations of convenience by which this inconvenience to the defendant may well be counter-balanced. If, on an action being brought for damage which has actually occurred, it were necessary to go into the question of possible future damage, where there was a possibility of such damage arising, both parties would be exposed to the inconvenience of a speculative enquiry depending upon the uncertain and often unsatisfactory evidence of experts—a consideration which appears to have had considerable weight in determining the decision of the Exchequer Chamber in *Bonomi v. Backhouse* (3). "The jury, according to this view," said Mr. Justice Willes, "would have to decide the speculative question whether any damage was likely to arise, and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur, when the most serious injury might in fact occur, and in others find and give large sums of money for apprehended damage which in point of fact never might arise. This," added the learned Judge, "is certainly not a state of the law to be desired. In many cases damages would be given where none could be sustained, while they would in other cases be given where they ought to be withheld."

In this view I entirely concur. Nothing, I think, could be more unsatisfactory than an enquiry into the possible future effect of underground operations, or more uncertain than its result, depending as it must do on the opinion of experts, taking the widest range as dealing with the unknown future, with the elasticity which generally characterises the formation of professional opinion as exhibited in Courts of justice.

Yet, if the proposed doctrine is to be

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sustained, it is obvious that in every case in which an action is brought in respect of actual damage, it will be necessary to go into the question of prospective or speculative damages, as, if the doctrine I am dealing with is correct, the plaintiff having brought one action, would be forever shut out from bringing another on account of subsequent damage, if such damage should afterwards occur.

Moreover, this inconvenience would be seriously aggravated by the fact that, whenever appreciable damage had resulted, however limited its extent, a plaintiff would be not only compelled to bring his action, though he might think the damage not sufficient to make it worth while to enter into litigation, but also to go into the whole question of speculative future damage, lest he should be barred by the Statute of Limitations in respect of future damage, however serious, which might occur after the expiration of the statutory period. For, whether the removal of the support is taken to be wrongful, and on the supervening of damage as amounting to a cause of action, or whether the interference with the enjoyment of the adjoining property is taken to constitute the wrong and to be the cause of action, as soon as the cause of action is complete the statutory time will begin to run, and the party wronged, who might otherwise have been content to wait to see if further damage would arise, will be without redress, however serious the damage he might sustain, if that injury should occur after the period of limitations has run out. The effect of all which must, I think, be to enlarge the sphere of such litigation, and to add greatly to its difficulty and expense. The balance of convenience appears to me, therefore, to be here consistent with legal principle.

On the whole, I am of opinion that the plaintiff cannot recover in respect of the prospective damage.

Judgment for the plaintiff.

Solicitors—Iliffe, Russell & Iliffe, agents for G. O. Crowther, Scarborough, for plaintiff; Ridsdale, Craddock & Ridsdale, agents for W. W. & W. J. Watson, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Court of Exchequer.*)

1878. } BETTS v. THE GREAT EASTERN
Feb. 24, 25. } RAILWAY COMPANY.

¶ *Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 127—*Railway—Superfluous Lands*—"The Purposes of the Undertaking."

Lands acquired by a railway company under their Act, and ever since retained bona fide for the purposes of the Act, in the belief that they will be required at some future time for such purposes, and with the intention of so applying them, are not "superfluous lands" within the meaning of section 127 of the Lands Clauses Act, 1845, though they have never been actually used for the purposes of the Act during the time specified in that section.

In an action of ejectment to recover lands from a railway company as superfluous, the question to be left to the jury is whether a reasonable person with a knowledge of all the facts actually existing at the end of the ten years prescribed in section 127, would then have been justified in coming to the conclusion that the lands would be required for the purposes of the company.

Semble, that lands adjacent to a railway station, occupied by granaries, coal-sheds and a public-house, let to tenants and used by them in connection with the traffic upon the railway, were "used for the purposes of the undertaking" within the meaning of the Lands Clauses Consolidation Act.

This was an appeal from a decision of the Court of Exchequer, in an action of ejectment by an owner of adjoining lands to recover certain lands from the defendants as "superfluous lands," under section 127 of the Lands Clauses Consolidation Act, 1845. The case will be found reported in 43 Law J. Rep. Exch. 4, where the facts are fully stated.

A case was stated for the opinion of the Exchequer Chamber, under section 39 of the Common Law Procedure Act, 1854.

The appeal now came on for hearing before the Court of Appeal, the question for the Court being whether the rule obtained on the 4th of November, 1870,

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ought to have been discharged or ought to have been made absolute on all or any, and, if so, on which of the grounds therein stated.

The case set forth in full the evidence given at the trial, the nature of which sufficiently appears in the judgments of the Court.

The pieces of land in dispute were indicated on a plan used before the Court by the letters A, B, C, D, E, F and G, respectively, and are so referred to in the judgments. All the pieces of land were contiguous to the railway, and all, with the exception of G, formed one continuous irregular strip adjacent to the Diss railway station.

A consisted of 0a. 3r. 15p. of pasture land, convenient for the construction of a road to B, and the erection of a toll-house and weighing machine. B of 0a. 2r. 1p., used as a lair for cattle travelling by the railway. C and D together contained 0a. 3r. 21p. On C coal-sheds had been built, rented by coal merchants; and on D, granaries, rented by corn merchants, and a public-house had been erected.

E and F, containing respectively, 0a. 0r. 14p. and 1a. 3r. 14p., were pieces let by the company as garden ground, alleged to be required for sidings, and an approach to the station. G was a piece of waste land occupying the site of an old road, which was retained by the company in case it should become necessary to convert it again into a road.

[For the plaintiff it was contended that the appeal was in the nature of a rehearing under the Judicature Acts, and that the Court were not restricted to the question which would have been before the Exchequer Chamber. This was contested on behalf of the defendants. But in consequence of the view taken by the Court on the main question, it became unnecessary to decide the point.]

Mereweather and *Robert Williams*, for the plaintiff.

Wills, Metcalfe and *Austin Metcalfe*, for the defendants.

BRAMWELL, L.J.—I wish to say that, in the opinion I expressed in the case of

Hooper v. Bourne (1), I had not the slightest notion of expressing any dissent, or any doubt as to the application of the principle upon which the House of Lords decided the case of *The Great Western Railway Company v. May* (2), and I had not the slightest notion of expressing any doubt as to the principles themselves.

In this particular case I think the matter must be decided as the Court of Exchequer Chamber ought to have decided it if they had cognizance of this case, and the Judicature Acts had not passed. I think so upon the reason of the thing, upon the right understanding of the Judicature Rules, and I think so more especially because here is a Special Case stated, and it is said expressly that the case is stated, pursuant to the provision of the 39th section of the Common Law Procedure Act, by way of appeal from a rule, and the finishing part of it is, "The plaintiff appeals from the decision and rule of the 6th day of June, 1873, and the question for the opinion of the Court of Appeal is, whether the said rule of the 4th day of November, Anno Domini 1870, ought to have been discharged, or ought to have been made absolute on all or any, and, if so, then on which of the grounds therein stated."

I think, therefore, that the question, or rather the questions, we have to decide are the same as would have had to have been decided by the Court of Exchequer Chamber if that Court had still been in existence. However, there still would be one question arising for us upon the materials before us. I have a very strong opinion that the view and intention of whoever prepared the rule in this case was that the five or ten years was a marked epoch, after which the company could not use the lands if they had not used them before.

I see the first ground is that the lands not having been dealt with, or used by the company within the five years limited by their Act, had become superfluous, and

(1) See *ante*, page 440; s. c. Law Rep. 3 Q.B. D. 258.

(2) 43 Law J. Rep. Q.B. (H.L.) 233; s. c. Law Rep. 7 H.L. 283.

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that the finding of the jury is therefore immaterial. Of course that is not sustainable.

The next ground is, "That the company cannot, after having parted with the possession of the lands acquired for the purposes of their undertaking, resume it, or retain such lands in the occupation of tenants beyond the period of ten years from the completion of their works." That is not maintainable.

The fourth ground is, "That the verdict was against the weight of evidence," which would be a ground for a new trial. I do not think that the verdict was against the weight of evidence, that is to say, that they have *bona fide* retained the lands for the purpose of the Act. I think it is in accordance with the evidence, and I shall have to give my reasons presently for that.

Then the other matter is, "That the learned Judge ought to have directed the jury that the said lands were severally superfluous lands within the meaning of the Lands Clauses Consolidation Act, 1845, upon the evidence.

I may state what my reasons are for thinking that the verdict and judgment were right, and that the defendants ought to be left in possession of this land. I protest, as I said in the case of *Hooper v. Bourne* (1), that I am not influenced by any feeling that the Act was a rash one. It is very natural and reasonable that a man should not wish to have a small holding interposed between him and a railway.

Now as to the first two pieces, the cattle lairs, what we are invited to do is either to disbelieve what has been said, or, at any rate, to doubt it to the extent of sending this case for a new trial. I cannot help thinking it is obvious that what the witnesses said was the truth; it is admitted that the cattle lairs are in the piece marked B, and then the question is whether it would be a good thing to have a road direct to those lairs.

Then it was asked, "Why do you not send cattle that way?" I suppose they get a few shillings or a pound a year for the use of that piece of land, and at present they can make a shift to get along the public road with the cattle or

anything else. But can anyone doubt that if Mr. Betts were to offer them 20l. for that piece of land as the agricultural value, they would not honestly and *bona fide* refuse it, and say, "No, it is better for us to keep it, though we do not wish to use it as a cattle way at present, and as long as we can get a few shillings a year out of it we shall do so." As to the objection that one end of the piece is broader than the other, and the question about the weighing machine and gate house, I doubt very much whether the Legislature intended that there should be any minute discussion of the sort, or that if you find that the Company have laid out a road five yards wide when four yards would have been enough, the extra yard is to be held superfluous and handed over. The substantial question must be looked at, as to the *corpus* of the thing, and not nice distinctions as to a yard more or less.

As to the part marked D, I confess I had some doubt, upon this ground, that this granary is no part of the railway or its works, and the land, therefore, is not required for the purposes of the Act, and therefore *quoad* the railway it is superfluous. But here is a man who deals in a variety of articles—coke, coals and corn—which mainly come by railroad, though possibly a part does not come by railway but is only sent off by railway. It is a great convenience to him to have it there to store and sell to his customers. What would be the consequence of taking that away from the railway? The consequence would be that some further sheds and stores would be required, at which these things could be unloaded from the trucks of the railway company into the carts of the present tenants, to be carried in the carts to private depots, so that you would have two cartings and transfers instead of one. If the company have no right to let their land to a tenant, and have not even a right to have a granary themselves, the only result would be they would have to pull down this granary and build more sheds of their own.

As to the stable, which I think was not quite given up by the plaintiff, railway companies must have horses, and horses

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require stables, and I cannot see why the defendants should not have them.

But then there is a public-house. I am sure I do not know why, if a refreshment room is allowable at a railway station, a public-house or beershop is not, but it seems to me we need not determine a question of that sort; for as I have said before we must look at the *corpus* of the thing, and if that belongs to the company, and there is anything upon it which the company have no right to put there, they do not in consequence lose the spot upon which it stands.

Let us suppose for a moment that there was a *bona fide* railway shed with rails under it, and suppose under the shed they built a room or two, and some man kept a beershop there; could it be contended that it was not a railway shed because there was a beershop below it?

There is also a detached piece of D. The siding used by the plaintiff runs over it, and the question is whether the plaintiff is entitled to the piece of land between his siding and the railway? It seems to me that as the plaintiff's siding runs over the land you cannot go into the question whether the piece of land is wider than it ought to be. We must deal with the thing as a whole, and it seems to me that the piece of land is substantially occupied.

It has occurred to me from the consideration of this case that it really will be very difficult, not from any ill will on the part of the Judge or jury, but from the nature of the case, to come to the conclusion that these small pieces are superfluous lands. A witness might always be brought to prove that the company would not exchange the land for its value, for they can always make some use of it, such as throwing down a heap of brick ends, or other purposes of that sort. They are not acting as jobbers of land, nor using the land for an improper purpose, but it is a convenience for them to have these lands for such occasions as may arise from time to time.

I have not had any great doubt as to the effect of the Railway Act, except in case the lands were put to a purpose quite independent of the railway.

But I think, upon consideration, that even if they had no power to let the land for the purposes for which they have let it, probably the result would be that they would have to pull down the buildings improperly erected upon it, and make some new arrangement. It may be observed that they have in all these cases reserved to themselves the right of resuming possession.

I have had some difficulty about pieces E, F and G; but it would be impossible for any one to say that the Judge ought to have directed the jury that E and F were superfluous lands, unless he ought to have directed them to disbelieve the plaintiff's witnesses altogether. And, in my opinion, he could not have said that the verdict was against the weight of the evidence as to the intended road. I do not myself see the improbability of it. It is said the road would contain thirty feet probably, and this piece contains two acres. But, considering the nature of the ground, they are entitled to say that the exact course of the road is not determined on, and besides there is the positive statement that the company intend to have sidings there. This has been sworn to, and not contradicted. I must confess I had considerable doubts as to G, for it seems that the old road is still in existence, and the defendants, who had no right to divert the old road, might have made a bridge connected with it over the railway. But then the extra land might have been required for the purpose of the abutments and approaches to the bridge, and therefore, I think, though what I am suggesting may not exist in fact, it is impossible to say, as a matter of inevitable conclusion from the evidence before us, that the learned Judge at the trial ought to have directed the jury that these were superfluous lands. I think, therefore, that the piece upon which I felt most difficulty is on the same footing as the others. I cannot say that the verdict of the jury was wrong, and I cannot say that the Judge ought to have directed the jury, or interfered with them, upon what may be called a question of facts.

As I said in *Hooper v. Bourns* (1), upon that which was treated in the Court below as a question of fact (for Baron

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Martin expressly puts it so), it would be a very strong measure for us to differ, without the most cogent reasons, from the decision of the Court below.

I think, therefore, that the judgment should be affirmed.

BRETT, L.J.—I am of opinion that the judgment of the Court of Exchequer was right, and for the reasons which the Court gave. Being of that opinion, it seems to me unnecessary to determine the question which has been raised upon the construction of the Judicature Act, for, without venturing at all to question what my Lord has said, if this appeal is to be treated in the way in which he has stated, that is, the way in which the Court of Exchequer treated the case, it is much more favourable to the plaintiff than the way in which he thinks, in a more restricted sense, the appeal ought to be treated. I decline, therefore, to give any opinion on the construction of the Judicature Act.

The question which the Court of Exchequer had to decide, and which we have to determine, seems to me that which was stated in *Hooper v. Bourne* (1) or that which was endeavoured to be stated in *Hooper v. Bourne* (1), as the result of the case in the House of Lords of *The Great Western Railway Company v. May* (2). I observe that Lord Justice Bramwell rather put the question—that is, one of the questions in such a case as this—to be whether any one could say *bona fide* that, although the company do not want the lands now, nor can they know how soon they will want them, whether they could say that they know they will want them within a reasonable time, that question being propounded as a question to be raised at the end of ten years. I find that I myself tried to state the same proposition thus—I read a paragraph from *The Great Western Railway Company v. May* (2), as I think Lord Cairns meant it—"Can the tribunal which has to try the case, and at the time the case is tried, say that if all the facts which were existing on the last day of the ten years had been known to a reasonably skilful and careful person, that person could have reasonably said at that time that the land would, by the

ordinary development of the railway or neighbourhood, be required to be actually applied to the purposes of the railway within a reasonable time." The need of the land must come into existence by the ordinary development of the railway or the neighbourhood, and I find my brother Cotton saying the same thing, perhaps in better terms. He says: "It is sufficient to my mind if, having regard to the ordinary and natural development of the traffic of the line, the lands are such that it cannot be said of them at the end of the ten years that they are not required for the purposes of the undertaking." Therefore, in such a case as this, the question is, first, was the land originally required for the purpose of the railway; and, secondly, can the tribunal which has to decide the case say that, at the end of ten years, if all the facts had been known, having regard to the nature and ordinary development of the railway and the neighbourhood, it could have been foreseen that the land would be required within a reasonable time. That, therefore, was one of the questions which had to be determined in this case. Now, it is somewhat difficult to say exactly how the case was treated by Baron Channell at the trial. The way in which the Lord Chief Baron and the Court of Exchequer understood that he had treated the case at the trial was, that he had obtained certain findings from the jury, and that then he had reserved a case for the determination of the Court upon those findings. The question for us seems to me to be, whether the Court of Exchequer were right in coming to a conclusion, not only that the lands were required for the purposes of the railway, which the jury had found, that is, whether they had been retained *bona fide* by those who were conducting the railway after the ten years, for the purposes of the railway, but whether at the end of the ten years, if all the facts which were known to the Court at the time of the trial had been known, it might then have been reasonably said that these lands would be required for the purposes of the railway within a reasonable time. The Lord Chief Baron, as it seems to me, deals with that question, and finds that

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it ought to have been answered in the affirmative. He had before him the summing up of Baron Channell, and that summing up shews how little there was for the Court really to find. Baron Channell told the jury that he supposed they could have no doubt that these lands were originally acquired for the purpose of the railway. He told them that, after the evidence, he thought they could have little or no doubt, though he left it to them to say whether the company did not retain them at the end of the ten years for the purposes of the railway; and he went further, and said that they could have no difficulty after hearing the evidence, in coming to the conclusion that at the time of the trial, at all events, these lands were lands which the railway company did want, although they did not want them immediately. Therefore, the only remaining question was, whether upon the facts then known, the lands being obviously wanted for the railway, that could have been reasonably foreseen in the year 1864, which I think was the end of the ten years. Now, what does the Lord Chief Baron remark about that? He remarks what seems to me to be the first thing which ought to occur to one's mind in such cases as this—the close proximity of all those lands to a railway station. And it seems to me that the Court ought to be very careful how they say that lands close to a railway station, if there is any evidence of the probable development of the railway should be said to be superfluous lands, and not required. On a railway which has any development at all, the place where more land would be required, would most likely be close to a railway station. The Lord Chief Baron then notices the size of the pieces of land, and that seems to be a material consideration. They are small. It is not as if many acres had been bought by the company. If this railway station wanted any development at all, these lands must be taken for that development, and there is so little of them that most probably the whole of them must be taken for any development. These are very grave considerations. Therefore, he had the opinion of Baron Channell, the finding of the jury, the situation of the lands, and

the evidence of the witnesses who were called at the trial. Their evidence has been criticised, as it is quite right and proper that it should; but after all, the question is whether that evidence was worthy of credit, or whether there was anything so improbable in it that it ought to be rejected. Now I fail to see that there was. But even if my own opinion were not clearly in the same direction as that of the Court of Exchequer, in my opinion a Court of Appeal ought to be very chary indeed of setting aside a decision of fact in the Court below, unless they are perfectly clear that that decision of fact is wrong, and if they themselves are left in doubt, they should not review that decision. Here we have the decision of the jury—the obvious view of Baron Channell upon questions which were not left to the jury, as it seems to me—and we have the decision of three Judges of the Court of Exchequer, dealing with the questions of fact; and I think that that decision ought not to be overruled unless we are clearly of a contrary opinion. I confess that, so far from that being the case, I should have been of the same opinion as to all these pieces of land. With regard to the first three pieces, A, B, and C, it seems to me that there is nothing to be said. Objection was taken to the part marked D, on the ground of the granaries being used by the people who now have them for private purposes. I shall assume that the company have gone beyond their powers in letting these granaries to be used in the way in which they are; but the turning point of the matter, besides the evidence of the witnesses that the buildings might be wanted by the company for the storing of grain, seems to me to be this, which is a most important fact, that the railway company when they let all these lands reserved to themselves the right of taking immediate possession at a future time; and it seems to me to make no difference that they were willing to make compensation if they did retake them. The important evidence as to what was in their minds, is the fact that they considered that they might at any time want immediate possession of these lands, and therefore they reserved to themselves the

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power of doing so. That seems to me to be strong evidence, to shew that these lands were in fact in the opinion of all competent persons, lands which might be required within a reasonable time. Therefore, with regard to the objections which have been taken to these granaries, and to the public-house, and to the stables, and what not, giving those objections their full effect, and assuming that it is *ultra vires* of the company that they should be used as they are now, it seems to me that they are all met by the evidence that the land might be wanted, and by the fact of power to resume possession having been reserved. With regard to the portions E and F, it seems to me that the evidence was strong, that they might within a short time be wanted for the extension of the station, and if the station were extended, then it was the most probable thing that a road joining the road to Walcott or to Frenze Hall might be very naturally required.

With regard to the part G, my opinion is, that it might very reasonably be said that the railway company did require it on account of a doubt (and that is quite sufficient to my mind) as to what might happen with regard to that road. I care not what was the strict law with regard to it, there was sufficient doubt about the case in my opinion to make it very reasonable that the railway company should reserve the whole of that piece.

With regard to all these points, it seems to me that the Lord Chief Baron and the Court of Exchequer dealt with the facts, and dealt with the question which is the governing question in this case, and found that question of fact in favour of the defendants. I think that their finding was right, and that we ought not in any way to set it aside.

COTTON, L.J.—The question which was raised as to what we were to consider upon this appeal, is one of very considerable importance; but having regard to the view which I entertain, if the case is to be dealt with as an appeal entirely under the Judicature Act, I think it is not necessary to give any opinion upon that point. But it must not be assumed that because I think the case is one where every-

thing is open to us as it would have been if the whole proceedings had been under the Judicature Act, that I decide against the point which was raised on behalf of the company, that the appeal having been, as it was, begun before the Judicature Act, and on a case framed under the Common Law Procedure Act, and intended to be prepared for the Court of Exchequer Chamber, that we can deal with it otherwise than that Court would have done; that is to say, for the purpose of considering any other question. But I will deal with it as if it had been entirely a question under the Judicature Act. I should be very sorry if it were considered that anything either I or the Court held in that case, which has so often been referred to of *Hooper v. Bourne* (1) was in any way inconsistent with the judgment of the House of Lords in *The Great Western Railway Company v. May* (2). In the first place, we have no right to decide anything contrary to a principle which has been laid down by the House of Lords, and the opinion of the learned Judge, the Lord Chancellor, who gave the principal opinion in that case, is one which I need not say we should regard with the highest respect as the opinion of a great lawyer. But none of us intended to lay down anything inconsistent either with the decision, or what was said by the Lord Chancellor in that case. I think the principal point seems to have been that there was some verbal difference between his language and that used by myself and the other Judges of this Court. He spoke of a survey being made, at the end of the ten years referred to by section 127, by the railway company for the purpose of seeing whether or not certain land was required. Now, in my opinion, he did not mean that the question to be decided was, whether the officers of the railway company in making the survey at the time then decide that the land was required: and for this obvious reason, that their decision would in no way be decisive. What I thought he meant, and still think he meant is this, that the period of the expiration of the ten years is that to which the tribunal which is to decide the question must

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look, and must say "having regard," for you cannot disregard them, "to the facts which you now know, if anyone had known the facts at that time, could it have been reasonably said that in the ordinary development of the railway and the neighbourhood, the land would be required for the purpose of the undertaking of the railway within a reasonable time after the expiration of those ten years?" That really is the question we have to consider here, and I think one must deal with it in this way: one must see whether or not, as regards any of these pieces of land, the learned Judge ought to have directed the jury, as a matter of law, that they must be considered as superfluous lands. Can we say the verdict, assuming it to be in favour of the railway company, was one which was not justified? Can we see any evidence before us that our decision ought to be that this land was superfluous land at the end of the ten years, or that there ought to be a new trial? In the first place, no doubt there is the strong fact here that a long period has elapsed, and the greater portion of the land, or some portion of the land at least, has not been used for any purpose which might be construed as a purpose of the undertaking. As to other parts, there is this question, whether or no the purposes for which the lands were used then and are now used, are purposes of the undertaking. As regards the non-application of parts of this land to the purposes of the undertaking, no doubt that is strong, but how is it explained? We find that it has not been so used for these reasons:—The company have not been in a position to employ money for the purpose of doing that, which by construing the evidence rightly in the year 1861, or at least a little time afterwards, ought to have been done for the purpose of providing for the development of this railway. I need not refer to the evidence, but both Mr. Bruff, the late, and Mr. Burt, the present traffic manager, and also two other persons who have land in the neighbourhood, and hold part of the land in question, agree that the traffic has been largely increasing, and for years past additional accommodation has been required.

Then let us consider whether, having regard to the development of the neighbourhood and their condition, these lands can reasonably be said to have been required, or whether we ought to hold that they are lands not required at that time for the purposes of the undertaking remembering the facts which have been elicited. It may be remarked that, with the exception of F and G, the land lies in a narrow strip of the railway in the immediate neighbourhood of the station, and that is land which, if there is any prospect of development, must naturally be required. I think I need not say any more as to that, except that I most entirely agree with what was said by Lord Justice Bramwell. No doubt the objects of the 177th and following sections were such as were pointed out, but it would be most unfair to railway companies who, after the time prescribed, had no power whatever to acquire land compulsorily, to say that though a great part of the land in question is required, and was land which at the time was said to be required for railway purposes, they must part with a portion of it because those purposes would not absolutely take the whole of the parcel of land. I think upon that I will say no more.

Now, B and C and a bit of D were practically given up; but really that goes a great way towards deciding the question as to the rest of D, because we must really take it as a whole, as land in the neighbourhood of the station and immediately behind the station, and if you find that a bit of D is certainly required, if you find that in fact there are buildings upon it used with the railway, it requires strong evidence to shew that a part of D is superfluous. In 1861, as I understand the evidence, the company were their own agents in the delivery of their goods, and they then kept horses in those stables. That was given up at some later period, and the company let those stables, and a tenant went into occupation. But he took the stables for the purpose of carrying his goods to and from the station; that is a railway purpose, and that would go a long way to shew that nothing between that and the railway could possibly

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be considered as superfluous land. Then we have the coal trucks and the granaries, which all come within the same class. My opinion as to these is, that the land occupied in this way is not superfluous land. As I pointed out in the course of the argument, railway companies need not be carriers. They may under the Railway Clauses Act, section 16, construct any warehouse and other things which they may think convenient for the purposes of the railway. These were used, not as shops and manufactories, but simply as places in which coal and grain brought along the railway were deposited until it suited persons who deposited them there and brought them along the railway to have them sent away. It would be very different indeed if they had let them for the purpose of an iron manufactory, even though the iron were brought over the line. But there is nothing to prevent a railway company from allowing any person who brings goods along the line from leaving them as long as he pleases at the station. What they do is simply to carry the goods along the line and leave them in such a way as best to satisfy and accommodate their customers. That I think disposes of this piece. The public-house is a little more doubtful, but we cannot possibly allow the plaintiff to recover the site of the public-house if we see that it is substantially used for what I consider railway purposes. If the company have been wrong in spending money in that way, the remedy is not to enable the landowner to recover the land, but to take proceedings against the directors for misapplying the funds of the company. But I think it may be looked at, as Lord Justice Bramwell said, as something equivalent to a third class refreshment room.

Now I come to E and F, about which I had for some time a little doubt, but that was before I heard the evidence. It appears to me that we cannot disregard the fact that a road and sidings were required in 1861, and that these lands were originally bought for that purpose, that they do contemplate and did contemplate using them for that purpose. The piece marked G does not seem to have been

dealt with separately. It was such a minute portion, that even if we had to decide in favour of the plaintiff upon it, I certainly would not have given him any costs, but having regard to the course the case took at the trial, and the matters which have been pointed out by Lord Justice Bramwell, I think we are not bound to overrule the decision of the Court below, and to hold that that piece must be considered as superfluous land, and, therefore, as having vested in the year 1861.

Judgment of the Court of Exchequer affirmed.

Solicitors—Twisden, Parker & Co., agents for T. W. Salmon, Diss, for plaintiff; C. A. Curwood, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE GUARDIANS OF THE KEYNSHAM
May 4. { UNION (*appellants*) v. THE GUAR-
DIANS OF THE BEDMINSTER UNION
(*respondents*).

Poor Law—Order of Removal—Settlement of Paupers under Sixteen—Second Marriage of Parent—"Widowed Mother"—Divided Parishes, &c., Act (39 & 40 Vict. c. 61), s. 35.

[For the report of the above case, see 47 Law J. Rep. M.C. 73.]

1877. }
May 14. } AGNEW v. JOBSON AND OTHERS.
June 26. }

Justice of the Peace—Notice of Action—11 & 12 Vict. c. 44. s. 9—Bona Fide Belief of Authority.

[For the report of the above case, see 47 Law J. Rep. M.C. 67.]

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878. } LEYMAN v. LATIMER AND
 Jan. 24. } OTHERS.

Libel—"Felon"—Effect of undergoing
 Punishment—9 Geo. 4 c. 32. s. 3.

In an action of libel for applying to the plaintiff the word "felon," it is no justification to shew that the plaintiff has been convicted of felony, without shewing that he actually committed the felony.

And per BRETT, L.J., and COTTON, L.J., it must also be shewn that the plaintiff has not undergone the punishment awarded to him for his offence, so as to be purged therefrom.

Appeal by the defendants from the decision of the Exchequer Division, reported 46 Law J. Rep. Exch. 765, where the facts and pleadings are stated.

Cole and Bullen, for the defendants.—The learned Judge at the trial found that the facts justified the defendants' statement; in fact, that the plaintiff had been convicted of felony. The 9 Geo. 4. c. 32. sec. 3, was passed merely to enable persons convicted of felony who have endured their punishment to give evidence. The case of *Cuddington v. Wilkins* (1), was misunderstood in the Court below. It was pointed out in *Sir Henry Fine's Case* (2), that Cuddington, who had never been convicted, was pardoned under a general pardon, and it was consequently not known whether he was guilty or not; but if he had obtained a special pardon the Court doubted whether the action could have been maintained, for the grant of a special pardon assumes the guilt of the person pardoned.

A. *Collins* (with him *Pitt-Lewis*), for the plaintiff.—He referred to the definitions of "felon" in the dictionaries of Johnson, Webster, Wharton and Ogilvie, to shew that a felon is defined as one who has committed a felony, not one who has been merely convicted of felony. He was then stopped.

(1) Hob. 67, 81.

(2) Godb. 288.

BRAMWELL, L.J.—I am of opinion that this appeal must fail, and I have come to that conclusion on a consideration of the statements of claim and defence and the issues raised by them. I hope I need not protest against any notion that I like to decide cases on technical grounds, but we must decide on what is alleged and the probabilities of the case, and not express any opinion on what is not before us.

I agree with the opinion of Blackburn, J., that the statement in the newspaper of April 24th meant that the plaintiff was a man who had been a convicted felon and no more, and not a thing so preposterous as that he was a man undergoing punishment and an editor at the same time; and therefore with submission to Baron Cleasby, I think the judgment of Mr. Justice Blackburn as to that was right. But I think that the attention of Mr. Justice Blackburn could not have been called to the paragraph in the paper of May 1st, and the expression "felon editor" contained in it. Those words, I think, mean that the editor was a person who had committed felony.

How, then, does the matter stand on the pleadings? The plaintiff proved all the facts in his statement of claim, the defendant pleaded that the plaintiff was convicted of felony and was sentenced to twelve months' hard labour. The plaintiff, in reply, does not deny that, but pleads what is a conclusion of law, namely, the effect of enduring his punishment. The plaintiff, therefore, as far as the issues of fact are concerned, is entitled to judgment. Then come the issues of law. First, then, as to the demurrers to the statement of defence. As far as they relate to the libel of May 1st, I think they must be held good, as the plea sets up no defence, for it does not say that the plaintiff was actually a felon but only convicted of felony—*Taylor on Evidence*, 6th ed. § 1505. "It has been determined that a judgment in a criminal prosecution—unless admissible in evidence in the nature of reputation—cannot be received in a civil action to establish the truth of the facts on which it was rendered." The conviction is no proof of the crime, it is *res inter alios*.

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This view is supported by the definitions of "Felon" and "Felony," in the dictionaries, which were brought to our attention. And the matter is so in point of good sense. The cases are rare, I am happy to say, in which there has been a wrongful conviction, but such cases have been, and the convicted person has been pardoned. It is right, therefore, where you charge a man, not with having been convicted of felony, but of having been a felon, that you should prove the charge which you actually make.

It is clear, then, that so far the demurrers to the statement of defence must prevail. As to those which relate to the paper of April 24th, Mr. Collins has wisely said that he will not rely on that libel, and so it is not necessary to decide the point, though I think judgment should be for him.

Besides demurring, the plaintiff has replied, and the defendants have demurred to the reply. The old rule must prevail here, that where the plea is bad all other demurrers are to be decided for the plaintiff.

I have said nothing on the point whether it is a good reply to say, "True, I was a felon; but I have suffered my punishment, and am one no longer." On that I express no opinion, as I do not think the matter is before us. One cannot, of course, but see the desirability of preventing such things being said of a man, but on the other hand part of the punishment of crime is the opprobrium which must cling to one after conviction. One cannot, however, but remark on the cruelty (I do not say it exists here) of raking up such things against a decent man.

BRETT, L.J.—It seems to me that the two questions which arise here for our decision, namely, the demurrers, and whether there shall be a new trial—must be treated differently, and with the greatest respect for my brother Bramwell, I think that the point which he declined to consider did arise, and must be disposed of with reference to the question of a new trial.

This case was not tried at all, but when it was called on, Blackburn, J., said he knew all the facts, and if they were

proved he should direct a verdict for the defendants. I think he would have had no right to do so. I do not think that the facts are tied down by the pleadings, but must be considered as they actually existed. The question as to the meaning of the words was one which must have been left to the jury. What the learned Judge said at the trial comes to this: "Whatever the jury may find to be the meaning of the words, I shall say that they must find a verdict for the defendants." If I had been on the jury I should have said that the libel of April 24th meant that the plaintiff was a person who had been convicted of felony, but I am not prepared to say that a jury might not find the other way, and if so, the same question would arise on both libels, as no doubt on the second libel the jury might find that the libel meant that the plaintiff was at that time "a felon editor." Now I do not think that the plaintiff is prepared to say that he is not guilty. Let us assume that he was convicted and rightly, but that it happened some time before. On that state of facts I am prepared to hold that, even though the defendants proved that the plaintiff had been rightly convicted, yet as he had served his time they would have shewn no defence, and on the ground that as he had suffered his punishment, he was not at the time of the libel a felon. I think the judgment in *Ouddington v. Wilkins* (1), is an authority for that; the Judges there say that they will hold so, so as not to favour idle and injurious words. *Searle v. Williams* (3), is an authority the same way; and the same thing is still more solemnly stated in *Hawkins' Pleas of the Crown* (book 2, c. 37, s. 48). I agree with Cleasby, B., and think that it is right that the doctrine should be upheld. That being the state of the authorities there comes the Act of 9 Geo. 4. c. 32, which makes the case still stronger. I do not think that that Act was intended to be confined merely to the question of evidence; I think the legislature deliberately adopted the view that no man should go on cruci-

(3) Hob. 288.

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fying another for the rest of his life without any justifiable motive.

At all events, then, on the libel of May 1st, if the facts had been proved as I have assumed them to be, I think the learned Judge, instead of directing the jury to find a verdict for the defendants, would have been bound to tell them to find for the plaintiff.

Then as to the demurrers, I do not think that any of them ought to have been pleaded. At the present time I think demurrers are idle, and if used at all should only be directed at the whole of the case of the opposite side.

We must, however, consider these as they are before us. As to the libel of May 1st, the defendant pleads that the plaintiff has been convicted, and was sentenced to twelve months' imprisonment. That will not suffice, for there is no allegation of the plaintiff's guilt, and moreover, if what I have said before is right, the plea is bad for not stating that the plaintiff has not served his imprisonment. That being so, we need not consider the subsequent demurrers.

In nothing that I have said do I mean to express that on proper occasions a man may not be asked as to his past life, but I do think that where people will rake up the past misdoings of others their conduct is wicked and malignant, and perhaps worse than that which they condemn.

COTTON, L.J.—The question is whether Mr. Justice Blackburn should, if this trial had taken place before a jury, have directed them as he said he should have done. Now, whether words are libellous or not is for a jury to decide unless the words cannot bear a libellous meaning. Here, at any rate as far as the libel of May 1st is concerned, it would be impossible to say that the words could not bear a libellous meaning. I should myself be inclined to differ from the Court below as to the first libel, but it is unnecessary from the course the case has taken to decide anything on that.

As there must be a new trial, I think we ought to express our opinion on the substantial question, namely, what is the effect of the plaintiff's having served his

time. I agree with Lord Justice Brett that it is impossible to say that the statute 9 Geo. 4. c. 32. s. 3, simply had effect as to evidence; the proviso clearly shews that. The effect on my mind is that it is not libellous to say that a man has been convicted at some former time. I think it is a matter of public policy that one should not be prevented from so saying, but it is quite another thing to say that one who has been so convicted is a felon; that would be actionable, except there be a duty to make the statement. I lay down no new doctrine in so saying, as the cases shew.

I add nothing as to the demurrers, except to agree with the remarks of Lord Justice Brett as to the uselessness of demurrers, unless they go to the root of the matter, as in the case of a demurrer to a statement of claim or defence where no facts are pleaded or statements traversed.

Appeal dismissed.

Solicitors—Coode, Kingdon and Cotton, agents for J. Daw and Son, Exeter, for plaintiff; Surr, Gribble and Bunton, agents for John Walter Wilson, Plymouth, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1877.
Nov. 24.
Dec. 1.
1878.
Feb. 18.

THE QUEEN v. FRENCH.

Highway—Turnpike Act—Roads authorised to be made by Trustees under Private Act—Tolls—Completion of Part of Roads—Insufficiency of Tolls to keep Completed Part in Repair—Statute 4 & 5 Vict. c. 59—Application for Contribution towards Maintenance out of Highway Rate—Jurisdiction of Justices.

[For the report of the above case, see 47 Law J. Rep. M.C. 74.]

1877. }
Dec. 1. }
1878. }
May 6. }

FOWLER v. KNOOP.

Ship and Shipping—Bill of Lading—18 & 19 Vict. c. 111. s. 1—Liability of Consignee named in Bill of Lading—Delivery to be taken within Reasonable Time—Contract implied by Law in Bill of Lading.

Where there is no express stipulation in a bill of lading it is an implied term of the contract contained in it, that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time; and the person to whom the property in the goods has passed, by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111. s. 1), subject to the liability so to take them.

Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charter-party, between the charterers and the shipowner, in reference to the same matter.

This was an action brought by the owner of a vessel, called the *Claudine*, against the consignee named in the bill of lading of a cargo of nitrate of soda, shipped on board the vessel by J. Gildemeister & Co., at Iquique in Peru, to recover damages for the detention of the vessel at the port of discharge.

By charter-party, entered into at Valparaiso on the 11th of September, 1875. J. Gildemeister & Co. chartered the *Claudine* to load a cargo of nitrate of soda at the port of Iquique, and proceed to a port for orders to discharge in a safe port in the United Kingdom.

The only material stipulations in the charter-party were the following:—

“Bills of lading to be signed by the master, weight and quality unknown, all on board to be delivered,” and that the vessel should, “in such discharge port as ordered, deliver the whole of her cargo as fast as the custom of the port will allow.”

On the 19th of November, the cargo of nitrate of soda was shipped on board

the *Claudine*, and consigned to the defendant, who carried on business in London, under the firm of Wm. Berkefeld & Co., and the following bill of lading was signed by the master:—

“Shipped in good order and condition by J. Gildemeister & Co., on board the British barque *Claudine*, whereof E. Jamieson is master, now lying at the port of Iquique, and bound for Queens-town or Falmouth for orders,—5,290 bags, nitrate of soda, weighing, &c., and are to be delivered, in the like good order and condition, at the port of her final destination (the act of God, fire and all other dangers and accidents of the seas, rivers and navigation excepted), unto Messrs. Wm. Berkefeld & Co., London, or to their assigns, he or they paying freight for the said goods, as per charter-party and average accustomed. In witness, &c. Dated at Iquique, Nov. 19, 1875.”

Gildemeister & Co. drew a bill of exchange for 5,000l. upon the defendant, on account of the cargo, and forwarded the bill of lading with a copy of the charter-party to the defendant, to whom the cargo was consigned for sale, and who thereupon accepted and paid the bill of exchange. The defendant contracted to sell the cargo to the London Banking Association, at a price per ton, delivered *ex ship*, and the London Banking Association contracted to sell the same to Bath & Sons upon similar terms, and Bath & Sons contracted in like manner to sell to Jas. Gibbs & Co. The defendant did not indorse the bill of lading to any of the purchasers of the cargo, and it remained in his hands.

The vessel was ordered to Plymouth to discharge, and she was there ready to discharge her cargo on the 8th of April, 1876. The cargo was delivered upon orders signed by the defendant to the ultimate purchasers, and the discharge was completed on the 27th of April.

The plaintiff contended that delivery of the cargo was not taken within a reasonable time, and the defendant relied upon there being a custom of the port of Plymouth to take delivery of cargoes of nitrate of soda at the rate of forty tons per day.

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At the trial before Field, J., at the Guildhall, during the Trinity Sittings, 1877, the defendant's counsel, at the close of the plaintiff's case, submitted that there was no liability on the part of the defendant to the plaintiff to take delivery of the cargo within a reasonable or any other time. The learned Judge reserved this point for argument upon the further consideration of the case, and the jury found, upon questions left by him to them—

1st. That there was no such custom as alleged;

2nd. That delivery of the cargo was not taken within a reasonable time, and that seventy tons per day was reasonable.

And it was agreed that if the defendant was liable, the plaintiff was entitled to recover for seven days' detention at 7l. 10s. per day.

Accordingly on the 1st of December, the point so reserved was argued before Field, J.

Cohen and Wood Hill, for the plaintiff.—

The first proposition on the part of the plaintiff is that, in the absence of express stipulation, it is an implied term of the contract contained in a bill of lading, that the consignee, or his assigns, will take delivery of the goods therein mentioned within a reasonable time. And then secondly, that the defendant here being the consignee named in the bill of lading to whom the property in the goods passed by reason of such consignment, is, under the Bills of Lading Act, 1855, subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with him.

First, then, the bill of lading is a contract to take delivery, and nothing being said expressly as to time, a reasonable time is in this, as in any other contract, to be implied. The judgment in *Ford v. Ootesworth* (1) says that the contract implied by law is that each party shall use reasonable diligence in performing his part of the delivery at the port of discharge. Then *Hill v. Idle* (2) is an au-

thority that the consignee of a particular parcel of goods in a general ship is liable for not taking them within a reasonable time. An element in estimating what is reasonable diligence, would be the custom of the port—*Burmester v. Hodgson* (3). It may be said that this argument does not apply where there is a charter-party; but the charter-party here is silent as to demurrage, and the only reference to delivery is that it shall be "as fast as the custom of the port will allow," which is just the same as would be implied according to the plaintiff's contention in the bill of lading. But the charter-party does not affect the contract contained in the bill of lading; as may be seen in the instance where the freight in the charter-party is at one rate and in the bill of lading at another, in which case the consignee and indorsee of the bill of lading is only liable at the latter rate. Again, it is clear that the consignee could sue the shipowner if, on tendering freight, he would not deliver; must there not be a corresponding obligation on the part of the consignee to take delivery?—*Holman v. Wade* (4).

Next, there is no question here but that a special property in the goods passed to the defendant, and that being so the statute applies. The words "contract contained in the bill of lading" extend to implied obligations—*Domett v. Beckford* (5). It is submitted that the statute may be read as if the words were "created by the bill of lading;" and the liabilities whatever they may be of the shipper are transferred to the consignee and indorsee of the bill of lading. But the contract between the shipper and the shipowner as to delivery was this implied one contained in or created by the bill of lading. As therefore the plaintiff does not proceed on any contract implied by the receipt of the goods, but relies on the Act against the consignee named in the bill of lading, the case of *Moller v. Young* (6) has no application. The consignee is not to look to the charter-party

(3) 2 Campb. 488.

(4) W. N. May 19, 1877, p. 117.

(5) 5 B. & Ad. 521.

(6) 25 Law J. Rep. Q.B. 94; s.c. nom. *Young v. Moller*, 5 E. & B. 765.

(1) 38 Law J. Rep. Q.B. at p. 56; s.c. Law Rep. 4 Q.B. at p. 132.

(2) 4 Campb. 327.

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as to terms of delivery; the bill of lading does not incorporate the charter-party; and the difficulties as to the rights and liabilities of consignees and indorsees appearing in *Sanders v. Vanseller* (7) and *Smith v. Steeking* (8) were removed by the Bills of Lading Act. This is not an action on demurrage, and so the later cases on that do not decide the present question.

Butt and *J. O. Mathew*, for the defendant.—The pinch of the case is the proposition that the shipper was liable to pay demurrage, or something in the nature of demurrage, for delay in unloading; for it is admitted that without the statute no liability would devolve on the defendant. First, then, the defendant contends that there is no such liability on the shipper under the bill of lading, which is silent as to time. But certainly there can be none when there is a charter-party which contains the contract between the shipowner and the charterer. The charterer and the shipper were the same person, and there was an express contract as to delivery in the charter-party; this, therefore, cannot be overridden by something to be implied in the bill of lading. In *Moeller v. Young* (6), *Parke, B.*, says the charter is the contract; but, if so, the bill of lading would not contain here any stipulation between the charterer and the shipowner. Suppose *Gildemeister* made a contract with the plaintiff to discharge the ship within a certain specified time, and afterwards *Gildemeister* took from the master a bill of lading by which the master promised to deliver on payment of freight; then suppose that *Gildemeister* had not assigned, and was himself sued for not taking delivery, is it not clear that his rights and liabilities would be wholly under the charter-party? The proposition of the defendant is therefore this: When the charterers and shippers are the same persons no contract can be implied with reference to any matter which is the subject of express contract in the charter-party between the charterers and shipowner, and as such contract cannot be implied between the

(7) 4 Q.B. Rep. 260; s. c. 11 Law J. Rep. Q.B. 241.

(8) 5 E. & B. 589; s. c. 24 Law J. Rep. Q.B. 257.

original parties, it is not contained in the bill of lading; and no right or liability exists which can be transferred to the consignee or any other person. The shipper, therefore, was not liable under any contract contained in this bill of lading, and the defendant is not liable for anything in the charter-party. In *Chappel v. Comfort* (9), *Willes, J.*, says, "The assignee of a bill of lading is generally not liable for anything in the charter-party, except as regards freight." This case, decided since the Bills of Lading Act, has been assented to by later authorities—see the judgment of *Erle, C.J.*, in *Fry v. The Chartered Mercantile Bank of India* (10), and the judgment of *Brett, J.*, in *Gray v. Carr* (11); while there is no authority since the Act for the plaintiff's contention. Again, the indorsement of the bill of lading by the shipper destroys his liability—*Smurthwaite v. Wilkins* (12), and therefore the effect of the Act is not to put assignees in all respects in the position of the shipper; at most they obtain a defeasible right and are subject to a defeasible liability.

Cohen in reply.—As to the argument of the defendant that an express contract in the charter-party excludes all implied contracts in the bill of lading, that must go the length of excluding or varying the warranties which would otherwise be implied by law in the bill of lading. For instance, the implied contract that the ship was seaworthy would be excluded or varied by an express stipulation in the charter-party as to the condition of the ship. But this has never been contended for, and it is impossible that it should be.

Our. adv. vult.

The following judgment was (on May 6, 1878) delivered by—

FIELD, J.—The question in this case is whether the defendant is liable for not

(9) 10 Com. B. Rep. N.S. 802; s. c. 31 Law J. Rep. C.P. 58.

(10) 35 Law J. Rep. C.P. at p. 312; s. c. Law Rep. 1 C.P. at p. 692.

(11) 40 Law J. Rep. Q.B. 257; s. c. Law Rep. 6 Q.B. at p. 540.

(12) 31 Law J. Rep. C.P. 214; s. c. 11 Com. B. Rep. N.S. 842.

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taking delivery at Plymouth, within a reasonable time, of a cargo of nitrate of soda, which was shipped on board the *Claudine*, at Iquique, by J. Gildemeister & Co., under a charter-party, whereby it was stipulated that the vessel should deliver the whole of her cargo as fast as the custom of the port would allow, and in respect of which a bill of lading, stating that the cargo was shipped by J. Gildemeister & Co., who were the same persons as the charterers, and was to be delivered unto the defendant or his assigns, he or they paying freight for the said goods, as per charter-party, was signed by the master. The defendant advanced to Gildemeister & Co. 5,000*l.* on account of the cargo, which was consigned to him to secure the advance and for sale, and it was admitted on the argument that he was a consignee named in the bill of lading to whom the property in the cargo passed.

Whilst the cargo was afloat the defendant sold it, and after some intermediate sales the ultimate purchasers were Jas. Gibbs & Co. The defendant did not, however, indorse or part with the bill of lading, and the cargo was delivered to Messrs. Gibbs & Co. by his orders. He, therefore, remained subject to any liability which attached to him as the consignee named in the bill of lading, and it becomes unnecessary to consider the point adverted to by the Lord Chief Baron in *Lewis v. M'Kee* (13), whether the doctrine of *Smurthwaite v. Wilkins* (12) that the right of the consignor to sue under the Bills of Lading Act passes to the indorsee with the indorsement applies to the liability of the consignee, so as to divest his liability in the event of transfer by him.

Upon the argument it was contended on the part of the plaintiff that it is an implied term of the contract, contained in the bill of lading, that the consignee shall take delivery of the goods within a reasonable time; and that by virtue of the Bills of Lading Act, 1855, the defendant to whom the property in the goods passed, by reason of the consignment, became liable to do so.

(13) 38 Law J. Rep. Exch. 62; s.c. Law Rep. 4 Exch. 68.

On the part of the defendant it was contended, first, that the bill of lading did not contain any contract to take delivery within a reasonable time, or at any time; and secondly, that as there was an express contract in the charter-party with reference to the discharge of the cargo, no other contract, on the part of the shippers who were the charterers, could be implied in the bill of lading, as between the shippers and the shipowner; and that, therefore, no liability passed from the shippers to the consignee, under the Bills of Lading Act; or, in other words, that the only liability to take delivery was under the charter-party, to which the defendant was not a party.

Upon the first question, which I answer without reference to the charter-party, I am of opinion that there is a contract in the bill of lading by the consignee to take delivery. It is true that in one sense there is no express contract to that effect in words, the only express stipulation being that the cargo is to be delivered to the defendant or his assigns, he or they paying freight as per charter-party (the only term of the charter-party which is incorporated with the bill).

But delivery by one person to another is not an act which can be performed by one of them only. In order to effect a delivery, one party must give and the other must take delivery. It is a composite act requiring a readiness and willingness in both parties to the delivery. It is as much the act of the person who takes as of the one who gives delivery, of the merchant as of the shipowner—see the judgment delivered by Blackburn, J., in *Ford v. Cotesworth* (1). I think that the obligation of the shipowner to deliver, which is expressed in the bill of lading, imports an obligation to take delivery, and that a contract to take delivery is to be implied in the bill of lading.

It is clear that the consignee on tendering freight is entitled to delivery: it would be, I think, unreasonable to hold that the shipowner has not a relative right to have the cargo taken and to sue the consignee for not taking it.

To hold otherwise would compel the owner to resort to the charterer, who may be, and often, as in this case is, a

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stranger, living in a distant part of the world, and to deprive him of what in comparison is the simple and natural resort to the person who has taken delivery of his cargo.

Then within what time is delivery to be taken? I think that in this, as in all other contracts where anything is to be done, and there is no express stipulation as to the time within which it is to be done, a reasonable time is to be implied, which, in the present case, is found by the jury against the defendant.

I also think that the liability to take delivery became vested in the defendant by virtue of the 1st section of the Bills of Lading Act, 1855, whereby it is enacted that "every consignee of goods named in a bill of lading, to whom the property in the goods therein mentioned shall pass upon, or by reason of such consignment, shall have transferred to and vested in him, all rights of suit and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." It was argued by Mr. Butt that, as there was an express contract in the charter-party as to the delivery of the cargo, and as the charterers were the shippers of the cargo mentioned in the bill of lading, there was no contract between the shipper and the ship-owner, contained in the bill of lading, as to taking delivery, and no new contract was to be implied.

This appears to me to misread the statute. The statute does not say that the contract between the shipper and the shipowner is to be transferred, but that the liability of the consignee, in respect of the goods, is to be the same as if the contract contained in the bill of lading had been made with the consignee himself. What is the object of taking a bill of lading where there is a charter-party? The object of a bill of lading is to enable the holder to sell, or otherwise deal with the cargo, and to transfer the right to the cargo upon the terms contained in the bill of lading, free from all rights and liabilities under the charter-party, except so far as any term in it is incorporated in the bill of lading. It is to be observed that whilst on the one hand it is clear

that as between the parties to the charter and the bill of lading, so long as they are the parties whose rights and liabilities have to be determined, the terms of the charter-party dominate; on the other, it is equally clear that when the bill of lading is in the hands of an indorsee, only those terms of the charter-party which are expressly incorporated bind the latter; and if there be a different rate of freight provided for, nothing can be clearer than that the indorsee is liable to the bill of lading and not to the charter freight.

In the present case, freight is the only term of the charter-party which is expressly incorporated in the bill of lading; and I have to say what is the term of the contract contained in the bill of lading which is to govern the rate and time of discharge.

If the effect of the reference in the bill of lading to the charter-party had incorporated the terms in the charter-party in reference to the mode of discharging, the consequence would be the same; for the jury have found that there was no special custom to take the contract out of the ordinary one of reasonable time, and that the delivery was not taken within that time; but if, as I hold, the contract upon which the defendant is liable is that contained in the bill of lading, then the same result follows.

My judgment is that the contract contained in the bill of lading was to take delivery of the cargo in a reasonable time according to the custom of the port of discharge, and that the defendant is subject to this liability, not because it was the contract entered into between the plaintiff and the shipper, but because it is the contract contained in the bill of lading. I, therefore, give judgment for the plaintiff for 52*l.* 10*s.* and costs, and I think that he should also have the costs of the introduction of the different purchasers as third parties.

Judgment for the plaintiff.

Solicitors—Stibbard, Gibson & Co., for plaintiff;
W. A. Crump & Son, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } THE QUEEN v. THE GOVERNMENT
May 20. } STOCK INVESTMENT COMPANY.

Company—Voting at Meetings—Demand of Poll—Holding Shares—Proxies how used—Election of Director—Mandamus to admit Director.

Where by the articles of association of a company registered under the Companies Act, it was provided, that at every meeting all questions should be decided by the result of a show of hands, unless immediately upon such show of hands a poll be duly demanded by shareholders qualified to vote, and holding in the aggregate 2,000 shares or more,—Held, that the shareholders demanding a poll must themselves hold the requisite number of shares, and that it is not enough that by the possession of proxies they represent that number.

Where a poll illegally demanded has resulted in the defeat of the candidate for directorship who had obtained the show of hands at the meeting, mandamus will lie to admit him to the office, notwithstanding its assumption and occupation by the candidate victorious on the polling.

This was a rule for a mandamus to the directors of a limited company, calling on them to shew cause why they should not admit one Fowler as a director of the company.

At the annual general meeting on the 14th of February, two of the directors retired according to the rules, and offered themselves for re-election. Fowler was also a candidate for election. A show of hands was taken, when Fowler obtained most votes, and was declared by the chairman elected. A poll was thereupon demanded by one of the directors in Fowler's presence and hearing. He raising no objection, it was taken on the 21st of February, and resulted in Fowler being lowest on the list, and the other two candidates having obtained a majority of votes, took their seats at the board, and had since acted as directors. Fowler now sought to dispute the validity of the poll, and obtained this rule to assert the validity of his own election by the show of hands. The articles of

association regulating voting by show of hands and polling were the following:—

Article 64.—“Upon all questions at every meeting a show of hands shall in the first instance be taken, and unless before or immediately upon such show of hands a poll be duly demanded as hereinafter mentioned, the question shall be decided by the result of such show of hands.”

Article 67.—“If a poll is demanded by shareholders qualified to vote, and holding in the aggregate 2,000 shares or more, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting.”

It appeared that at the meeting on the 14th of February, there were not present shareholders holding themselves as many as 2,000 shares, even putting all together; but the person demanding the poll and his supporters held proxies far in excess of that number. The form of appointing a proxy given in the articles of association was, “I appoint A. B. to be my proxy at the general meeting of the company, and to vote for me in my name upon all questions before such meeting.”

L. W. Cave and Wood Hill shewed cause.—The poll taken was a legal one, and was demanded at the proper time; the applicant is therefore bound by the result of it. The provision as to a poll is expressly to prevent a packed meeting carrying a question against the real sense of the shareholders of the company. A proxy can demand a poll, because he is appointed to act in the stead of the person appointing him, and to vote. Then if the poll were not at the time legally demanded, it is now too late for Mr. Fowler to object. He made no protest at the time, but acquiesced, and took his chance.

Bray, in support of the rule.—If no poll was duly demanded, then by virtue of Article 64 the question was decided by show of hands, and Fowler was elected, and there was no necessity for a protest. Nor could the duty be imposed on him of knowing at the moment whether the directors were violating the articles of

The Queen v. Government Stock Investment Co., Q.B.

association or not. It is enough when he discovers it to assert his right. Then, if the poll has been illegally taken, and there has been a good previous election by show of hands, the office is full only by reason of the illegal votes, and mandamus will lie to admit the proper person—*Rea v. Barker* (1), and *The King v. The Bedford Level Corporation* (2). This was illegal, because the demand must be a personal demand, and those demanding must be qualified to vote, and hold the requisite number of shares. A poll is not a question, and a demand is not a vote. Those to whom the privilege of demanding a poll is given, must themselves be present, and be qualified as prescribed.

COCKBURN, L.C.J.—It is not without considerable regret that I think that this rule must be made absolute, because I cannot help seeing that the applicant, although on a show of hands at a limited meeting he was the favoured candidate, yet on the sense of the company at large being taken, he evidently was not the choice of the majority. At the same time I think the case is sufficiently made out to have the matter put on record for further explanation.

It turns on the construction of the 67th article, read in conjunction with the 64th. Now the latter says, "Upon all questions at every meeting a show of hands shall in the first instance be taken, and unless before or immediately upon such show of hands, a poll be duly demanded as hereinafter mentioned, the question shall be decided by the result of such show of hands." That article provides for the taking of the poll, but it must be duly demanded, and we are referred to the 67th article to see what a due demand is. I think that Mr. Bray is right when he says that the poll must be demanded by shareholders present at the meeting, qualified to vote, and holding in the aggregate 2,000 shares. For although it is true that the proxies are entitled to vote, yet here the poll is to be demanded by shareholders present, and, as I think we

must read it, *themselves* qualified to vote, and holding in the aggregate 2,000 shares. I do not think that a shareholder *holds* shares, where he only holds proxies. Without, therefore, putting a larger construction on Article 67 than I think the language fully warrants, I am of opinion that the shareholders demanding a poll must be persons themselves present, and holding the requisite number of shares. The rule will be made absolute on these grounds, in order that the facts may be put on record.

MELLOR, J.—I have come to the same conclusion, though after some hesitation, because I thought that the object of making the show of hands conclusive in the first instance was to determine questions of no very vital interest or importance. But when I see that Article 67 says that a demand for a poll made immediately after a show of hands must be made by shareholders in the way prescribed, it becomes necessary to see that the demand is duly made.

If the shareholders are not present, they cannot make a demand; they must be qualified to vote, and as I agree with my Lord that we must insert the word "*themselves*" before "*holding*," they must themselves hold 2,000 shares. Were the meaning otherwise, the article might very well have said, "*holding or by proxy representing*," as the distinction between acting in person or by proxy appears continually in the articles. Coming to this conclusion, therefore, and being satisfied that there is authority for a mandamus issuing where the office is full, but only by reason of a vote which cannot be upheld, I think that this rule should be made absolute.

Rule absolute.

Solicitors—Hargrove & Co., for prosecutor; Carr, Bannister & Co., for defendants.

(1) 3 Burr. 1265;

(2) 6 East 356.

[IN THE COMMON PLEAS DIVISION.]

1878. }
May 28. } ROBERTSON v. HOWARD.

Practice—Writ specially Indorsed—Demurrer to Indorsement—Judicature Act, 1875, Order XXI. Rule 4; Order XXVIII. Rule 1.

A writ with a special indorsement which has been delivered in lieu of a statement of claim is equivalent to ordinary pleading.

Therefore, where the plaintiff specially indorsed his writ with a claim shewing no cause of action, giving notice under Order XXI. rule 4, that the special indorsement was the statement of claim, the defendant was allowed to demur.

Writ specially indorsed as follows:—

The plaintiff's claim is 100*l.* amount of money owing by the defendant to the plaintiff upon an agreement or undertaking given by the defendant to the plaintiff on the 12th day of September, 1876.

The following are the particulars of plaintiff's claim:—

1876. To amount owing upon an
Feb. 25. agreement or undertaking
given by the defendant
to the plaintiff on the
12th day of September,
1876 £100

The following is a copy of such agreement or undertaking:—

“Liverpool, Sept. 12.

“To Mr. Robertson.

“Dear Sir,—I agree to give you the sum of one hundred pounds in the event of getting the contract for plumbing, painting and glazing of hotel, baths, &c., to be built at New Brighton.

“T. Howard.”

The defendant did not dispense with a statement of claim, and the plaintiff delivered a notice under Order XXI. rule 4, to the effect that his claim was that which appeared by the indorsement on the writ.

To this writ so specially indorsed the defendant demurred.

R. F. Turner, for the defendant, in support of the demurrer, contended that under Order XXI. rule 4, the special indorsement on the writ must be considered as equivalent to a statement of claim, and that the agreement set out in the special indorsement shewed no consideration for any promise by the defendant to pay the 100*l.*

Channell, for the plaintiff, contended that the demurrer was misconceived, and that the proper course for the defendant to take was to apply for an order for the plaintiff to deliver a statement of claim, and not to demur to the notice, and that the indorsement on the writ containing the allegation that the money is owing on the agreement sufficiently alleged that the plaintiff performed the services which were, in fact, the consideration for the agreement.

LINDLEY, J.—The point here raised is of importance so far as it affects the practice. The question for determination is, whether a writ specially indorsed is equivalent to pleading, and can be demurred to. I am of opinion that the language of Order XXI. Rule 4, renders the special indorsement on the writ for all purposes the same as a statement of claim, and, therefore, I cannot say that it cannot be demurred to—Order XXVIII. Rule 1. It is conceded that this pleading does not shew a consideration for the agreement, therefore the demurrer must be allowed.

Under the circumstances I think that the costs should be costs in the cause, and that the plaintiff should have leave to deliver a statement of claim.

Demurrer allowed.

Solicitors—Milne, Riddle & Mellor, agents for W. Duckworth, Manchester, for plaintiff; J. & R. Gole, agents for Lawrence, Dixon & Co. Liverpool, for defendant.

[IN THE HOUSE OF LORDS.]

1878. { LINDSAY AND COMPANY (*respondents*) v. CUNDY AND
March 1, 4. { OTHERS (*appellants*).

Contract—Sale of Goods—False Pretences—Bona fide Purchase by Third Party—Passing of Property.

Goods were supplied by the plaintiffs to one Blenkarn, who had taken premises at 37, Wood Street, and in ordering the goods had signed his name in such a way as to induce the plaintiffs to believe that he was a member of a well-known firm of Blenkiron & Sons, in Wood Street. For this fraud Blenkarn was tried, and convicted of obtaining the goods under false pretences. Before his conviction the defendants had honestly bought the goods in question from him, and had sold them again. In an action for conversion of the goods,—

Held (affirming the decision of the Court of Appeal), that the property in the goods did not pass from the plaintiffs, who were consequently entitled to recover their value from the defendants.

This was an appeal from a decision of the Court of Appeal, reported 46 Law J. Rep. Q.B. 233; s. c. Law Rep. 2 Q.B. Div. 96, reversing the decision of the Queen's Bench Division, reported 45 Law J. Rep. Q.B. 381; s. c. Law Rep. 1 Q.B. Div. 348.

The action was brought by Messrs. Robert Lindsay & Company, who were linen manufacturers at Belfast, against Messrs. Cundy for the conversion of 250 dozen handkerchiefs. At the trial before Blackburn, J., at the Michaelmas Sittings, 1874, in Middlesex, it appeared that one Alfred Blenkarn, in 1873, hired a room on the third floor of a corner house, No. 37, Wood Street, Cheapside, the entrance of which was in Love Lane, and wrote certain letters to Messrs. Lindsay, by the first of which he proposed to order, and by the others of which he did order, large quantities of handkerchiefs. The letters had a printed heading, "37, Wood Street, Cheapside. Entrance, second door in Love Lane," and were signed "A. Blenkarn & Co.," so as to look like "A. Blenkiron & Co." There was a well-known firm of long standing carrying on busi-

ness at No. 123, Wood Street, under the style of "William Blenkiron & Sons." One of the members of Messrs. Lindsay's firm had in former years had dealings with "William Blenkiron & Sons," and knew them to be a firm of high credit and respectability. Messrs. Lindsay accordingly wrote several letters addressed to Messrs. Blenkiron & Co., 37, Wood Street, and forwarded goods to the same address, heading the invoices "Messrs. Blenkiron & Co., London, bought of Robert Lindsay & Co." The fraud was afterwards discovered, and Blenkarn was indicted and convicted in April, 1874, of obtaining the goods by false pretences. In the meantime Messrs. Cundy had bought of Blenkarn 250 dozen handkerchiefs, and had resold them to different persons before the fraud was discovered.

Messrs. Lindsay thereupon brought this action against Messrs. Cundy for conversion of the handkerchiefs. At the trial the jury, in answer to questions put by the learned Judge, found, in effect, that the defendants had *bona fide* purchased the handkerchiefs from Blenkarn, and that they were part of the handkerchiefs forwarded to "Messrs. Blenkiron & Co., 37, Wood Street," by the plaintiffs. The learned Judge reserved the question for the Court whether, on the facts and findings, the action was maintainable. The Queen's Bench Division held that the action could not be maintained, and ordered judgment to be entered for the defendants. On appeal this decision was reversed by the Court of Appeal, and judgment entered for the plaintiffs.

From this decision the defendants brought the present appeal.

*The Solicitor-General (Sir H. Giffard) and Mr. Benjamin (Mr. B. Francis Williams with them), for the appellants.—*The main question in this case is whether or not the property in the goods passed from the respondents. This was a case of obtaining goods by false pretences, and Blenkarn was convicted of that offence. The distinction between larceny and false pretences is that in the latter case there is no *asportavit*, or in other words, that the property does

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not pass, though the possession does pass. The respondents clearly intended to enter into and carry out a contract with the person who invited them to do so, and who carried on business at 37, Wood Street, though that person was in fact different from the person they believed him to be. There was therefore an intention on the part of the respondents to part with the property. It may be admitted that the intention was induced by fraud, but under that inducement they did deal with a person actually carrying on business at 37, Wood Street. It may well be that, as between the respondents and Blenkarn, the former, on discovering their mistake, might have avoided their contract; but the contract was voidable, not void, and until the option has been exercised it must be regarded as an existing contract, so that if in the meantime the goods are passed on to third parties the property in them passes, and the vendors cannot follow the goods. If A. represents himself as the agent of B., then the vendor intends to pass not the property but only the possession or custody of the goods to A., and accordingly the goods can be followed, as was held in *Hardman v. Booth* (1); but it is otherwise where, as in the present case, A. says he is B., and obtains goods on faith of that representation. The credit was given to Blenkarn, and steps were, in the first instance, taken against him to recover the price of the goods, indicating that he was regarded by the respondents as their debtor. Where goods are parted with by an agent in excess of his authority they can be followed into the hands of third parties—*The Queen v. Middleton* (2), but where there is an intention to pass the property, as distinguished from mere possession in goods which pass by delivery, followed by delivery by a person having authority to deliver, then the property in the goods does pass. This principle is recognised in all the Courts—*Pease v. Gloaghe* (3). The purchase of

the goods from Blenkarn by the appellants was honest and *bona fide*, and ought not to be set aside. If this had been a case of larceny, then under 30 & 31 Vict. c. 35, s. 9, any money found on Blenkarn would have been handed over to the appellants, but the case being one of false pretences no such application to the Court could have been made. The reason of this is that the Legislature considered that there was no necessity to give such relief in a case of false pretences where the property would not pass and the innocent purchaser would keep the goods, but that it was necessary to make such provision in cases of larceny where the goods would be taken back by the original owner.

Mr. A. Wills and *Mr. Fullarton*, for the respondents.—If the property in these goods passed at all it must have been by virtue of a contract, but there cannot be a contract without the consensus of two minds to the same thing. Here there was no such consensus, and consequently no contract—*Boulton v. Jones* (4). The fact that the repudiation of any contract did not take place till after the goods had been made over to third parties does not affect the question—*Kingsford v. Merry* (5). A mistake as to the subject-matter is fatal to a contract; so also a mistake as to the identity of a party to the contract. Here there was no contract with William Blenkiron & Sons, for they knew nothing of the matter. Nor was there any contract with Blenkarn, for the respondents had no intention to deal with him, and he obtained by fraud possession of goods intended not for him but for other persons. This is not a case of a voidable contract; there was no contract whatever to be avoided. It follows that the appellants took the goods subject to all the infirmity of Blenkarn's title.

The Solicitor-General in reply.

THE LORD CHANCELLOR.—We have in this case to discharge a duty which is always a disagreeable one for any Court,

(1) 1 Hurl. & C. 803; s. c. 32 Law J. Rep. Exch. 105.

(2) 42 Law J. Rep. M.C. 73; s. c. Law Rep. 2 C.C.R. 38.

(3) 35 Law J. Rep. P.C. 66; s. c. Law Rep. 1 P.C. 219.

(4) 2 Hurl. & N. 564; s. c. 27 Law J. Rep. Exch. 117.

(5) 1 Hurl. & N. 503; s. c. 26 Law J. Rep. Exch. 83.

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namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. In discharging that duty your Lordships can only apply rigorously the settled rules of law. With regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed:—By the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract—that is to say, a contract which has purported to pass the property to him from the owner, then the purchaser will obtain a good title, even although, afterwards, it should appear that there were circumstances connected with the contract which would enable the original owner of the goods to reduce it and to set it aside, because these circumstances so enabling the original owner to reduce the contract and set it aside will not be allowed to interfere with a title for valuable consideration obtained by a third party during the interval while the contract remained unreduced.

The question therefore in the present case really becomes a very short and simple one: Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although that contract might afterwards be open to a process of reduction upon the ground of fraud, still, in the meantime, Blenkarn might have conveyed a

good title for valuable consideration to the present appellants.

There are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed it could only pass by way of contract. There is nothing else which could have passed the property. The second observation is this. Your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or acts done; the whole history of the transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came into contact personally; everything was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing as applied to the admitted facts of the case.

Now discharging that duty and answering that question, what the jurors have found is in substance this: They have found that by the form of the signatures to the letters which are written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which in turn he was addressed by the respondents, that by all these means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Co., doing business in the same street. These things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when in return the goods were forwarded and letters were sent accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods and of the letters

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which were addressed to and intended for, not himself, but the firm of Blenkiron & Co. Stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure. The result therefore is that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside on the ground of fraud, but you have to deal with a case which ranges itself under a completely different chapter of law—the case, namely, in which the contract never comes into existence. That being so, it is idle to talk of property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

I therefore move that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.

LORD HATHERLEY.—I have come to the same conclusion. The real question we have to consider here is this—whether or not any contract was actually entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described in the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased from Blenkarn.

Now the case was simply this, as put

by the learned Judge in the Court below: it was most carefully stated, as one might expect it would be by that learned Judge. "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intention to induce customers generally, and Mr. Thomson in particular, to give him the credit of the good character which belonged to William Blenkiron & Sons, wrote those letters in the way you have heard and had those invoices headed as you have heard?" and further, "did he actually by that fraud induce Mr. Thomson to send the goods to 37, Wood Street?"

Both these questions were answered in the affirmative by the jury. The result was that there were letters written by a man endeavouring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron & Co., of Wood Street. That was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. He headed the letters in that way in order that by this device he might represent himself to the respondents as Blenkiron of Wood Street. He did that purposely, and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood Street. I apprehend therefore that if there could be said to have been any sale at all it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons of Wood Street if they had chosen to adopt it, and to no other person whatever—not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have any dealings whatever.

It appears to me that the case is thus brought completely within the authority of *Hardman v. Booth* (1), where it was held that there was no real contract between the parties by whom the goods were delivered and the concoctor of the fraud, who obtained possession of them, because they were not sold to him. Exactly in the same way here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered

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to anybody except for the purpose of transferring the property to Blenkiron, not Blenkarn; therefore the case is really in substance the case of *Hardman v. Booth* (1) over again.

My attention has been called to a case which seems to have been decided on exactly the same principle as *Hardman v. Booth* (1), and it is worth while referring to it as an additional authority upon that principle of law. It is the case of *Higsons v. Barton* (6). There one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers. He concealed that dismissal from a customer of the firm, the plaintiff in the action, and having concealed the dismissal continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that the delivery was not to any person whatever who had purchased the goods. The goods, if purchased at all, would have been purchased by the firm for which this man had acted as agent; but he had been dismissed from the agency. There was no contract therefore with the firm; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm, and the consequence was there was no contract at all. There, as here, the circumstance occurred that an innocent person purchasing the goods from the person with whom there was no contract was obliged to suffer the loss. The point of the case is put so shortly by Chief Baron Pollock that I cannot do better than adopt his reasoning:—"There was no sale at all, but a mere obtaining of goods by false pretences. The property, therefore, did not pass out of the plaintiffs." The other Judges, Barons Martin, Bramwell and Watson, concurred in the judgment.

Here, I say, exactly as in those cases of *Hardman v. Booth* (1) and *Higsons v. Burton* (6), there was no sale at all. There was a false representation made by Blenkarn, by which he got goods sent to him upon applications from him to be-

come a purchaser, but upon invoices made out to the firm of Blenkiron & Co. But no contract was made with Blenkarn, nor was any contract made with Blenkiron & Co., because they knew nothing at all about it, and therefore there could be no delivery of the goods with intent to pass the property.

We have been much pressed with an ingenious mode of putting the case on the part of the counsel who have argued with eminent ability for the appellants in this case; namely, suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented himself as a member of one of the largest firms in London; suppose that on his making that representation the goods had been delivered to him. I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent for that firm. Or suppose he had said, "I am as rich as that firm; I have transactions as large as that firm; I have as large a balance at my bankers;" then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations, and the parting with the goods in that case might possibly—I say no more—have passed the property.

But this case is entirely different. The whole case, as represented here, is this—from beginning to end the respondents believed they were dealing with Blenkiron & Co.; they made out their invoices to Blenkiron & Co.; they supposed they sold to Blenkiron & Co.; they never sold in any way to Alfred Blenkarn, and therefore Alfred Blenkarn cannot by so obtaining the goods have by possibility made a good title to a purchaser as against the owners of the goods, who had never in any shape or way parted with the property, nor with anything more than the possession.

LORD PENZANCE.—The findings of the jury in this case coupled with the evi-

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dence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by so doing they passed the property in them to Alfred Blenkarn is, I conceive, the real question to be determined.

The respondents had never seen or even heard of Alfred Blenkarn when they received a letter, followed by several others, signed in a manner which was not absolutely clear, but which the writer intended them to take, and which they did take, to be the signature of a well-known house of Blenkiron & Co., which in fact carried on business at 129, Wood Street. The purport of these letters was to order the goods now in question. The house of Blenkiron & Co. was known to the respondents, and it was also known that they lived in Wood Street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron & Co. in Wood Street, but in place of No. 123 they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron & Co., No. 37, Wood Street, London. It is not doubted or disputed that throughout this correspondence, and up to and after the time that the respondents had despatched their goods to London, they intended to deal, and believed they were dealing with Blenkiron & Co., and with nobody else. Nor is it capable of dispute that when they parted with the possession of their goods they did so with the intention that the goods should pass into the hands of Blenkiron & Co., to whom they addressed these goods. The goods, however, were not delivered to Blenkiron & Co., to whom they were addressed, but found their way to the hands of Alfred Blenkarn, owing to the number in Wood Street being given as No. 37 in place of No. 123, a mistake which had been purposely brought about by the writer of the letters, as I have before mentioned, who was Alfred Blenkarn, and who had an office or room at No. 37, Wood Street. In this state of things it is not denied

that the contract or dealing which the respondents thought they were entering into with Blenkiron & Co., and in fulfilment of which they parted with their goods, and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron & Co. knew nothing of the transaction. But, say the appellants, it was a contract with, and a good delivery to Alfred Blenkarn, so as to pass the property in the goods to that individual, although the goods were not addressed to him and the respondents did not know of his existence.

I am not aware that there is any decided case in which a sale and delivery intended to be made to one man has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants is to be maintained. It was indeed argued that as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shewn that the respondents knew that there was such a person, and that he had offices there; whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed "Blenkiron & Co."

I am unable to distinguish this case in principle from that of *Hardman v. Booth* (1), to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co., which he had not, and then intercepted the goods and made away with them. The Court held that there was no contract with Thomas Gandell & Co., as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him. In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Co., with whom alone the vendors meant to deal. No contract was ever intended with

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him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me to be quite alike. Another case of a similar kind is that of *Higgon v. Burton* (6), to which similar reasoning was applied.

Hypothetical cases were put in argument, in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can, I think, be paralleled with that which your Lordships have now to decide; for in the present case the respondents were never brought personally in contact with Alfred Blenkarn. All their letters, although received and answered by him, were addressed to Blenkiron & Co., and intended for that firm only, and finally, the goods in dispute were not delivered to him at all, but were sent to Blenkiron & Co., though at a wrong address.

This appeal ought therefore, in my opinion, to be dismissed.

LORD GORDON concurred.

*Judgment appealed against affirmed,
and appeal dismissed with costs.*

Solicitors—C. O. Humphrey & Son, for appellants;
Ashurst, Morris & Co., for respondents.

[IN THE COURT OF APPEAL.]

1878. } THE ATTORNEY-GENERAL v.
Feb. 28. } MOORE.

*Municipal Corporation Act—Borough
Fund—Fines made "payable to her Ma-
jesty" by subsequent Act.*

[For the report of the above case, see
47 Law J. Rep. M.C. 103.]

[IN THE COMMON PLEAS DIVISION.]

1878. }
April 6. } RAWLINS v. BIGGS.

*Landlord and Tenant—Covenant to pay
all Rates, &c.—Expense of Drainage—
Public Health Act, 1875.*

The plaintiff let certain houses to the defendant for a term of years, and the defendant covenanted to pay the rent without any deduction except land tax and landlord's property tax, and he also covenanted to pay "all and all manner of taxes, rates, charges, assessments and impositions whatsoever (except as aforesaid), at any time during the said term to be charged, assessed or imposed on the said premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever."

An urban sanitary authority for the district within which the houses were situate, required the plaintiff, under the Public Health Act, 1875, to abate a nuisance arising from the drains of the said houses, and for that purpose to construct proper and sufficient drains, and the defendant having refused to execute such works or to pay for the same, the plaintiff executed them according to the directions of the said sanitary authority, and then sued the defendant for the expense incurred in executing such works:—

Held, that the plaintiff was not entitled to recover the same, as it was not a charge imposed by the Act upon the premises but on the landlord personally, and was therefore not within the terms of the defendant's covenant.

The statement of claim was as follows:—

1. The plaintiff is the lessor and the defendant is the lessee of certain houses and premises known as No. 119 and 121, London Street, Reading, in the county of Berks.

2. By an indenture of lease, bearing date the 20th day of October, 1873, the plaintiff demised the said houses and premises to the defendant for the term of twenty-one years, from the 29th day of September preceding, subject to the covenants and conditions therein contained.

3. The defendant thereby covenanted to pay to the plaintiff during the said term the yearly rent of 65*l.*, without any

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deduction or abatement except land tax and landlord's property tax.

4. And the defendant also covenanted thereby from time to time to pay and discharge all and all manner of taxes, rates, charges, assessments and impositions whatever (except as aforesaid), then or at any time or times during the said term to be charged, assessed or imposed on the said premises thereby demised or in respect thereof, or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever.

5. The defendant, from the date of the said indenture and during the month of May, 1877, has been and still is the occupier of the said houses and premises.

6. On the 14th day of May, 1877, the urban sanitary authority for the borough of Reading and for the district within which the said houses and premises were and are situated, pursuant to the provisions of "the Public Health Act, 1875," duly gave notice to the plaintiff that the sanitary authority being satisfied of the existence of a nuisance injurious to health at and upon the said houses and premises, arising from the bad condition of the drains upon the said premises and from the want of sufficient drains, thereby required the plaintiff within six weeks from the service of the said notice to abate the same, and for that purpose to construct a proper and sufficient covered drain or drains emptying into the sewer of the said sanitary authority for the effectual drainage of the said houses and premises, and to empty and cleanse, and further fill up and deodorise and arch over the existing cesspools.

7. And the said notice further stated that if the plaintiff made default in complying therewith, summary proceedings would be taken to enforce the abatement of the said nuisance, and to recover costs and penalties incurred thereby.

8. Upon the receipt of the said notice the plaintiff required the defendant to execute the said works or to pay the costs thereof, but the defendant refused to execute the said works or to pay for the same, and denied his liability in respect thereof.

9. Thereupon and in order to prevent any further proceedings, the plaintiff by his servants and agents executed the said

works according to the said notice, and to the plans and directions of the said sanitary authority.

10. The plaintiff has paid for the execution of the said works the sum of 25*l*.

The plaintiff claims the said sum of 25*l*. and interest thereon from the date of payment till judgment.

Demurrer.

Goodman appeared to support the demurrer, but the Court called on

McCall, for the plaintiff, to support the statement of claim.—*Sweet v. Segar* (1) is in point. There the expense of drainage works done upon the premises under the authority of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, was held recoverable under a covenant to pay "all such parliamentary, parochial and county, district and occasional levies, rates, assessments, taxes, charges, impositions, burthens, duties and services whatsoever, as during the term should be taxed, assessed or imposed upon or in respect of the premises or any part thereof." The case of *Tidswell v. Witsworth* (2) will be relied upon by the defendant, but that case is distinguishable from the present one. There a local improvement Act had imposed the duty on the landlord of paving a street which was to his advantage as improving his property, and being a personal duty on the landlord, it was held not to come within a covenant by the tenant to pay "all taxes, rates, assessments and impositions payable in respect of the demised premises." That case was explained and commented upon by the learned Judges who decided the subsequent case of *Thompson v. Lapworth* (3), which last case is an authority for the plaintiff. There the landlord, having been compelled to pay a certain proportion of the expense of paving a new street under the Metropolis Management Acts, was held entitled to recover the money so paid from the tenant, who had covenanted to pay "all taxes, rates, duties and assessments" which should be taxed, &c., "on

(1) 2 Com. B. Rep. N.S. 119.

(2) 36 Law J. Rep. C.P. 103; s. c. Law Rep. 2 C.P. 326.

(3) 37 Law J. Rep. C.P. 74; s. c. Law Rep. 3 C.P. 149.

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the tenant or landlord of the premises in respect thereof."

[LINDLEY, J.—Is there any clause in the Public Health Act, 1875, which makes the expense of doing these works a charge on the premises?]

Sections 94, 95 and 96 enable the local authority to serve a notice on the owner or occupier of the premises on which the nuisance arises requiring him to abate the same, and they further enable the justices to make an order requiring the notice to be complied with; and by section 104, the costs and expenses of making and carrying the order into effect are recoverable from the person on whom the notice is served.

[LINDLEY, J.—That makes it like a personal debt. I see nothing in the Act which makes it a charge on the premises.]

The 257th section declares that the local authority may recover the expenses and interest "from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest, the same shall be a charge on the premises in respect of which they were incurred." In *Crosse v. Raw* (4) the expense of connecting the house drains with the main sewer, which the local board of the district were empowered to recover from the owner of the house, was held to be an expense which the lessee was bound to pay under a covenant to pay "all rates, assessments and outgoings" imposed upon the premises or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved." So in the present case, the expense of making the drain necessary to abate the nuisance is an imposition on the demised premises, "or in respect thereof," within the meaning of the defendant's covenant. If the plaintiff is entitled to recover the amount of this expense in any way it is sufficient to support the present claim, and he is entitled to recover it as money paid to the defendant's use.

Goodman, for the defendant.—The present case is not distinguishable from that of *Tidswell v. Witsworth* (2). In the present case the Public Health Act, 1875, has cast the burthen of abating the nuisance on the landlord, since the nuisance was one arising from want of a structural convenience, for the notice is to construct a proper and sufficient covered drain; and by the 94th section it is expressly provided "that where the nuisance arises from want or defective construction of any structural convenience," "notice under that section shall be served on the owner." Though it is no doubt competent by contract to transfer to the tenant the obligation which the Legislature may have imposed on the landlord, yet the words having that effect must be clear. Here there are no such words. *Thompson v. Lapworth* (3) is distinguishable from the present case, as there there was the word "duties" as in *Sweet v. Segar* (1), and also the words "imposed on the tenant or landlord." The case of *Bird v. Elwes* (5) was the converse of the present case. There by the agreement of letting the landlord agreed to pay and discharge "all rates, taxes, tithes and other charges, payable in respect of the said premises during the said tenancy," and a piece of ornamental part of the demised premises having by the accumulation of foul mud become a nuisance, the local board obtained an order of the justices, under the Nuisances Removal Act, 1855, against the tenant for the removal of such nuisance. The tenant did the necessary work for such removal, and sued the landlord for breach of the said agreement, but the Court of Exchequer held that the landlord was not liable, as the expense of removing the nuisance was not a charge within the meaning of the agreement.

LINDLEY, J.—I am of opinion that this demurrer should be allowed. I think it is impossible to distinguish this case from that of *Tidswell v. Witsworth* (2). The question turns on the true construction of the defendant's covenant. [The learned

(4) 43 Law J. Rep. Exch. 144; s. c. Law Rep. 9 Exch. 209.

(5) 37 Law J. Rep. Exch. 91; s. c. Law Rep. 3 Exch. 225.

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Judge read the covenant in paragraph 3, and also the covenant in paragraph 4 of the plaintiff's statement of claim.] Now the plaintiff (the landlord) must shew that the money which he seeks to recover in this action comes within the words of this last covenant as being a rate, charge or imposition charged "on the said premises thereby demised, or in respect thereof or of the said rent." Now this money is not charged on the premises, and it cannot be brought within those words of the covenant. It is obvious that the Act only makes the expenses a charge on the premises in favour of the local board, and as a remedy given to the board to enable it to recover such expenses from the owner. Then, not being charged on the premises, is the money sought to be recovered a charge in respect of the premises? The difficulty is in what sense it is at all a charge. I have looked through most of the sections of the Act, and at all those to which my attention has been called, and to my mind the whole scheme of the enactment, with reference to this matter, is to cast the duty of making sufficient drains upon the landlord. If he performs that duty it is not a charge in respect of the premises or of the rent, it is a personal duty cast on the landlord, and it appears to me that the covenant is similar to and within the meaning of the covenant in *Tidswell v. Witsworth* (2), and that I cannot distinguish the present from that case. Then the cases of *Thompson v. Lapworth* (3) and *Orosse v. Raw* (4) are relied upon on behalf of the plaintiff. In *Thompson v. Lapworth* (3) the language of the covenant was more extensive than it is here, and the Court in that case took great care to distinguish it from that of *Tidswell v. Witsworth* (2), and the ground of the distinction was that in *Thompson v. Lapworth* (3) it was impossible to get over the large words by which the tenant covenanted to pay all duties which should "be imposed on the tenant or landlord." Those words are not in the covenant in the present case, and it is for that reason that I cannot distinguish it from the case of *Tidswell v. Witsworth* (2). In *Thompson v. Lapworth* (3) Willes, J., proceeded in the course of

his judgment to remark on *Tidswell v. Witsworth* (2), saying in the report in the Law Reports (6), "I think, however, it is distinguishable on grounds to be found in the judgment there pronounced. It turned upon the construction of the Manchester Improvement Act, 14 & 15 Vict. c. cxix., the scheme of which was that the commissioners might call upon the owners of property to pave, &c., and imposed upon them the duty of so doing when called upon; and that in default of their performance of that duty after notice, the commissioners were empowered to do the work, and recover the expenses incurred therein from the owners—the Act giving an additional remedy against the tenants or occupiers for recovery of the amount, and authorising the latter to deduct the payments as made from their rent. If the landlord had performed his duty in the terms in which it was imposed upon him, he would have had no claim against his tenant." Now that last statement is precisely what has taken place here. The landlord has chosen to do the work required by the notice for removing the nuisance, and it follows from the passage I have just read from the judgment of Willes, J., that he cannot recover the expense of such work unless it was imposed on the tenant by the terms of the covenant. For these reasons I am of opinion that this demurrer must be allowed.

Demurrer allowed.

Solicitors—P. W. Rawlins, for plaintiff; Rooke & Son, agents for W. J. Brain, Reading, for defendant.

(6) See 37 Law J. Rep. C.P. 77, where a similar passage to the above is reported.

[IN THE EXCHEQUER DIVISION.]

1877. { THE BENFIELDSDALE LOCAL BOARD
Nov. 28. { v. THE CONSETT IRON COM-
PANY, LIMITED.

Land—Support for Surface—Mining—Inclosure Act—Reservation of Lord's Right to Minerals—Public Rights—Highways.

An Act for inclosing the waste lands of a manor directed that the commissioners under the Act should set out highways over the lands, and extinguished all former roads which should not be so set out. The Act reserved to the lord his right to the minerals, with power to work them as freely as if the Act had not been made:—

Held, that the lord was not entitled to work the minerals so as to damage highways set out under the Act.

This was an action to recover damages for injuries done to certain highways within the plaintiffs' district, by mining operations, which the defendants contended were within the mining powers and reservations in an Inclosure Act of the year 1773. A case was stated which, so far as is material (and tacitly omitting unnecessary words and clauses of enactments), was as follows:—

1. In the year 1773 an Inclosure Act, known as "The Lanchester Common Division Act," was passed for dividing and inclosing certain moors, commons or tracts of waste land within the parish and manor of Lanchester, in the county palatine of Durham, containing 20,000 acres or thereabouts. [The Act was made part of the case.]

2. The Act recited that the Bishop of Durham, in right of his church and see, was lord of the manor, and as such seised of and entitled to the soil of and royalties within and under the said lands; and commissioners were appointed for making the contemplated division.

3. The Act contained an enactment that the commissioners should "set out such public highways and roads over the more improveable parts of the said moors or commons intended to be divided as they should think proper and convenient (which highways and roads should not be less than sixty feet in breadth), and

should also set out proper parts of such more improveable parts for common quarries, watering places for cattle and wells, and should also set out such common public and private horse and other roads, ways, passages and bridges, and such gates, styles, hedges, sewers, drains and watercourses in, over, upon and through the said lands so to be inclosed as they should see proper, useful and convenient."

4. And it was enacted—

"That the commissioners should cause all public highways, roads, bridges and drains by this Act appointed to be set out to be well and sufficiently made, and that the expenses should be borne in the same manner as the expenses of passing and executing the Act, and should order the said public high roads, bridges and drains, from the making thereof, and also such common or public and private horse and other roads, ways, passages and bridges, and such gates, styles, hedges, sewers, drains and watercourses, to be made and for ever maintained by such persons and means as to them should seem proper, which orders should be set forth in their general award, and that after the making of the same award and of such highways and roads and other ways, it should not be lawful for any person to make or use any roads or ways, either public, common or private, in, over or through the said allotments or any part thereof (except the bishop and his successors and assigns as thereafter mentioned), either on foot or on horseback, or with horses, cattle, carts or carriages or otherwise, other than such as should be so set out by the commissioners, and that all former roads and ways which should not be set out as roads and ways through the said intended inclosures should be deemed part of the lands to be inclosed, and should be divided and allotted, held and enjoyed accordingly."

5. The Act also contained the following enactment—

"That nothing in this Act shall prejudice the right of the bishop, as lord of the manor, or his successors or assigns, to the seignior and royalties belonging to the manor, but the lord and his assigns

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shall and may hold and enjoy all courts, rents, services, estrays and all royalties, jurisdictions and things to the manor or the lord appertaining, except such common right as they might claim as owners of the soil and inheritance of the moors or commons, as fully as if this Act had not been made, and also that the bishop and his successors and assigns shall and may have, hold, work and enjoy all mines, minerals and quarries, within or under the said moors or commons intended to be divided and allotted as aforesaid, together with all convenient and necessary ways and wayleaves over the said moors or commons, not only before but also after the same shall be divided, and full liberty of making and using any new ways over the same, and for that purpose to remove any partitions or other obstructions which shall be made for dividing the said moors or commons, or shall be standing thereon, and to do every other act necessary for the purpose aforesaid, and of searching for, draining, winning and working the said mines and quarries, by any means now in use or hereafter invented, and also of leading and carrying away manure bred at the said mines, and things to be gotten thereout, and also of leading and carrying all iron, wood and things unto the said mines and quarries, proper for the use of the same, and of making pits, shafts, pit rooms, heap rooms, drifts, levels, watercourses and drains, and of using as heretofore all those buildings, workshops, hay-yards and raff-yards, already erected for working the coal mines, and of erecting and using fire and other engines and other buildings, workshops, hay-yards and raff-yards, pit and heap rooms, and all other necessary and convenient works, erections, liberties and authorities either now in use or hereafter invented, as fully and freely as he or they might have had, held, used and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing.

6. To provide compensation for damage to the allotments by the working of the mines and quarries, the commissioners were empowered to allot to the justices of Durham any quantity of the moor not

exceeding 500 and not less than 300 acres, in one plot; and in reference thereto the Act enacted—

“Whereas damage may be done to particular persons, by reason of searching for, winning and working the said mines and quarries within and under their respective allotments, by the bishop and his successors and assigns, without making any satisfaction, be it enacted, that when any person shall sustain any loss or damage in his allotment by the searching for, winning or working of the said mines and quarries therein, or the leading or carrying away the coals or other things to be gotten thereout, or by the making, repairing or using of waggon and other ways, or by making drifts, levels or watercourses, or erecting or using engines, or making or using pit or heap rooms, or using any other of the powers or liberties hereby reserved to the bishop, such person shall receive such satisfaction as hereinafter is directed. And to that end the allotment to the justices shall be vested in the justices upon the trusts hereinafter declared.”

7. Then followed directions for letting the allotment; and then, after charging the rents with the expenses of management, it was enacted—

“The balance shall from time to time be disposed of in manner following (that is to say), Upon the complaint of any person so to be damnified, the justices shall enquire into such complaint in a summary way, and finally ascertain the damages sustained, and shall order their agent to pay the same together with reasonable charges, and the surplus (if any) of the rents and profits after satisfying all such damages and charges shall be applied in the repairing, amending and supporting the public and common highways, causeways and other ways, which shall be set out and made upon or through the said moors or commons by virtue of this Act, in such manner as the justices shall direct. And whereas it may happen in some years that the clear rents and profits of the last-mentioned allotment may not be sufficient to satisfy all the damages and charges ascertained as aforesaid, be it enacted that the deficiency shall be borne by the owners or

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occupiers of all the several allotments, except the allotment so to be vested in the justices (but including those of the persons damnified), according to their respective yearly values, in such shares and manner as the justices shall direct, provided always that every occupier who shall have paid such damages may deduct out of his rent so much money as he shall so pay."

8. In 1779, by a further Act, after reciting that the commissioners had set out a plot for allotment to the justices, and that one Mr. White had proposed to purchase the allotment in fee simple for a perpetual rent-charge of 30*l.*, it was enacted that if no person should advance upon that sum, Mr. White was to be the purchaser at that yearly sum; and it was enacted that such yearly sum of 30*l.* or more should be applied, under the direction of the justices, in the same manner as the rents and profits of the plot in case the same had been let according to the first-mentioned Act.

9. Under this enactment the said allotment was allotted to Mr. White, subject to the perpetual rent-charge of 30*l.* This sum has ever since been paid to the treasurer of the county by the owners of the allotment, but is quite insufficient to meet all the claims for compensation upon it.

10. The commissioners, by their general award, set out, among other roads, a public highway, sixty feet in breadth, over the more improveable parts of the said moors and commons, called the Shotley Bridge and Durham Road, and also another public highway, sixty feet in breadth, over part of the said moors and commons, called the Shotley Bridge and Newcastle Road, and thereby directed that the same should be, as to the portions within the township of Benfieldside, for ever maintained and kept in repair by the inhabitants and occupiers of lands, tenements, woods, tithes and hereditaments within the township in like manner as they were by law liable to repair other highways within the township.

11. And the commissioners, by their general award, ordered—

"That all the before-mentioned public

highways by them set out, as well those of the breadth of sixty feet, as also the public roads or ways less than sixty feet in breadth, should at all times continue of the respective breadths prescribed, and that it should be lawful for all persons at all times thereafter to go, pass and repass on foot and on horseback and with horses, coaches, carts and carriages, and also to lead and drive all manner of cattle and other things in, through, over and along the said respective public highways and roads at their free pleasure."

12. Under a large portion of the 20,000 acres so allotted, including the part near to the said highways, and under the said highways themselves, there were and are valuable seams of coal, which, as hereinbefore appearing, were at the time of the passing of the Act of 1773 the property of the bishops, and were specially reserved to them under the clauses of the Act before set out. These coal seams now belong to the Ecclesiastical Commissioners, who are now lords of the manor, with the same powers of working and leasing the minerals as the bishops previously enjoyed. The coal seams have been leased by them to the defendants.

13. In consequence of the mining operations of the defendants, which have been carried on near to and underneath the two highways so set out as above-mentioned, portions of these roads within the township of Benfieldside sank below their original level, and became, until repaired, dangerous to travel over.

14. The plaintiffs (in whom the roads within the said township are now vested, and whose duty it is to repair them) have been put to an expense of about 30*l.* up to the present time in filling in the cracks and falls caused by the shrinking of the surface of those roads in consequence of such mining operations, and in keeping such roads level and in good repair.

15. The defendants refuse to reimburse the plaintiffs, on the ground that, under the mining powers and reservations in the Act of 1773, they are entitled to work the whole of the coal without leaving any support for the surface, and

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without making any compensation for injury thereto.

16—17. At the time of and for a short time after the passing of the Act of 1773, the customary mode of working coal in the county was by leaving ribs or pillars of coal to support the surface; but it has since become customary to take the whole of the coal where the owner is not liable for surface damage, it being usual, leaving at first pillars of coal to support the roof, to remove these pillars in working back again. Some of the seams under and near to the roads in question are on the outcrop, and so near the surface, that the coal could not be worked, even by leaving pillars of coal, without probably causing some, although slight, damage to the roads. The coal has been and is worked by the defendants in the usual manner, according to the manner now practised, when the object is to extract the whole of the coal without regard to the surface, but the effect is to damage the said highways; and if such mode of working is pursued under the said roads, many parts thereof will become, where they are near the outcrop, quite impassable.

[Paragraphs 18 and 19, being purely argumentative, are omitted here, and incorporated, so far as is necessary, with the argument.]

20. The question for the Court is, Are the owners of the minerals, and their lessees, entitled to work the coal as claimed in paragraph 15, and so as to withdraw the natural support of the roads set out under the Act, and that without making any compensation for injury thereby caused to such roads?

If the Court should be of opinion that they are not so entitled, the judgment shall be entered for the plaintiffs for 30*l.* damages and costs, otherwise for the defendants with costs.

Hugh Cowie (J. D. Fitzgerald with him), for the plaintiffs.—The reservation of minerals under "the said moors or commons intended to be divided and allotted" is, by its very terms, limited to minerals under the lands "allotted," and does not extend to minerals under the lands made into highways. But even if

the reservation does extend to minerals under the highways, the defendants are wrong, first, because they are not entitled to let down the surface even of the allotments; and, secondly, because even if they are so entitled as to the allotments, they are not so entitled as to the highways, the compensation clause (such as it is) not extending to damage to highways, but only to damage to allotments, the presumption, moreover, against the defendants' construction being stronger as to public rights than as to private rights. It is clear that the law gives a *prima facie* right to support for the surface; and that right is not excluded in the present case, even as to the allotments; for the words relied on by the defendants, as entitling them to mine to the destruction of the surface, can be satisfied by comparatively innocent acts done on the surface, and must therefore not be read as extending to mining to the destruction of the surface: per Lush, J., in *Smith v. Darbey* (1), and Mellish, L.J., in *Heat v. Gill* (2). The present case is distinguishable from *The Duke of Buccleuch v. Wakefield* (3) in the three points of distinction relied on by Mellish, L.J., in *Heat v. Gill* (2), it not appearing, in the first place, that previously to the Act of 1773 there had been destruction of the surface by the working of the minerals; secondly, the liberties reserved as to the surface acts, &c., being less extensive in their terms, and there being no reason (as there was in *The Duke of Buccleuch v. Wakefield* (3), by virtue of the general reservation, coupled with the nature of the mineral,) to imply a power to get the minerals by means destructive of the surface; and, thirdly, there being, even as to the allotments, no provision for full compensation. It is further distinguishable, as to the highways, in the fact that a public right and not a merely private right is affected; this reservation of mining rights must be construed as subject to a paramount

(1) 42 Law J. Rep. Q.B. 140; s. c. Law Rep. 7 Q.B. 716.

(2) 41 Law J. Rep. Chanc. 761; s. c. Law Rep. 7 Chanc. 699.

(3) 39 Law J. Rep. Chanc. 441; s. c. Law Rep. 4 H.L. Cas. 377.

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right on the part of the public to the use of the highways, and the rather that the highways set out under the Act are in substitution for former highways, the latter being directed to be thrown into the lands to be allotted. [He referred to *Blackett v. Bradley* (4), and *Roberts v. Haines* (5)].

Herschell (*Orompton* with him), for the defendants.—The natural construction of the Act is in favour of the defendants; and there is nothing in the authorities to require a different construction. It is to be remembered that at the time of the passing of the Act the lord of the manor owned the surface, as well as the minerals, subject only to the obligation of leaving pasturage for the commoners. His rights would be greatly cut down if the right of the public in these roads made over his own land were held paramount to his mining rights. It has not been contended on the part of the plaintiffs that the lord was compensated by the Act for the loss which he would suffer by this curtailing of his rights. The reservation of the lord's right to the minerals, including the right to search for, win and work them is clear and full, and against these clear words the absence of provision for compensation is of no weight—*Buchanan v. Andrew* (6), *Aspden v. Seddon* (7). The authorities cited for the plaintiffs are reviewed in *Aspden v. Seddon* (7).

Cowie was not heard in reply.

KELLY, C.B.—I am of opinion that the plaintiffs are entitled to the judgment of the Court. The question arises under an Inclosure Act passed in the year 1773, known as the Lanchester Common Division Act, which directed the setting out of roads over the lands intended to be divided, and further enacted that all former roads not set out under the Act should be extinguished, and also prohi-

bited the making of new roads other than those which should be set out under the Act. Two of the roads made as directed by the Act have been injured by the mining operations of the defendants, as mentioned in paragraph 13 of the case, which states that they "sank below their original level, and became, until repaired, dangerous to travel over." The question asked by the case is, "Whether the owners of the minerals and their lessees are entitled to work the coal as claimed in paragraph 15, and so as to withdraw the natural support of the roads set out under the Act, and that without making compensation." And paragraph 15, which is thus referred to, states the defendants' claim as follows: that "They are entitled to work the whole of the coal without leaving any support for the surface, and without making any compensation for injury thereto." Such a contention takes one by surprise. Let us see upon what foundation the defendants rest this claim to be at liberty to render dangerous roads which have now been enjoyed for some sixty or seventy years. The Bishop of Durham was the owner of certain mines worked in a certain way, which it is unnecessary particularly to advert to. The Act for the inclosure of the lands under which these mines were situated reserved to the bishop the right to "have, hold, work and enjoy all mines, minerals and quarries within and under the said moors or commons intended to be divided and allotted," and the liberty "of searching for, draining, winning and working the said mines and quarries," with the liberty "of making pits, shafts, drifts, &c., and using and erecting workshops," and the like; and all other liberties and authorities in respect of the minerals "as fully and freely as he might have had, held, used and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing." Upon the plain meaning of the words of this reservation clause the mine-owner, if he is entitled to work the mines without leaving any support for the highways, must also be entitled to erect workshops on the highways.

(4) 1 B. & S. 940; s. c. 31 Law J. Rep. Q.B. 65.

(6) 6 E. & B. 643; s. c. 7 E. & B. 625; s. c. 25 Law J. Rep. Q.B. 353; s. c. 27 Law J. Rep. Exch. (in mistake for Q.B.) 49.

(8) Law Rep. 2 Scotch App. 286.

(7) 44 Law J. Rep. Chanc. 359; s. c. Law Rep. 10 Chanc. 394.

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But the plain answer to the whole contention of the defendants in respect of these highways is, that the reservation must be read with the other provisions of the Act; and to construe the reservation in a way which would justify the destruction of these highways would be to make the reservation repeal the direction in the Act to set out highways. I am of opinion that anything done by the mine-owner interfering with the perfect maintenance of the highways is beyond his powers. The authorities are fully consistent with judgment for the plaintiffs. This is not, as in the case of *The Duke of Buccleuch v. Wakefield* (3), an interference with a private right, but an interference with a public right.

CLEASBY, B.—It is unnecessary to go through the points raised in the discussion and the authorities cited. I should have desired time to consider my judgment, if any question had arisen upon the authorities. But the case is quite different from any case referred to in the argument, and which can be supposed to favour the defendants. The Act which we have to consider says that the commissioners shall set out highways; and from paragraph 10 of the case it appears that highways were set out accordingly. Now the right to pass from place to place by means of public roads is a right essential to the existence of society; and the law treats an interference with highways as a nuisance. The question, therefore, distinctly arises whether the Act which directs the setting out of these roads legalises at the same time a nuisance by interference with them. (Similar questions would seem to arise with regard to the wells for which the Act provides; but this is a matter with which I need not deal, and which I mention only in passing.) I am clearly of opinion that every private reservation by the Act must be read subject to the public rights conferred by the Act.

Although this is sufficient for the decision of the case, and is the ground upon which I decide, I may add, I doubt whether the words of the reservation clause, "minerals under the said moors or commons intended to be divided and allotted," reserve to the lord the minerals

under the highways as well as the minerals under the allotments. I think that possibly the words mean, "intended to be divided and which shall have been allotted."

Judgment for the plaintiffs.

Solicitors — Rogerson & Ford, agents for Jno. Booth, Shotley Bridge, for plaintiffs; Torr & Co., agents for G. W. Hodge, Newcastle-on-Tyne, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } COHEN v. HALE; THE MIDLAND
May 23. } RAILWAY COMPANY (*garnishees*).

Debtor and Creditor—Garnishee Order—Payment of Debt by Cheque—Stoppage of Cheque—Revival of Debt.

Where a cheque has been given in satisfaction of a debt, but payment of the draft has been stopped before it has been cashed, the debt and the position of the parties is just the same as though such cheque had never been given, and the debt revives and is capable of being attached under a garnishee order.

This was an appeal against an order made by the District Registrar of Dudley, referred by Lindley, J., sitting at chambers, to this Court.

The following are the material facts:—the plaintiff had, in November, 1877, recovered judgment in this Division against the defendant for 35*l.* 12*s.*, including costs. On the 24th of December, 1877, the garnishees being indebted to the defendant in the sum of 44*l.* 8*s.* 9*d.* sent him their cheque (drawn on the Wolverhampton branch of Lloyds Banking Company, limited), for that amount; this cheque was shortly afterwards received by the defendant. On the 27th of December, 1877, the plaintiff, whose judgment debt was still unsatisfied, obtained an order, under Order XLV. rule 2, to attach so much of the debt due from the garnishees as would be sufficient to answer his judgment debt. On the 30th of December, 1877, the order was served on the garnishees, who, on receipt of such

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order, at once stopped payment of the cheque. The cheque, however, remained in the hands of the defendant until the 11th of February, 1878, when he succeeded in getting it cashed at the Dudley branch of Lloyds Banking Company, who were not aware of the stoppage. The garnishees suggested that under the above circumstances Lloyds Banking Company had a lien or charge upon the debt sought to be attached, but the District Registrar barred such lien or charge and ordered that execution should issue against the garnishees for the sum of 35*l.* 12*s.* The garnishees, as well as Lloyds Banking Company, who were affected by the order, appealed (1).

R. C. E. Plumptre appeared in support of the appeal.—The short point is, whether the debt, which was at one time due, having been paid by cheque was a debt which could be attached, the cheque not having been cashed at the time when the garnishees' order was served. It will not be disputed that the debt must be an absolute debt, and the appellants contend that the cheque having been given by the garnishees extinguished the debt. A cheque is, doubtless, no payment when dishonoured; but, until it is dishonoured, it operates as a conditional payment. When a cheque is given for a debt, it is

(1) By Order XLV. Rule 2 (Rules of Court, 1875), a Judge may, upon the *ex parte* application of a judgment creditor stating that judgment has been recovered and is still unsatisfied, and that another person, within the jurisdiction, is indebted to the judgment debtor, order that all debts owing and accruing from the garnishee shall be attached to answer the judgment debt, and may also call upon the garnishee to shew cause why he should not pay the judgment creditor so much of the debt due from him to the judgment creditor as might be sufficient to satisfy the judgment debt. By Rule 6, where it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Judge may order such third person to appear, and state the nature and particulars of his claim upon the debt. By Rule 7 after hearing the allegations of such third person, under such order, the Judge may order execution to issue to levy the amount due from such garnishee, and may bar the claim of such third person, and make such order with respect to the lien or charge of such third person and to costs as he may think just and reasonable.

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equivalent to a cash payment unless subsequently dishonoured. If this is a debt which can be attached, it follows that an execution creditor can call on a garnishee who has paid by cheque to stop payment thereof, and in the event of his not doing so, the former can hold him responsible for the consequences. He cited *Hall v. Pritchett* (2).

Edward Clarke, for the judgment creditor, was not called upon to argue.

COCKBURN, L.C.J. — I think that we need not call upon Mr. Clarke. The argument addressed to us on behalf of the garnishee involves this fallacy, namely, that the debt was extinguished at the time when the garnishee order was served. I quite agree that there must be a subsisting debt upon which the garnishee's order can operate at the time when such order is served, but I don't agree with Mr. Plumptre when he says that in this case there was no existing debt. It is quite true that a man who takes a cheque in payment of a debt due to him is estopped from enforcing payment by process of law for the time being, and that in a sense the debt is thereby suspended; but if, after the cheque has been given, it is dishonoured, the debt, the remedy for which was suspended by the giving of the cheque, revives just as much as if there was a subsisting debt for which no cheque had ever been given. The giving of the cheque merely suspends the remedy, but does not extinguish the debt. Here the payment of the cheque was stopped before payment, and, as a consequence, the debt revived as though the cheque had never been given. The Midland Railway Company might have objected to the order on the ground that as they had already discharged their debt, by giving a cheque for the amount due to the execution debtor, they could not afterwards withdraw it. The company, however, without adopting this course, chose to stop the cheque, and thereupon the remedy, which before was suspended and could not be enforced, was revived. Accordingly I am of opinion, that there was a subsisting debt in the hands of the

(2) *Ante*, p. 15; s. c. Law Rep. 3 Q.B. Div. 215.

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garnishees, and that this appeal must be dismissed.

MELLOR, J.—I am of the same opinion. The fallacy of Mr. Plumptre's argument is that because the execution debtor has got the cheque and was estopped from recovering the debt, that thereupon the debt is at an end. I don't myself see how a debt can be dealt with so as to become extinguished save by accord and satisfaction. The mistake is in not distinguishing between the right and the remedy. It may be that a debt cannot be sued upon, and that the remedy may be suspended, but when once the suspense is at end the position of affairs is just as if no such suspense ever existed. I think that this was an existing debt, and was, therefore, properly made the subject of a garnishee order.

Appeal dismissed with costs.

Solicitors—Emmet & Son, agents for Sanders, Smith & Parish, Dudley, for appellants; Milne & Co., agents for Lowe, Birmingham and Dudley, for the judgment creditor.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
May 16. } *Ex parte* RICHARDS.

Public Health Acts, 1848 and 1875, 11 & 12 Vict. c. 63. ss. 34 and 37, and 38 & 39 Vict. c. 55. s. 189, and schedule I—Clerk to Local Board—Bye-laws as to Rescission of Resolution—Dismissal of Servant—Quo warranto—Discretionary Writ.

A bye-law of a Local Board of Health, duly made and confirmed, forbade the rescission of any resolution of the Board, unless at a meeting where at least as many members were present as were present when such resolution was passed:—Held, that such bye-law did not apply to the dismissal of the clerk to the Board: for a resolution to effect this was not in the nature of a rescission of that by which he had been appointed but was a new resolution in itself.—*The Queen v. Wrexham Turnpike Trustees* (5 Ad. & E. 581) not followed.

Such clerk, therefore, holding his office under the Public Health Acts, "at the pleasure of the Board," could not obtain an information in the nature of quo warranto because of his dismissal by the resolution of a meeting consisting of fewer members than were present when he was appointed.

Where application is made for an information in the nature of a writ of quo warranto by a person who is liable to immediate dismissal from the office in which he seeks to be reinstated, the Court will not, in the exercise of its discretion, grant the application.

This was a rule for a *quo warranto*, which had been obtained by Richards, calling on Parry Jones to shew by what authority he claimed to exercise the office of clerk to the Llangollen Local Board of Health.

The applicant had been appointed clerk to the local board in 1857, under the Public Health Act, 1848 (11 & 12 Vict. c. 63.), s. 37, by the unanimous vote of the nine members of the board present at the meeting appointing him.

In 1878 a meeting at which eight members were present, was held after one week's notice only had been given setting forth the business proposed to be transacted at it. At this meeting a resolution to dismiss Richards was carried by a majority of seven to one, and Parry Jones was appointed in his place, and had since acted.

It appeared from the affidavits that Richards had only one supporter among the members of the Board, and that the majority had fully determined to dismiss him.

The Public Health Act, 1848, under which Richards's appointment was made, enacts in section 37:—"The local board shall, from time to time, appoint fit and proper persons to be surveyor, clerk, &c., for the purposes of this Act . . . and shall make bye-laws for regulating the duties and conduct of the several officers and servants so appointed or employed, and every such officer and servant shall be removable by the said local board at their pleasure."

Section 34 of the same Act provides

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that the Local Board shall hold meetings, and that they "shall from time to time make bye-laws with respect to the summoning, notice, place, management and adjournment of such meetings, and generally with respect to the transaction and management of business by such Board under this Act."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), repeals the former Act, but re-enacts similar provisions as to the appointment of clerk in section 189, and as to making bye-laws or regulations in schedule I.

The Local Board of Llangollen, in pursuance of the above power, had, in 1857, made bye-laws, which had been duly confirmed by the Secretary of State; one of which bye-laws was in the following terms:—

"No resolution of the local board shall be altered or rescinded unless one month's notice be given by the clerk to each member of the Board, setting forth the proposed alteration, nor unless there be at least as many members of the local board present at such meeting as were present at the meeting when such resolution was adopted."

The rule *nisi* for the *quo warranto* was granted on the ground that the requirements of this bye-law had not been fulfilled in the holding of the meeting or passing the resolution dismissing Richards.

Æ. M'Intyre and *A. G. M'Intyre* shewed cause.—First, the bye-law as to resolutions of the Board has no application to the dismissal of a servant. The inconvenience and impropriety would be manifest were it held otherwise, for it might be impossible to dismiss a servant if one member of the Board absented himself from a meeting. So that a clerk might have been appointed by a majority of five to four, but could not be dismissed by a majority of seven to one, or by the unanimous vote of eight members present in the absence of the ninth.

But, secondly, the office is held only at the pleasure of the Board, therefore *quo warranto* is not the proper form of remedy. Section 37 of the Public Health Act, 1848, under which Richards was appointed, says, "Every such officer and

servant shall be removeable by the said local board at their pleasure." This was decided in the case of a clerk to justices, appointed under section 102 of 5 & 6 Will. 4. c. 76, where the words are "removeable at their pleasure"—*In re Fox* (1). The cases under the Turnpike Acts are distinguishable; the words there are, "may from time to time remove," 4 Geo. 4. c. 95. s. 43. In *Darley v. The Queen* (2) Tindal, C.J., says, "*Quo warranto* will lie for usurping an office, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others." This is approved in *The Queen v. St. Martin in the Fields* (3). Then the only requirement as to notice here is in the bye-laws, which do not apply; and if they did, then the dismissal of Richards was voted to be urgent.

Francis Turner, contra.—The cases of *The King v. The Osheshunt Trustees* (4) and *The King v. The Wrexham Trustees* (5), are authorities that *quo warranto* can go in respect of their office. The words "remove from time to time" must be equivalent to "at pleasure." It was held that section 39 must be read with section 43; and the provision in the former as to the revocation of any "order or determination" is similar to the provision in the bye law here as to a resolution. The position of a servant appointed under the Public Health Act, 1848, and his rights, are preserved to him expressly by sections 326 and 343 of the Act of 1875, and all bye-laws are to be deemed as made under the later Act. *The Queen v. The Mayor of Chester* (6) shews that *quo warranto* is the proper remedy.

COCKBURN, L.C.J.—I entertain a strong conviction that the bye-law has no application to this case. When it says that "no resolution of the local board shall be

(1) 27 Law J. Rep. Q.B. 151; s. c. *nom. R. v. Fox*, 8 E. & B. 989.

(2) 12 Cl. & F. 520.

(3) 17 Q.B. Rep. 149; s. c. 20 Law J. Rep. Q.B. 423.

(4) 5 B. & Ad. 438.

(5) 5 Ad. & E. 581.

(6) 26 Law J. Rep. Q.B. 61.

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altered or rescinded unless there be as many members present as were present at the meeting when such resolution was adopted," that applies, in my opinion, to the alteration or rescission of some subsisting resolution as to the constitution of the Board, or as to some thing which was to be done in its executive capacity. The dismissal of a servant of the Board is not to be regarded as the result of the rescission of an old resolution, but is a new one in itself.

If this were under the Turnpike Acts, the decisions in the cases which have been cited might bind us here; but I think that those are very doubtful decisions as they stand, and I shall decline to follow them except in exactly the same circumstances.

What would be the effect of a *quo warranto* here? It would be to displace Mr. Jones; but would it restore Mr. Richards? It might do so momentarily, but he might be turned out again, and, therefore, as we have some discretion in granting a writ of *quo warranto*, we should refuse it here, even if it could issue, because it would be an idle form to let the writ go. This is obviously a vexatious proceeding on the part of the applicant, and we shall not, in our discretion, afford him any help in promoting it.

MELLOR, J.—This writ is one which cannot be allowed without the leave of the Court. Therefore there is some discretion as to whether we shall grant it which will justify our refusal here. But I question whether the bye-law applies to the dismissal of a servant who was liable to dismissal at pleasure under the Act of Parliament by virtue of which he held his office. The substance of the matter is that Richards has been dismissed by an authority which had power to dismiss him, and it would have no effect to displace for a moment his successor.

Rule discharged.

Solicitors—Simpson, Hammond, Richards & Simpson, agents for Richards, Llangollen, for the applicant; Dean & Taylor, agents for Minshalls & Parry-Jones, Oswestry, for P. Jones.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { EASTLAND (*respondent*) v.
May 8, 17. { BURCHELL (*appellant*) AND
WIFE.

Husband and Wife—Separation by Agreement—Authority to pledge Husband's Credit—Inadequacy of Wife's Income.

When a wife lives apart from her husband under an agreement by which she is to receive a specified income for her maintenance, and is not to apply to him for anything more, she has, so long as he fulfils those conditions, no authority to pledge his credit; nor can any such authority be implied from the alleged inadequacy of her income.

This was an appeal by Special Case from the judgment of a County Court Judge on a plaint in which the plaintiff (*respondent*) claimed from the appellant and his wife, as co-defendants, the sum of 38*l.* for butcher's meat supplied to the wife at various dates between March and October, 1877. The appellant and his wife were married in 1850, and lived together until January, 1875, when by a deed of separation, appointing a trustee, it was agreed between them "that she should live separate from her husband, and should take and enjoy the separate use of all articles of personal ornament and dress, and all property and income of or to which she then was, or thereafter should become, possessed or entitled, and the savings of such income, subject, nevertheless, to the provisions of the marriage settlement . . . that she should have the custody and control of the three younger children, the four elder children remaining with the said James Burchell, and that so long as the said three children, or any of them, were under the age of twenty-one years, and continued so to reside with or under the control of the said Emmeline Burchell, the said James Burchell would pay to the said Emmeline Burchell the sum of 5*l.* a quarter, to be held in trust for the said Emmeline Burchell for her separate use, and to be applied by her towards the education of her said children respectively. And by the said deed it was covenanted that the said

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Emmeline Burchell should provide for and maintain herself and the said three younger children while under the age of twenty-one years, and also duly educate the said children respectively with or out of her own separate income, together with the said quarterly payment of 5*l.* from the said James Burchell, and would not apply to the said James Burchell for any further pecuniary assistance for or towards her maintenance, or that of any of the said three children that might be under the age of twenty-one years. And the said trustee further covenanted to indemnify the said James Burchell from all debts and liabilities thereafter to be contracted by the said Emmeline Burchell, and against all actions, suits, proceedings, expenses, claims and demands upon account or in respect of any such debts or liabilities, or upon account or in respect of the maintenance of the said Emmeline Burchell, or the maintenance or education of the said three children, or any of them, as far as their education could not or should not be defrayed by means of the quarterly payments before referred to."

The parties lived separate under the terms of this deed, but the plaintiff, a butcher, had never known the husband, "and supplied the goods to the wife, supposing that she was a married woman, but without making any enquiries in the matter."

At the trial the Judge, upon the evidence of the wife alone, decided as a matter of fact that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon decided, as a matter of law, that she therefore had authority to pledge her husband's credit, and did pledge it to the plaintiff.

Evidence was also given by the wife as to her husband's income, she being called as a witness for the plaintiff; but upon the solicitor for the husband, who was conducting the case on his behalf, tendering himself as a witness to give evidence, stating that he did so from personal knowledge of the exact income of the appellant at the time, the Judge refused to allow him to be sworn. The Judge gave judgment for the wife on the

plea of coverture, and against the appellant, for the amount claimed by the plaintiff. The question for the opinion of the Court was whether the Judge was right in rejecting the evidence of the appellant's solicitor and in giving judgment against the appellant for the said sum of 38*l.* and costs on the grounds stated in the case.

Watkin Williams (Moulton with him), for the defendant appellant.—The Judge here was clearly wrong, for if a husband and wife agree to separate she has no right to pledge his credit or to say that her allowance is insufficient—*Jolly v. Rees* (1). Moreover, it is clear that Mr. Wylde should have been allowed to give evidence from *Cobbett v. Hudson* (2). He referred to *Manby v. Scott* (3), and the cases collected there.

Kingsford, for the plaintiff.—On the second point it must be conceded that the Judge was wrong. But with regard to the right of the wife to pledge her husband's credit when living apart from him the rule of law is that, where a husband and wife have separated by consent, the adequacy of allowance is a question for the jury or the Judge if sitting, as here, without a jury. If the allowance be inadequate the wife may pledge her husband's credit for necessities. He referred to *Addison on Contracts*, p. 135, *Hodgkinson v. Fletcher* (4), *Hunt v. De Blaquiére* (5), *Nurse v. Oraig* (6), *Johnson v. Sumner* (7).

Williams, in reply, referred to *Biffin v. Bignell* (8), and the judgment of Bramwell, B., in that case.

Our. adv. vult.

(1) 15 Com. B. Rep. N.S. 628; s. c. 33 Law J. Rep. C.P. 177.

(2) 1 E. & B. 11; s. c. 22 Law J. Rep. Q.B. 11.

(3) 2 Smith's Leading Cases, 7th ed. 429.

(4) 4 Campb. 70.

(5) 5 Bing. 550.

(6) 2 New Rep. 148.

(7) 3 Hurl. & N. 361; s. c. 27 Law J. Rep. Exch. 341.

(8) 7 Hurl. & N. 877; s. c. 31 Law J. Rep. Exch. 189.

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The following judgment of MELLOR, J., and LUSH, J., was (on May 17) delivered by

LUSH, J.—The questions arising in this appeal are, first, whether the appellant is liable for butcher's meat supplied to his wife between the 13th of March and the 3rd of October, 1877, under the circumstances stated in the case; and secondly, whether the County Court Judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the appellant was, the ground of rejection being that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence. The appellant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the appellant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed by which she was to take and enjoy all articles of personal ornament and dress, and all property and income of or to which she then was, or should thereafter become, possessed or entitled, and the savings of all income. The appellant covenanted to pay to the trustee 5*l.* a quarter so long as the three children, or any of them, should be under the age of twenty-one years, and continued to reside with her. The wife covenanted that she would maintain and educate the children out of her separate income and the 5*l.* per quarter, and not apply to the appellant for any further pecuniary assistance; and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the appellant had paid the 5*l.* per quarter up to a period subsequent to the accruing of the debt in question. The respondent had never known the appellant, and had only dealt with the wife subsequently to the deed of separation. He supplied the

goods, supposing her to be a married woman, but without making any enquiries in the matter.

The only evidence on which the learned Judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been, ever since the separation, in receipt of her separate income, which brought in 29*l.* 15*s.* 2*d.* per annum, and the 20*l.* a year paid by the appellant, and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned Judge decided upon this evidence that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held, as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the respondent in respect of the meat supplied to her.

We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause, and without his consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent they may make their own terms, and so long as they continue the separation these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her

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maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property or from the allowance of the husband, or partly from the one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will by supplying goods to the wife on credit compel the husband to pay more than the wife could have claimed—that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are therefore of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence offered should be rejected.

We do not think it necessary to go through the various cases cited. They are no guide to us except so far as they exhibit the principle on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to shew that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him. We need only refer to the two more recent cases of *Johnston v. Sumner* (7) and *Biffen v. Bignell* (8). We are not concerned to enquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them we hold that the appellant is not liable for the debt contracted with the respondent. Being satisfied that we have all the materials before us necessary for the determination of the question, it would

be a useless expense to the parties to send the case back for a new trial. We therefore act upon the wholesome provision of the Judicature Act, 1875, Order XL. rule 10, and direct that the judgment for the plaintiff below be set aside, and judgment be entered for the appellant.

Judgment for the appellant.

Solicitors—W. G. Wilde, for appellant; Prior, Bigg, Church & Adams, agents for Gorham & Warner, Tonbridge, for respondent.

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1878. } DAVIS v. THE FLAGSTAFF SILVER
March 6. } MINING COMPANY OF UTAH.*

Practice—Inferior Court—Jurisdiction as to Defence and Counter-claim—Judicature Act, 1873 (36 & 37 Vict. c. 66), secs. 89, 90.

Under sections 89 and 90 of the Judicature Act, 1873, inferior Courts may give effect to counter-claims relating to matters beyond the jurisdiction of the Court, by way of defence to, and to the extent of, the plaintiff's claim, but such Courts have no power to award to a defendant, in respect of such counter-claim, damages in excess of the claim.

The plaintiff in this case was a citizen of America, and the defendants, a registered company, carrying on business in the city of London.

The action was in the Mayor's Court on two promissory notes, amounting in value to 500*l.* The defendants put in a counter-claim for a sum of 79,000*l.* alleged to be due to them from the plaintiff in respect of causes of action arising in Utah.

The plaintiff then applied to Field, J., at chambers for a writ of prohibition against the defendants' counter-claim on the ground that it related to matters beyond

* *Coram* Brett, L.J.; Cotton, L.J.; and The-siger, L.J.

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the jurisdiction of the Court, supporting his application with an affidavit to that effect.

Field, J., referred the question to the Divisional Court, and the matter came on for hearing on the 21st of February before Lindley, J., and Grove, J., who dismissed the application. The plaintiff thereupon appealed.

Talfourd Salter and Cook (on March 6), for the plaintiff, argued that on the true construction of sections 89 and 90 of the Judicature Act, 1873, the counter-claim was beyond the jurisdiction of the Mayor's Court.

Edward Clark (Grosvenor Wood with him), for the defendants, contended that under those sections an inferior Court could entertain any counter-claim, whether within the jurisdiction or not, as an answer to the plaintiff's claim, even if no judgment could be given for the defendant in respect of matters beyond the jurisdiction, for the amount by which the counter-claim overtopped the plaintiff's claim.

BRETT, L.J.—I am of opinion that the judgment should be affirmed. In this case the plaintiff has made a demand in the Mayor's Court in a matter over which that Court has jurisdiction. To that the defendants have pleaded various defences, also within the jurisdiction, and beyond that, as matter of controversy if not of defence, have put forward a counter-claim, as to which we must take it, considering the affidavit made by the plaintiff and not answered by the defendants, that the whole related to matters which would have been beyond the jurisdiction of the Court if they had been put forward as an original demand; that is to say, that it was in respect of matters arising at Utah.

Then the question arises, should the Mayor's Court be prohibited to this extent, that it should be allowed to entertain the plaintiff's demand and the remaining defences, but compelled to shut out the counter-claim?

That depends on the construction of the Judicature Act of 1873. I think the fundamental object of those Acts in

amalgamating the Courts of justice and in everything done by them was to enable the Court, before whom a controversy was brought, as far as possible to determine all matters which might then be in controversy between the parties, and every part of the Act and all the rules made under it, must be construed with regard to that fundamental object of the whole legislation.

Section 89 of the Act of 1873 (1) deals among other things with the Admiralty jurisdiction given to inferior Courts. Now, in the Court of Admiralty (which though it was in one sense a superior Court, had certain things only with which it could properly deal) when a plaintiff in that Court entered into a controversy within the jurisdiction, and the defendant relied on matter of controversy with which the Court ought to have dealt if it

(1) By 36 & 37 Vict. c. 66. s. 89, "Every inferior Court which now has or which may after the passing of this Act have jurisdiction in Equity, or at law and in Equity and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction, for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal, subject to the provision next hereinafter contained in as full and ample a manner as might and ought to be done in the like case by her Majesty's High Court of Justice."

By section 90, "Where in any proceeding before any such inferior Court, any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competency or the duty of the Court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer, shall be given to the defendant upon any such counter-claim: Provided always that in such case it shall be lawful for the High Court or any division or Judge thereof, if it shall be thought fit, on the application of any party to the proceeding to order that the whole proceeding shall be transferred from such inferior Court to the High Court, or to any division thereof; and in such case the record in such proceeding shall be transmitted by the registrar or other proper officer of the inferior Court to the said High Court, and the same shall thenceforth be continued and prosecuted in the said High Court, as if it had been originally commenced therein."

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had been within the jurisdiction, and it was suggested that because the matter relied on by the defendant was beyond the jurisdiction of the Court, the Court could not do complete equity between the parties, the Admiralty Court decided this—that whenever there was matter of controversy properly before the Court, and in order to do equity it was necessary to entertain other matter of controversy raised by the defendant which could not have been entertained under the original jurisdiction of the Court, the Court nevertheless, for the purpose of doing equity, would entertain the matter which arose out of the jurisdiction. I think from what we know of the practice of the Admiralty Court, and bearing in mind the fundamental object of the Judicature Act, the intention of the Legislature was to give all inferior Courts a similar power to that which was exercised by the Court of Admiralty.

Therefore I think that section 89 means that when the plaintiff has brought an action, the subject-matter of which is within the jurisdiction, and the defendant has brought forward by way of defence or counter-claim matter which would not originally have been within the jurisdiction, in order that the Court might give a final decision between the parties and do absolute equity, under section 89 the Court is entitled to entertain the matter so brought forward as a defence, though it may be in this sense out of the jurisdiction,—that if it had been brought forward by a plaintiff, the Court could not have entertained it. The terms of the section give the widest power to the defendant as to counter-claim. It says that every inferior Court “shall have power to grant, and shall grant in any proceeding before such Court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim equitable or legal (subject to the provision next hereinafter contained) in as full and ample a manner as might and ought to be done in a like case in the High Court of Justice.” If the phrase “subject to the provision next hereinafter contained” were omitted,

that section would entitle the inferior Court to give effect to every defence or counter-claim which could be entertained by the High Court of Justice under the Judicature Acts; that is to say, when the cause of action is within the jurisdiction of the Court, all the barriers of jurisdiction would be thrown down and the inferior Court would be left in possession of the jurisdiction of one of the superior Courts of this country. But that power, extensive as it is, is subject to the provision in the next section. To what extent then is the power cut down by section 90? That section is as follows: “Where in any proceeding before any such inferior Court, any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court” (it is obvious that the section is dealing with defence and also counter-claim involving matter beyond the jurisdiction; shewing the intention of the Legislature that such counter-claims shall be entertained), “such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy.” So far, the enactment leaves the competency of the Court to deal with counter-claims arising beyond the jurisdiction complete, and the whole matter in controversy would be before the Court,—demand, defence, and counter-claim. But now comes a phrase limiting the power of the Court: “so far as relates to the demand of the plaintiff and the defence thereto.” That raises a difficulty. The use of the word “defence,” it might be contended, excludes counter-claim. But looking, as I have said before, to the fundamental object of the Act, namely, to do complete equity in all matters before the Court, I think we ought not to construe the word as limited to defence properly so-called, but as containing also counter-claim, so far as a counter-claim can be used as a defence to a claim. Then the section goes on to shew what the inferior Court cannot do. “But no relief exceeding that which the Court has jurisdiction to administer, shall be given to the defendant upon any such counter-claim.” That phrase may be read: “no relief beyond so much as is a defence to

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the claim." Relief is to be given to the extent of a defence to the claim, but not beyond that point if the counter-claim is in respect to matters beyond the original jurisdiction of the Court. The Act, therefore, entrusts the inferior Court with powers to deal with a counter-claim which would be, if it were an original claim, beyond the jurisdiction of the Court, to the extent of the claim and no further.

But it has been contended that the excess of jurisdiction referred to is only excess in point of amount. I cannot think so. Matters may be beyond the jurisdiction of an inferior Court in both respects. Inferior Courts may have a limit to their jurisdiction as to amount, but they always have a limit as to locality; and it would be defeating the fundamental object of the Legislature if we said such Courts might deal with a counter-claim which was beyond their jurisdiction as to amount, but not with one which was so in point of locality, and that a counter-claim might be beyond its jurisdiction because material facts which had to be proved with regard to it had arisen out of the jurisdiction. I am, therefore, of opinion that the section does not confine the inferior Courts to matters within their local jurisdiction, but gives them power to deal with all matters of counter-claim, whether beyond the jurisdiction as to amount, or locality, or both. That being so, when a counter-claim is pleaded of such a nature that if it had been pleaded in the superior Courts, it might have given rise to a judgment for some amount in favour of the defendant, if such counter-claim is out of the jurisdiction, in either respect inferior Courts can deal with it only so far as it is a defence to the claim. This gives effect to the words of both the sections.

It might no doubt be productive of inconvenience. All sorts of defences might be raised, and proceedings required for which the Court had no machinery; for instance, in the present case a commission might be wanted to take evidence at Utah, and the Mayor's Court would have no authority to issue it, and that, if there was no remedy, might give rise to great difficulties and injustice. But there

is a remedy provided by the latter part of section 90. If the counter-claim goes into matters beyond the jurisdiction, then the whole proceeding may be transferred from such inferior Court to the High Court of Justice, and then the High Court will have the whole matter in its hands. That ought to be the case here; and I have no doubt that at some point of the proceedings the action will be so removed.

Mr. Salter wishes to cut down the powers of the Court in dealing with the matter, and says that the Mayor's Court ought to have power to retain the claim, but no power to deal with the counter-claim in any way, but that the counter-claim must be brought separately before the High Court. I do not think that view can be maintained. Prohibition has been asked for to prevent the Mayor's Court from dealing at all with a counter-claim with which I think that Court must deal, if the matter is left there, to the extent of the claim and no more. To do that, the Court must entertain the whole counter-claim, and therefore the prohibition will not lie.

As to the time when this action ought to be transferred we are not called upon to express an opinion. But it is clear that it must and ought to be done at some stage or other of the action. All we can decide is that prohibition ought not to issue.

COTTON, L.J.—I am also of opinion that this appeal must fail. The counter-claim raises questions as to matters which the Mayor's Court would have no jurisdiction to entertain in an original action. The question then is, whether sections 89 and 90 of the Judicature Act, 1873, give authority to that Court to deal with the subject-matter of the counter-claim as a counter-claim, and to what extent.

Section 89 deals with two matters. First, as to the relief to be given by inferior Courts to plaintiffs, so far as concerns the plaintiff taking the matter into the inferior Court, he has no power to do so unless the Court has independent jurisdiction to entertain the matter. But the Act gives further powers as to actions so commenced. The section ex-

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pressly provides that the cause of action must be within the jurisdiction of the Court; when that is so, the Court is to grant such relief, redress or remedy, or combination of remedies, as the High Court of Justice can give. No additional jurisdiction is given as to the plaintiff's claim, and it must be borne in mind that the plaintiff has a right to choose the Court in which the litigation is to be carried on. But the subsequent part of the section deals with the defendant's rights. The Court "shall in every such proceeding give such, and the like effect to every ground of defence or counter-claim equitable or legal (subject to the provision next hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." Nothing is said here as to the defence or counter-claim arising within the jurisdiction. The fair construction is, that under that section the defendant might raise any defence or counter-claim in any inferior Court which he might have raised in the High Court of Justice. Mr. Salter says it merely means that the inferior Court may deal in the same way with a defence or counter-claim in respect of matters within its jurisdiction, as the High Court may in respect of matters within its jurisdiction. But does it not mean that all defences and counter-claims are available, which would be available in the High Court of Justice, but subject to the "provision thereinafter contained," that is in section 90? What is that provision? It is this: "Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court"—those words are strongly in favour of the construction I have given to section 89, for they assume that the defence or counter-claim entertained under it may involve matters beyond the jurisdiction—"such defence or counter-claim shall not affect the competence or the duty of the Court," to do what? "to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto." The whole difficulty arises from the use of the words "defence thereto," no men-

tion being made of the counter-claim. But it would be wrong to limit "the whole matter in controversy" to that which is contended for. The Court may entertain the "whole matter in controversy," and that, looking at the earlier part of the section, may go beyond the jurisdiction of the Court. Then to what extent may the Court entertain it? It may enter into all matters in controversy, whether within the jurisdiction or not, for the purpose of seeing first whether there is a good cause of action; and, secondly, whether there is a cause of counter-claim, and whether the defendant can protect himself by it. But he must use the counter-claim merely as a shield to protect himself against the claim, and not as a means of recovering a sum of money beyond the amount of the plaintiff's claim. Then, as a remedy for any injustice or inconvenience, the whole matter may be transferred into the High Court, so that the whole matter may be disposed of, and the defendant enabled to obtain such judgment on the counter-claim as he may be entitled to.

THESIGER, L.J.—I am of the same opinion. I think section 90 is sufficiently plain in itself; and when read in connection with section 89 and one or two others, it becomes, as it seems to me, entirely free from doubt.

Prior to the passing of the Judicature Acts there were a variety of claims which, though resulting in payments of money, could not be made the subject of set-off, and the Courts were thus prevented from doing complete justice between the parties.

That difficulty was got over by sections 24 and 25 of the Act of 1873, and by those sections the High Court of Justice was enabled to do complete justice in all the divisional Courts with regard to all the claims of the particular parties to a litigation, and also in some cases with regard to third parties. One of the matters provided for was, that in addition to the ordinary right of set-off, the defendant might set up a counter-claim in respect of any right or claim which he possessed, whether sounding in damages or not; which though not actually a legal

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set-off, might be treated as such. Then machinery is provided by Order XIX. rule 3 under the Act of 1875, by which such set-off is to have the same effect as a statement of claim in a cross action; and then come the important words: "so as to enable the Court to pronounce a final judgment" (not two judgments) "both on the original and on the cross-claim." That being the state of legislation under the Judicature Act of 1873, so far as regards the High Court, and such being the machinery for carrying out its objects, Parliament had to deal with inferior Courts, and it dealt with them in sections 89 and 90 of the Act of 1873. In section 89 we find general provisions; first, as regards causes of action; and, secondly, as regards defences and counter-claims in particular actions. As regards causes of action, the inferior Courts are limited as to locality or amount just as they were before the Act, but subject to such limitation the Courts had power to deal with all claims in as full and ample a manner as the High Court of Justice. Then the Legislature had to deal with defences and counter-claims. Now *a priori* anyone who had studied the matter, would say that if the particular plaintiff might choose the Court in which he would bring his action, the defendant should be entitled to set off, to the extent of the claim, any demand he might have against the plaintiff, whether within the jurisdiction or not. Otherwise the plaintiff might actually be able by choosing his own Court to enforce the payment of a sum of money by the defendant, although the defendant might have a larger claim against him, which he could only recover by bringing an action in the superior Court. This is provided for in general terms by section 89. Then when we come to section 90 we find that the words "every ground of defence or counter-claim" are intended to have their natural meaning; that is to say, every ground of defence or counter-claim in whatever place and in whatever circumstances it may have arisen. Then it was felt that a limit must be put on the powers thus given, for otherwise the jurisdiction of inferior Courts would be raised beyond all convenient bounds. So

we have the enactment in section 89 made "subject to the provision thereafter contained." Looking again at the object of the Act, we would expect to find that the defendant would be allowed to set off so much of the counter-claim out of the jurisdiction as would cover the plaintiff's claim and no more, and that intention seems to be carried out in tolerably clear terms by section 90, which is as follows: "Where in any proceeding before any such inferior Court, any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court" (the Legislature is dealing therefore, not merely with defences, but also with counter-claims involving matter beyond the jurisdiction), "such defence or counter-claim shall not affect the competence or the duty of the Court to dispose," not of the plaintiff's claim, but "of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto." I agree with Lord Justice Brett as to the word "defence" there, that it is not limited to defence properly so-called, as in the earlier part of the section, and a reason which points distinctly to that being the true view of the matter is that where the words defence and counter-claim have been used, as in the earlier part of the section, the word "such" is introduced before counter-claim, "but no relief exceeding that which the Court has jurisdiction to administer, shall be given upon any such counter-claim. But here the power given to the Court is "to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto," words which are as wide as any words can be, and even if the word "defence" is not to be used as I have indicated, the "disposing of the whole matter in controversy" is a power amply sufficient to meet the case where a question arises whether the defendant has not a counter-claim either equal to or overtopping the plaintiff's claim, so that in point of fact the plaintiff ought not to have a judgment.

Then it is enacted that "no relief exceeding that which the Court has jurisdiction to administer, shall be given to the defendant upon any such counter-

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claim." That means that as soon as the defendant has proved that he is entitled to a judgment equal to the amount of the plaintiff's claim, then as the counter-claim is *prima facie* beyond its jurisdiction, the Court must hold its hand, and, as to any surplus, leave the defendant to his remedy in the superior Court. That being so, as the defendant is entitled to such relief as I have mentioned, though the counter-claim is for more than the amount of the plaintiff's claim, that does not justify a prohibition. Relief must be given, for here is in one sense a set-off, though not in another, and the Court must give relief as regards the counter-claim to an extent equal to the plaintiff's claim and no further. There is, therefore, at present no ground for complaint on the part of the plaintiff; there is nothing in the course pursued by the defendants, or by the Court below, to justify our issuing a prohibition at this stage of the proceedings.

The costs of this appeal must be the defendants' costs in any event.

Appeal dismissed.

Solicitors—J. W. Sykes, for plaintiff; Ashley & Tee, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } *Re HERITAGE; ex parte*
May 6, 7. } *DOCKER.*

Taxation—Solicitor's Charges—Agreement to pay Fixed Sum for Costs—Right to Delivery of Bill of Costs—Pressure—Overcharge—Payment—"Special Circumstances"—Statute 6 & 7 Vict. c. 73. ss. 37, 38, 41.

By the 6 & 7 Vict. c. 73, a person not the party chargeable may, if there are "special circumstances," have a solicitor's bill of costs referred for taxation, even after payment.

In 1875, H., as solicitor for the Credit Foncier, commenced an action against D.

to recover a sum of money due from him on a promissory note. After long negotiations the Credit Foncier were induced by H. to accept a composition, D. at the same time agreeing to pay H.'s costs. D.'s solicitor thereupon asked H. to name a lump sum for his costs, and H. named 200l. as a fair and reasonable sum. The money was paid by D. in February, 1877; twelve months later D. applied for the delivery of a bill of costs, alleging that the sum paid by him was excessive, and that great pressure was used by H. to compel him to agree to the sum named for costs:—Held, that the case did not come within the provisions contained in 6 & 7 Vict. c. 73, at all, and that, even if it did, there were no special circumstances such as would justify the Court in exercising its jurisdiction.

This was a motion, by way of appeal, from an order of Field, J., at chambers, dismissing a summons for the taxation of a bill of costs.

In July, 1875, Mr. Heritage, instructed by the Credit Foncier of England, Limited, commenced an action against Mr. E. S. Docker, to recover 5,000l., being the amount of a promissory note indorsed by him to the Credit Foncier. Shortly afterwards proceedings in bankruptcy were commenced by the Credit Foncier against Mr. Docker with reference to the promissory note. On the 20th of January, 1876, Mr. Docker presented a petition for liquidation by arrangement or composition; and ultimately resolutions were passed by the creditors (who were practically represented by the Credit Foncier), accepting a composition by which the liquidation proceedings were annulled, and a composition accepted, to be raised by means of a loan, by his wife, upon property belonging to her for her separate use.

Considerable trouble and expense were incurred by Mr. Heritage at the request of Mr. Honey, who was at that time acting as solicitor for Mr. Docker, in investigating the title of Mrs. Docker to the property in question, and in persuading the creditors to allow the matter to be arranged out of bankruptcy. Mr. Honey afterwards proposed to Mr. Heritage that he should name a lump sum to cover his

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costs in all the transactions above referred to, including certain fees paid to auctioneers for valuation of property. Mr. Heritage named a sum of 200*l.* Mr. Honey, on Docker's behalf, at once agreed to the proposal, and the money was eventually paid in or about February, 1877. No complaint whatever was heard about the matter till the 1st of November, 1877, when Mr. Lydall, a solicitor, applied on behalf of Docker for a bill of costs, which was declined. On the 12th of February, 1878, the usual summons for delivery of a bill of costs was taken out, and heard before a Master, who dismissed the summons, and on appeal Field, J., confirmed the Master's decision.

In his affidavit Mr. Docker alleged that the sum claimed by Mr. Heritage for his costs was excessive and unreasonable, and also that undue pressure had been used to compel Mr. Honey, acting as his solicitor, to agree to the payment of 200*l.* This, however, was denied by Mr. Heritage, and there was no affidavit in support by Mr. Honey.

Charles Russell and *Morton Daniell* now appeared, on behalf of the appellant, in support of the motion.—This application is made under the provisions of 6 & 7 Vict. c. 73. ss. 37, 38, 41 (1); and it is contended that Mr. Docker is war-

(1) By 6 & 7 Vict. c. 73. s. 37, a party chargeable is entitled to have a solicitor's bill of costs referred for taxation, even though twelve months have expired since the bill has been delivered, "under special circumstances to be proved to the satisfaction of the Court or Judge to whom the application for such reference shall be made." By section 38, "Where any person, not the party chargeable with any such bill . . . shall be liable, or shall have paid such bill to the attorney or solicitor, &c., or to the person chargeable with such bill, as aforesaid, it shall be lawful for such person, &c., to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make. . . . Provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorised to be made, except under special circumstances, it shall be lawful to the Court or Judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill

ranted under the circumstances in asking for the delivery of a bill of costs. It is admitted that "special circumstances" must exist. It has, however, been decided that gross overcharges or pressure are sufficient "special circumstances" within the meaning of the above Act—*Re Strother* (2), and *Re Dickson* (3).

Reginald Brown, contra.—The appellant is not within the provisions of the Act at all. This was a voluntary compromise. Moreover, the 37th section does not enable any person to apply to a solicitor to have a bill of costs furnished to him. The words "shall be liable or shall have paid" must be read as equivalent to "shall be liable and shall have paid;" and the class of persons intended to be included within the provisions of the section are residuary legatees, *cestui que trusts*, and the like. If the Legislature had intended that any person who should pay a solicitor's bill should be entitled to have such bill submitted to taxation, different language would have been employed. Again, even if the bill can be referred to taxation, the appellant is not entitled to have it delivered.

[LUSH, J., referred, on this point, to 6 & 7 Vict. c. 73. s. 40.]

Lastly, no "special circumstances" exist here. It is distinctly denied on the part of Mr. Heritage that the charges were unreasonable or that any pressure was used; and no affidavit to the contrary has been filed by Mr. Honey, who

as aforesaid, if he was the party making the application." By section 40, "upon the application of a person not being the person chargeable . . . or of a party interested as aforesaid," the Court or Judge may order the solicitor to deliver a copy of his bill of costs, upon payment of the costs of such copy. By section 41, "The payment of any such bill, as aforesaid, shall in no case preclude the Court or Judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such Court or Judge appear to require the same, upon such terms and conditions, and subject to such directions as to such Court or Judge shall seem right, provided the application for such reference be made within twelve months after payment."

(2) 3 Kay & J. 518; s. c. 26 Law J. Rep. Chanc. 695.

(3) 26 Law J. Rep. Chanc. 89; s. c. 3 Jur. N.S. 29.

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conducted this negotiation throughout. Assuming, however, that such overcharges existed and such pressure was used as is alleged on behalf of the appellant, and that there are "special circumstances," the time has now expired within which such an application as this could be maintained. There are many authorities in Chancery to shew that these "special circumstances" must be circumstances recently come to the knowledge of the party, and that an application such as this must be made promptly. Here no bill was ever asked for till nine months after the matter had ended; and such delay, independently of other circumstances, is sufficient to justify the line of action adopted by Mr. Heritage—*In re Neate* (4); *In re Harding* (5); *In re Harrison* (6); *In re Harper* (7); *In re Drew* (8); *In re Becke* (9).

Daniel replied.

COCKBURN, L.C.J. — I entertain a strong opinion that the present case does not come within the provisions of 6 & 7 Vict. c. 73, at all. It is not necessary, however, for us to decide that point now. If you look at the terms of the 37th section, it is quite manifest that the intention of the Legislature was, that a solicitor having a right of action against the person who employed him for costs should not be allowed to bring such action without first delivering a bill of costs. The case is different from that where a third party is a defendant to an action, and is defeated, and has to pay the costs of the action; in that case the costs go to the Master to be taxed, and such costs when taxed become part of the judgment against him. That is not this case; and if a party in the position of the appellant chooses, without waiting for the event of a trial, to submit, and agrees to pay a sum for costs, I fail to see how the 37th section can apply.

(4) 10 Beav. 181.

(5) 10 Beav. 250; s. c. 16 Law J. Rep. Chanc. 288.

(6) 10 Beav. 57; s. c. 16 Law J. Rep. Chanc. 170.

(7) 10 Beav. 284.

(8) 10 Beav. 368.

(9) 5 Beav. 406; s. c. 13 Law J. Rep. Chanc. 157.

Then the 38th section only says that the same rule, which by the 37th section is established in the case of solicitor and client, shall also apply to the other persons who are in the same position as regards the solicitor or the client; such persons are in fact to stand in the shoes of the client, and to have the same remedy against the solicitor which the client would have had. In my judgment the 38th section has no application here, but applies, for instance, to a third person who has agreed to indemnify a client against costs, or has entered into a guarantee for him.

It is not, however, necessary to decide this application on any such ground. There is nothing at all in the Act to prevent a solicitor from coming to an arrangement in respect of his costs; and he may, if he chooses, agree to accept a lump sum in respect of them; and, so long as this is done *bona fide*, there is no reason why such a compromise should not stand. The applicant here agreed through the solicitor, who was then acting for him, to pay a lump sum for costs; and as no fraud is alleged, I fail to see any special circumstances which would induce us to interfere. This is not even the case of a solicitor taking advantage of the ignorance of a layman; for here the appellant's own solicitor intercedes, and agrees with the solicitor on the other side as to the sum which should be paid. No doubt it would have been more satisfactory if the costs had been ascertained in the regular way; that, however, is only a passing observation, and I fail to see anything here which would justify us in exercising any summary jurisdiction.

MELLOR, J.—I entirely agree with the Lord Chief Justice; and although it is not now necessary to decide that point, am of opinion that he has rightly interpreted the meaning of the statute. With regard to the other matter, the transaction seems to have been quite a legitimate one. A question arose as to the amount of the costs, and the appellant in effect said: "I don't want to have a special enquiry about costs—What will you take as a lump sum?" The solicitor replied: "Under all the circumstances,

Re Heritage; ex parte Docker, Q.B.

I think 200*l.* is the proper amount." That, perhaps, may have been a little too much, but the appellant agrees to pay it without, so far as I can see, any pressure being put on him to do so. What was done was, in my judgment, done voluntarily, and I hardly remember a case with less merits. Independently of all this, I think the delay which has taken place in making this application justifies our refusing it.

LUSH, J.—I am of the same opinion. The present is a most ungracious application; and I think it is, moreover, not within the Act at all. The 38th section applies only to a case where a third party has undertaken to indemnify the client. This was a voluntary agreement to pay a lump sum to cover costs and other payments; and it was never intended by the parties that the sum should be enquired into by taxation or otherwise.

Appeal dismissed with costs.

Solicitors—W. H. Lydall, for appellant; Fredk. Heritage in person.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { LEWIS AND ANOTHER (*appellants*) v. THE CARDIFF URBAN
May 22. { SANITARY AUTHORITY (*respondents*).

Public Health—Paving, &c., of Private Streets—Notice to Owners to pave, &c., in Front of their Premises—Recovery of Expenses from Owners in Default—Effect of Agreement by Owner that Sanitary Authority may execute Works and charge him with Expense—Condition Precedent to Summary Recovery of Expenses by Sanitary Authority—38 & 39 Vict. c. 55 (Public Health Act, 1875), ss. 160, 257.

[For the report of the above case, see 47 Law J. Rep. M.C. 101.]

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1878. } LAING v. HOLLWAY AND
May 4, 18. } OTHERS.*

Ship and Shipping—Charter Party—Construction—Time—"Despatch Money at 10s. per Hour for all Time Saved."

Under the terms of a charter-party, cargo was to be shipped at the rate of 200 tons per running day, and to be discharged as fast as ship could deliver, not exceeding 200 tons per working day. Demurrage, if any, at the rate of 20s. per hour, except in certain cases, and despatch-money 10s. per hour on any time saved in loading or discharging. Ship to load and discharge by night and by day, and as rapidly as possible when required by shippers, consignees or charterers:—

Held, that, according to the true meaning of the charter-party, despatch-money was payable for every hour saved during the whole twenty-four hours, and not merely in respect of a working day of twelve hours.

This was an appeal from a decision of the Queen's Bench Division on a Special Case, stated by consent, and by order of the Registrar of the Lord Mayor's Court of London, pursuant to ss. 6 and 7 of the schedule to the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86).

The material facts of the Special Case were as follows:—

This is an action brought by the plaintiff, the owner of the British ship the *Good Hope*, to recover 54*l.*, the balance of freight alleged to be due to the plaintiff from the defendants under the following circumstances:—

On the 24th of May, 1876, a charter-party was entered into between the plaintiff and the defendants, by which it was agreed that the said ship should proceed with all despatch to Elba, and there ship a cargo of ore for Newport.

The material parts of such charter-party were as follows:—

The cargo to be shipped at the rate of 200 tons per running day, Sundays and holidays excepted, and to be discharged

* *Coram* Baggallay, L.J.; Brett, L.J.; and Cotton, L.J.

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as fast as ship can deliver, not exceeding 200 tons per working day, weather permitting. Steamer to unload the barges sent alongside with all possible despatch so long as this mode of shipment is continued, and any delay incurred by not doing so not to count as part of the lay days.

Demurrage, if any, at the rate of 20s. per hour, except in case of any hands striking work, frosts or floods; revolutions or wars, which may hinder the loading or discharge of the said vessel. Despatch-money 10s. per hour on any time saved in loading or discharging. The charterers to have the right of averaging days for loading and discharging in order to avoid demurrage, and steamers are to load and discharge by night as well as by day, and as rapidly as possible when required by shippers, consignees or charterers. Ship to allow two days in loading in case of bad weather.

In pursuance of the said charter-party, the said ship duly loaded and delivered a cargo of ore, and the plaintiff became and was entitled to receive the sum of 1,061*l.* 19*s.* 11*d.* in respect of the freight.

Four days were saved in loading at Elba, and five days were saved in discharging at Newport, making altogether nine days, which, if calculated at twenty-four hours a day, would make 216 hours, or at twelve hours per day, 108 hours.

The defendants have paid the said freight so payable to the plaintiff as aforesaid, with the exception of the sum of 108*l.* which they claim to deduct as despatch-money, being at the rate of 10*s.* per hour for nine days of twenty-four hours.

The plaintiff admits that the defendants are entitled to despatch-money for nine days, but contends that such despatch-money is only payable at the rate of 10*s.* per hour per working day of twelve hours, and not of twenty-four hours as contended by the defendants, and that therefore the defendants were only entitled to 54*l.* despatch-money, and not to 108*l.* as claimed by them.

If the Court shall be of opinion that, on the true construction of the said charter-party, despatch-money, at the rate of 10*s.* per hour, is to be paid per

working day of twelve hours, the verdict shall be for the plaintiff for 54*l.*, with costs of this action, and if the Court shall be of opinion that despatch-money at the rate of 10*s.* per hour is to be paid per day of twenty-four hours, the verdict shall be for the defendants, with costs of the action.

The case came on for hearing before Mellor, J., and Lush, J., on the 23rd of November, 1877, when the Court gave judgment for the plaintiff.

Against this decision the defendants now appealed.

Linklater, for the defendants.

A. L. Smith, for the plaintiff.

Our. adv. vult.

The judgment of the Court was delivered (on May 18) by—

BAGGALLAY, L.J. — We cannot agree with the judgment in this case. It seems founded on there being something in the charter-party by which days and their length can be ascertained, and become of importance. We can find nothing to this effect. There is no such expression as “lay day,” and nothing which would ascertain how many hours would make a working day; and certainly we have no statement what is its length in Elba. We think there is nothing by which time can be measured, except hours. The charterer is to ship at the rate of 200 tons per running day, that is to say, at least that quantity, unless hindered by strikes, &c., on which nothing turns. Weather may excuse him to the extent of two days. But he may ship by night as well as by day, for so the steamer is bound to load. And the steamer is to unload barges sent alongside with all possible despatch. The charterer may therefore ship cargo the whole twenty-four hours round, and ship no more than the 200 tons. The cargo is to be discharged as fast as the ship can deliver, not exceeding 200 tons per working day, weather permitting. The working day here does not mean a day of any particular length, but “working” as opposed to Sunday or holiday. This means

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that the charterer is to unload at that rate, not that the ship is bound to discharge that quantity only. On the contrary, as in the case of the loading, the steamer is bound "to discharge by night, and as rapidly as possible when required by shipper, consignee or charterer." There is therefore no day of any length mentioned. There is a maximum of obligation on the charterer of 200 tons for loading and discharging on each working day, but the maximum of obligation on the ship to receive and discharge has no limit except "as rapidly as possible," and the charterer has the whole twenty-four hours round in which he may unload the 200 tons. Then what is the meaning of time saved in loading or discharging? The literal meaning I suppose would be "doing those things in less time than they might be done in with ordinary despatch," i. e., if ordinary despatch, with the ordinary number of hands and ordinary diligence, would load and unload in twenty days or 240 hours, then extraordinary despatch, extraordinary numbers of hands and extraordinary diligence, doing those things in fifteen days or 150 hours, the difference, i. e., five days or sixty hours is time saved. Because strictly speaking time is not saved in doing a thing by working twenty-four hours round, instead of twelve one day and twelve another, twenty-four hours have been consumed in each case. Time is saved in getting from A. to B. if a man runs in one hour instead of walking in two. But nobody suggests that this is the meaning. It is admitted on both sides, and is clear that "time saved" means if the ship is ready earlier than she would be if the charterer worked up to his maximum obligation only; all the time by which she is the sooner ready is time saved within the meaning of the charter-party. Then the question is by how much time is she sooner ready? The answer is, by nine times twenty-four hours. Really the reason of the thing is that way. The owner would sail away, by what has happened, 216 hours sooner than he would have done but for the defendant's despatch.

Suppose that, taking the maximum liability, the charterer had till and on a

certain day, say Thursday, to load without incurring demurrage. Suppose he began at 6 A.M. and finished at midday, then he would at least have saved the rest of that day, let us call it seven hours. Now suppose by working all Wednesday night and Thursday morning the loading was finished at 6 A.M., he would have saved thirteen hours. Then suppose he finished at 3 A.M. would he not have saved sixteen hours? and so if he finished on Wednesday at 7 P.M. he would have saved twenty-four hours. It was admitted by the plaintiff that demurrage was to be paid on this footing; then why not the despatch-money?

I think the judgment must be reversed.

Judgment reversed.

Solicitors—Shum & Crossman, for plaintiff; George and William Webb, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1878. } HANCOCKS and COMPANY v.
March 9. } LABLACHE.

Husband and Wife—Married Women's Property Act, 1870 (33 & 34 Vict. c. 93)
—*Charging separate Property with Wife's Debt—Action against Wife alone.*

An action cannot be brought against a married woman without joining her husband as defendant, though the action be brought only in order to declare that property from her separate earnings, and which had become her separate property within the meaning of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), might be made chargeable with the payment of a debt she had contracted whilst living apart from her husband.

The following was the plaintiffs' statement of claim:—

1. The plaintiffs are co-partners, carrying on the business of goldsmiths, silver-smiths and jewellers at No. 39, Burton Street, in the county of Middlesex, under the firm of "Hancocks & Company."

2. The defendant is an actress and an

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operatic and public singer, and as such is engaged in an employment from which she derives wages and earnings separately from her husband, whereby she has acquired, and is still acquiring, separate property within the meaning of the Married Women's Property Act, 1870, and the property so acquired has been received by the defendant on her sole receipt, and the same property and the investments thereof are now held by the defendant in her own name as her separate property, and are under her sole power and control.

3. The plaintiffs, on the 16th day of June, 1875, at the request of the defendant, supplied and delivered to the defendant an oval gold locket, with turquoise, pearl and rose diamonds set on one side, of the value of 28*l.*, and the defendant thereupon, as a married woman entitled to separate property, and then earning separate property, agreed to pay the said sum of 28*l.* out of her separate property by instalments in manner following—that is to say, the sum of 10*l.* immediately on the delivery of the said locket, the sum of 4*l.* on the 26th day of June, 1875, and the balance of 14*l.* before the 10th day of August, 1875.

4. The defendant, in accordance with the terms of the said agreement, paid the instalments of 10*l.* and 4*l.* out of her separate property, but the defendant has not paid the said balance of 14*l.*, and although frequently applied to by the plaintiffs for the payment thereof, the defendant has refused and still refuses to pay the same, and the whole of the said sum of 14*l.* is still due and owing to the plaintiffs by the defendant. The defendant has had, and still has, in her possession separate property more than sufficient to pay the said sum of 14*l.*, and is in receipt of wages and earnings which will be more than sufficient to answer the same.

5. The defendant was at the date when the said locket was supplied and delivered to her, and still is, living apart from her husband, and the plaintiffs have been unable to discover the address of the defendant's husband. The defendant's husband has no interest in the property sought to be charged in this action, but

the same remains in the hands of the defendant with the acquiescence of her husband, in order to be applied as her separate property.

The plaintiffs claim—

1. A declaration that the separate property of the defendant vested in her, or in any other person in trust for her, is chargeable with the payment of the said sum of 14*l.*, and of interest thereon, from the 10th day of August, 1875, and of the costs of this action.

2. Payment of the said sum of 14*l.*, interest and costs accordingly; or if the defendant shall not admit possession of separate estate sufficient to answer the same, an enquiry of what the defendant's separate property consists, and in whom it is vested, with proper consequential directions for payment thereof of the said sum, interest and costs.

3. Such further or other relief as the nature of the case may require.

Demurrer thereto.

Pyke appeared to support the demurrer, but

W. P. Beale, for the plaintiffs, was called on to support the statement of claim.—It is not necessary to join the defendant's husband in this action. The action is only to charge the separate property of the wife with the payment of this debt, and in order to charge the separate property of a married woman which is in the hands of trustees it is not necessary to make all the trustees parties to the action—*Picard v. Hine* (1), *Davies v. Jenkins* (2). That the plaintiffs are entitled to a charge on the separate estate of the defendant for the debt contracted by her under the circumstances stated in this case is established by the cases of *Murray v. Bardee* (3), *Gaston v. Frankum* (4), and *McHenry v. Davies* (5). That last case is one very much in point, as the suit there was brought against the married woman alone, and no objection was taken that no other person was made

(1) Law Rep. 5 Chanc. (App.) 274.

(2) Law Rep. 6 Chanc. Div. 728.

(3) 3 Myl. & K. 209.

(4) 2 De Gex & S. 561.

(5) 39 Law J. Rep. Chanc. 866; s. c. Law Rep. 10 Eq. 88.

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a party defendant. The effect of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), is to make the property which a married woman has acquired from her separate earnings her separate property, for which she might sue or be sued as a *feme sole*. The 1st section enacts that such earnings "shall be deemed and taken to be property held and settled to her separate use, independent of any husband," and this must be read with section 11, which states that "a married woman may maintain an action in her own name for the recovery of any wages, earnings and property by this Act declared to be her separate property," and "shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings," &c., "as if such wages, earnings," &c., "belonged to her as an unmarried woman." By section 10 she may effect a policy of insurance, "and the contract in such policy shall be as valid as if made with an unmarried woman." Now a contract must be mutual, and she must be liable to pay the premiums as much as the insurance company to pay the money insured. By the 11th section she can sue alone, and she therefore must equally in like manner be liable to be sued; for said Lord Eldon in *Beard v. Webb* (6), "I think it will be difficult to contend that the right to sue and the liability to be sued do not stand upon the same footing."

[LINDLEY, J., referred to Order XVI. rule 8, which allows married women, "by the leave of the Court or a Judge," to sue or defend without their husbands and without a next friend. There is in a note to this rule in *Charley's Judicature Acts*, 3rd ed. p. 457, a reference to a case of *Oakes v. Bedford*, reported in the *Times* newspaper of May, 1876, in which it is said the Queen's Bench Division allowed a demurrer to a statement of claim in an action by a dressmaker against a married lady who was living apart and received an allowance from her husband. "There would be extreme injustice," the Court is there reported to have said, "in

making a charge upon the allowance in the absence of the husband. The action must be amended by bringing in the husband."]

The *ratio decidendi* of the cases in which it has been held necessary to join the husband has been the inability of a married woman to contract—*Manby v. Scott* (7), and *Bacon's Abridgement*, title *Baron and Feme, L*, where it is said, "For if she alone were sued, it might be a means of making the husband's property liable without giving him an opportunity of defending himself." The joinder of the husband, which was for conformity, as shewn in *Bell v. Commissary Hyde and uxor* (8) is now no longer necessary. [He also referred to *Marshall v. Rutton* (9) and *Vansittart v. Vansittart* (10).] It is admitted that such an action as the present could not have been brought before 1870, but since 33 & 34 Vict. c. 93, and the Judicature Acts, a married woman may be sued without her husband in order to charge her separate estate. (Judicature Act, 1873, section 24, sub-sections 1 and 7, and Order IX. rule 3; Order XVI. rule 13.)

Pyke, for the defendant, was directed to confine his arguments to the construction of the Married Women's Property Act, 1870.—The only sections of that Act which allude to a married woman being sued are sections 12, 13 and 14, and those are cases which are not applicable to the present case, being cases in which the wife is sued either for a debt contracted by her before marriage, or where she is sued by the poor-law authorities for the maintenance of her husband or children. These being expressly provided for by the Act, rather shew that she cannot be sued in any other case on the principle that *expressio unius est exclusio alterius*. If the Legislature had intended that she should be sued as well as sue in respect of her separate property, it would have stated it in so many words, and the absence in section 11 of words to that effect is a strong ground for believing

(7) 2 Smith's Leading Cases, 7th ed. 429.

(8) Precedents in Chancery, 328.

(9) 8 Term Rep. 545.

(10) 4 Kay & J. 62; s. c. 27 Law J. Rep. Chanc. 222.

(6) 2 Bos. & P. 99.

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that the Legislature did not intend that she should be sued as a *feme sole*. If a married woman could be sued without her husband she would be put to a great disadvantage, as she could only then defend by leave of the Court or a Judge, and that, too, on giving security for costs—Order XVI. rule 8, where the words are not “sue or be sued,” but “sue or defend.” Then Order IX. rule 3, to which reference has been made by the counsel for the plaintiffs, refers to service only and to actions in which the husband and wife are joined as defendants. In the recent case of *Atwood v. Chichester* (11) the Court of Appeal set aside a judgment which had been entered by default against a married woman with a separate estate in an action brought against her on her cheque which her husband had induced her to sign. The judgment was set aside on the merits, but in the course of his judgment Cotton, L.J., after stating that the plaintiff had brought his action against the wife as *feme sole* on the cheque, said, “this he ought not to have done, and even if he endeavoured to obtain a judgment against her separate estate he ought to have joined the husband, for in equity the wife cannot be sued without joining the husband, in order that the settled property may be attached.” [He also referred to *Duckett v. Gover* (12).]

W. P. Beale cited *In re The Leeds Banking Company, Matthewman's Case* (13).

LINDLEY, J.—The question raised in this case, though a small one, is an important one. The action is by certain creditors against a married woman, and it appears that the married woman has property derived from earnings under an engagement as an actress and public singer, which is property separate from her husband within the meaning of the Married Women's Property Act, 1870, and the claim in the action is not against her personally, but is for a declaration

that her said separate property may be made chargeable with the payment of the debt due to the plaintiffs. The objection to the action is that the husband is not made a party thereto. It is said on behalf of the plaintiffs that the husband has no interest in the property sought to be charged, and that the plaintiffs have been unable to discover the husband's address. The point which I have to determine is whether this action can be maintained against the married woman without joining the husband, and I have come to the conclusion that it cannot. Apart from the question whether there is any power to maintain such an action, since the Married Women's Property Act, 1870, it is clear that no suit in equity could have been brought against a married woman without joining her husband as defendant. The general rule as to this is undisputed, and is to be found in 1 *Daniel's Chancery Practice*, p. 162, and if the present action had been a suit in Chancery before 1870 there is no doubt that the plaintiffs could not in point of form have succeeded. Now the first and important question is whether, on the true construction of the Married Women's Property Act, 1870, the property which is the separate property of the married woman under that Act is property in respect of which she can sue and be sued as if she were unmarried? By the 11th section of that Act it is such in respect of which she clearly can sue as if she were unmarried, but that section does not say that she can be sued as such, and I do not see that the first section can be construed in the way I have been asked to construe it by the counsel for the plaintiffs, namely, so as to treat the property which by that section is to be deemed settled to her separate use as property belonging to her in all respects as if she were an unmarried woman. I cannot think that it was a mere accident that different phrases are used in section 1 and section 11, nor can I hold that the Legislature, in section 1, has used language which is equivalent to saying that the property shall be deemed to be the property of the married woman as if she were unmarried. Then, starting from that point, I come to the conclusion that

(11) *Ante*, 300.

(12) 46 Law J. Rep. Chanc. 407; s. c. Law Rep. 6 Chanc. Div. 82.

(13) 36 Law J. Rep. Chanc. 90; s. c. Law Rep. 3 Eq. 781.

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the property from the separate earnings of the married woman is to be treated as if it had been settled to her separate use, and like other property which has been so settled. Then the Act does not say that the married woman is to be sued as a *feme sole* in respect of that property. This is an omission in the Act, and it is not for me to say whether such omission was intended or not. The result, therefore, is that the Act has not altered the law as to her being sued in respect of her separate property.

Then is there anything in the Judicature Act as to this? I think that there is nothing in that Act which alters the law on this point. I am unable to find either in the Married Women's Property Act, 1870, or in the Judicature Act, any warrant for departing from the established practice, and therefore I must allow this demurrer. The plaintiffs to have liberty to amend, but the costs to be the defendant's costs in any event.

Demurrer allowed accordingly.

Solicitors—W. Pilcher, for plaintiffs; Lumley & Lumley, for defendant.

[IN THE EXCHEQUER DIVISION.]

1878. Jan. 29. Feb. 4.	{	THE GUARDIANS OF THE POOR OF WESTBURY-ON-SEVERN UNION (<i>appellants</i>) v. THE OVER- SEERS OF THE POOR OF THE PARISH OF BARROW-IN-FUR- NESS (<i>respondents</i>).
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Poor Law—Derivative Settlement—Parentage—39 & 40 Vict. c. 61. s. 35—Retro-spective Operation of that Section.

[For the report of the above case, see 47 Law J. Rep. M.C. 79.]

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1878. } GRANT v. HOLLAND; *in re*
March 21. } NORTON.*

Practice—Order changing Solicitor—Solicitor's Costs—Conflict between Rules of Equity and Rules of Common Law—Judicature Act, 1873 (36 & 37 Vict. c. 66. s. 25, sub-sec. 11, and s. 87).

An order for changing a solicitor in an action is not to be conditional on payment of the costs of the original solicitor, unless under exceptional circumstances, as the rule in Equity before the Judicature Act, 1873, did not require such payment as a condition precedent to the change, and now, in accordance with section 25, sub-section 11 of the Judicature Act, 1873, the rule in Equity must prevail.

Appeal from a decision of Field, J., in chambers. A summons had been taken out by the plaintiff, calling upon his solicitor, Mr. Norton, to shew cause why a new solicitor in this action should not be appointed in his stead. The Master made the order in the usual form, conditional on payment of costs to Mr. Norton. A summons was then taken out to vary the order of the Master. This summons was heard in chambers before Field, J., who ordered that the condition requiring payment of costs to Mr. Norton should be struck out of the order. This was not the first occasion on which the question had come before Field, J., in chambers, and he had satisfied himself on enquiry that the uniform practice in Chancery was not to require such payment of costs. Mr. Norton thereupon brought the present appeal.

The Solicitor-General (Brooks Little with him), for the appellant (Mr. Norton), moved that the order of Field, J., should be set aside, and the order of the Master restored.—There are no affidavits in this case, and no special facts to bring before the notice of the Court. The simple question is, what is to be the ordinary rule in the future in cases of this sort? At Common Law the solicitor in an action could not be

* *Coram* Huddleston, B.; and Lindley, J.

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changed without obtaining the permission of a Court or a Judge, and this permission was not granted except conditionally on payment of costs to the original solicitor—*Chitty's Archbold*, 12th ed. p. 92-95, and *Lush's Practice*, 3rd ed. p. 253. The case of *Witt v. Ames* (1) is an express decision of the Court of Queen's Bench to this effect. [*Macpherson v. Robinson* (2) and *Twort v. Dayrell* (3) were also quoted.] This was the invariable practice at Common Law, and it has not been altered by the passing of the Judicature Act. The practice in Chancery has not been the same, perhaps because the solicitor retains his lien upon a fund which may be in Court—*Daniell's Chancery Practice*, 5th ed. p. 379, Forms 1982-3; *Seton on Decrees*, 4th ed. pp. 637-641. The Consolidated Order, III. 3 (*Morgan*, 5th ed. p. 437) is altogether silent on this point. But even supposing that the invariable practice in Chancery was that a solicitor could be changed without an order for payment of costs, such practice would not be a "rule of Equity" within section 25, sub-section 11 of the Judicature Act, 1873. That sub-section applies to the principles of jurisprudence as administered in a Court of Equity, and not to the practice and procedure of the Court, or to the form of an order. Again, it is a privilege of the solicitor not to be changed without having his costs paid; and section 87 of the Judicature Act, 1873, expressly enacts that "solicitors . . . shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed."

J. C. Mathew, for the plaintiff.—At Common Law the order changing a solicitor is in the nature of a rule *nisi*. It is only made after notice to the original solicitor to shew cause; and the Court is in the habit of imposing whatever conditions it may deem necessary, when the order is made. Of these the condition to pay costs is usually one. In Chancery, on the other hand, the order is made *ex parte*, with no notice to the other side.

The order, however, does not interfere with the rights of the solicitor. He retains his lien upon the papers, and he can apply to the Court if there are any special circumstances in the case. There being, therefore, a conflict between the rules of Equity and the rules of Common Law, Equity must prevail. In *Bustros v. White* (4) it was decided by the Court of Appeal that the practice of the Court of Chancery in regard to discovery of documents must prevail. [He was then stopped by the Court.]

The Solicitor-General, in reply.

HUDDLESTON, B.—I am of opinion that this appeal must be dismissed, and the order of my brother Field affirmed. For the proper determination of the case it is necessary to distinguish three separate questions. First, what is the invariable practice at Common Law in reference to ordering payment of costs on the change of an attorney? Secondly, what is the invariable practice in Chancery? Thirdly, what is the effect of the Judicature Acts? Now with regard to the first question, the text books do not afford any satisfactory solution. In *Chitty's Archbold*, 12th ed. p. 93, it is said that "the order is usually drawn up on payment of the attorney's bill in the action, to be taxed by the Master." But *Macpherson v. Robinson* (2), the case cited in support of this proposition, has unfortunately no bearing upon the matter. Similarly in *Lush's Practice*, 3rd ed. p. 253, it is laid down that "in general, an attorney is entitled to be paid his costs before he can be removed," but no decision is quoted on that particular point. However, *Witt v. Ames* (1) is now a distinct authority that "it is the invariable practice not to permit the attorney to be changed unless his costs are paid." [This case is cited in *Lush's Practice*, l.c.] The next matter is to discover the Chancery practice in such a case. Here again the text books do not help us. The Consolidated Orders are silent on the point. *Seton on Decrees*, a work of great authority, is also silent. I infer from this

(1) 11 W.R. 751.

(2) 1 Dougl. 217.

(3) 13 Ves. 195.

(4) 45 Law J. Rep. Q.B. 642; s. c. Law Rep. 1Q.B. Div. 423.

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silence of the text books that it has not been usual in Chancery to order payment of costs on change of a solicitor. But the case does not stop here. We have been informed that my brother Field had a similar case previously before him in chambers, that he instituted enquiries, and that he satisfied himself before he made the present order, that the rule in Chancery is not to direct the payment of costs. There is, therefore, a direct conflict between the rule of Equity and the rule of Common Law in this respect; and it remains to answer the third question, What is the effect of the Judicature Acts? Now the whole tendency of the Judicature Acts is to assimilate the practice in all Divisions of the High Court of Justice. Wherever any difference is found between the practice of the Common Law Courts and the practice of the Equity Courts, then the Common Law Courts are to give way. Section 25 of the Act of 1873 begins by picking out certain important principles in which the rules of Equity are for the future to prevail, such as the administration of assets of insolvent estates, the doctrines of equitable waste, merger and assignment of *choses in action*—and then says, “generally in all cases not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail.” The invariable practice of the Court of Chancery in not ordering costs to be paid on change of a solicitor may be looked upon as a rule of Equity which ought to prevail over the different practice at Common Law. To this the Solicitor-General objects that the solicitor will be deprived of one of his privileges expressly reserved to him by section 87 of the same Act. But in my opinion that section merely applies to such privileges of a solicitor as he enjoys over the ordinary layman. These may be found in any text book, and include the freedom from serving certain offices, the right to sue in their own Courts, &c. The order of my brother Field must be upheld.

LINDLEY, J.—I am of the same opinion. I am influenced partly by my own recol-

lection of the practice at Equity, confirmed by the silence of *Seton on Decrees* with reference to this point, and also by the result of my brother Field's enquiries. If nothing, therefore, is said in the Chancery forms about the payment of costs as a condition precedent to the change of a solicitor, the present case reduces itself to the construction of the Judicature Act. The entire tendency of that Act is to establish a uniform system in the administration of justice. If there were any doubt, the spirit of that Act should be taken into consideration. But in the case of *Bustros v. White* (4) the Court of Appeal decided that the rules of Equity should prevail in a matter very similar to the present. I am also of opinion that the 87th section of the Judicature Act, 1873, has no application. That section refers only to the privileges which solicitors enjoy as a body, and this is not such a privilege. In future, the form of order in all Divisions of the High Court should be the Chancery form, unless any exceptional circumstances happen to present themselves.

Appeal dismissed with costs.

Solicitors—The appellant in person; Harrison, Beal & Harrison, for respondent.

IN THE QUEEN'S BENCH DIVISION.]

1878. }
Feb. 21. } STALLARD AND SONS (*appellants*)
May 15. } *v. MARKS* (*respondent*).

Wine and Spirit Merchant — Retailing Spirits without Excise License—Traveller — Orders Taken at one Place and Executed at another—Statutes 6 Geo. 4. c. 81. ss. 2, 10, 26, and 30. & 31 Vict. c. 90. s. 17.

[For the report of the above case, see 47 Law J. Rep. M.C. 91.]

[IN THE QUEEN'S BENCH DIVISION.]
 1878. } NUTTER v. THE ACCRINGTON
 May 24. } LOCAL BOARD OF HEALTH.

Highway—Damage occasioned by raising Road—Power of Local Board to undertake Repair of Part of Turnpike Road—Local Government Act, 1858 (21 & 22 Viet. c. 98), s. 41—Public Health Act, 1848 (11 & 12 Viet. c. 63), ss. 2, 68 & 144.

A local board having been constituted in a district through which a turnpike road and footpath passed, an agreement was entered into between the Board and the Turnpike Trustees that the former should take upon themselves the repair of the footpath within their district, and afterwards a further agreement was entered into by which the trustees undertook to raise a certain part of the carriage way and the Board the corresponding part of the footpath. The necessary result of raising the footpath was to occasion damage to the plaintiff's house, who thereupon claimed to be entitled to compensation from the Board under section 144 of the Public Health Act, 1848.

That Act, which by section 68 vests other highways in Local Boards, and authorises them to "alter such highways as and when occasion may require," and by section 144 directs that they "shall make compensation to all persons sustaining any damage by reason of the exercise of any of the powers of the Act," excludes, by section 2, turnpike roads from their jurisdiction. The Local Government Act, 1858, however, authorises a "local board" by agreement with the trustees of any turnpike road to take upon themselves the maintenance, repair, cleansing or watering of any such road or of any part of such road.

By the Public Health Act Amendment Act, 15 & 16 Viet. c. 42, it is enacted that highway in the above 68th section of the principal Act shall mean "any highway repairable by the inhabitants."

The question whether the plaintiff was entitled to compensation under section 144 of the Public Health Act, 1848, as a person sustaining damage by the exercise by the Local Board, the defendants, of the powers of the Act, having been raised by special

case setting out the above facts,—Held, that even assuming the agreement between the Local Board and the trustees to be one within section 41 of the Local Government Act, 1858, the rights and liabilities undertaken by the Board could only be commensurate with those of the trustees; and there being no provision in the Turnpike Acts for obtaining compensation in such case from the trustees, the defendants were not liable. But semble that an agreement for a longitudinal division of any part of a road is not authorised by section 41 of the Local Government Act, 1858, which contemplates the transfer of a complete portion of a highway from one jurisdiction to another, not the introduction of a double jurisdiction into the same area. The raising the footpath, therefore, by the defendants not having been authorised by the Acts, could not be the subject of compensation under the Acts, but might render the defendants liable in an action at the suit of any person damaged by it.

This was a Special Case stated for the opinion of the Court under a Judge's order. The writ and pleadings in the action and the Acts of Parliament and documents mentioned in the case were to be taken to form part of the same.

CASE.

1. The plaintiff was in September, 1864, and is now, the owner of a house and land in the town of Accrington, adjacent to a certain road called the Whalley Road.

2. The defendants became in 1857 the Local Board of Health, and are the urban sanitary authority for the town and district of Accrington under the provision of the Public Health Act, 1848, and the other Acts therewith incorporated.

3. The house and land of the plaintiff, and that part of the Whalley Road adjacent thereto, are within the district of the said local board.

4. By Act of Parliament of the 29th year of George 3, a turnpike trust was established, which included the Whalley Road, part of which was within and some part without the district of the Accrington Local Board, and such trust

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expired in 1874, up to which time toll-gates were maintained and tolls taken at various parts of the road.

5. There has always, for fifty years at least, been a footway immediately adjacent to the plaintiff's premises, and previous to the establishment of the local board the turnpike trustees had maintained, and from time to time repaired, the footway, both within and without the local board district, with the exception of the pavement within the local board district. The carriage way adjacent to plaintiff's property had not been paved at the time the footway was raised as hereinafter set forth.

6. After the establishment of a local board and previous to the year 1871 by agreement between the local board and the turnpike trustees the local board sometimes provided curbstones for the footpath of such part of the Whalley Road as was within their district, and the trustees put them in, and the trustees did everything that was done for the maintenance and repair of the carriage way.

7. In the year 1864 the trustees communicated to the defendants their intention of erecting a toll-bar in another turnpike road in the township of Accrington, subject to the same trusts, and afterwards in February, 1865, the defendants in order to induce the trustees not to erect such toll-bar passed the following resolution, which was in due course communicated to the trustees and accepted by them, resolved that the proposal made to a deputation from this board by the trustees of the turnpike road at their meeting of September 15th last to the following effect:—

"That the local board should take upon themselves the future repair of such parts of the turnpike road within their district as are already or may be hereafter pitched with stone, and all such parts of the footpath as are already or may hereafter be flagged at least a yard in width, and that other parts of the road and footpaths shall continue to be repaired by the trust," be accepted by this board.

8. That part of the footpath immediately adjoining the plaintiff's land was

flagged more than a yard in width previous to 1864.

9. Previous to 1871 a further agreement had been entered into between the local board and the trustees, whereby, among other things, the trustees undertook to raise the level of the carriage way at a part of the road immediately opposite the house and land of the plaintiff, and the defendants on their part undertook to raise the footpath to a corresponding height.

10. In or about the month of May, 1871, in execution of the last-mentioned agreement, the trustees raised the level of the carriage way opposite the plaintiff's house and land, and the defendants raised the footpath to a corresponding height.

11. The plaintiff sustained damage within the meaning of section 144 of the Public Health Act, 1848, by the raising of the footway by the defendants, and such damage was the necessary and direct result of the raising of the footpath and not of any negligence of the defendants in the execution of the work.

12. In October, 1874, proceedings against the defendants were commenced by the plaintiff to obtain compensation under the provisions of the Public Health Act, 1848, and after all due preliminaries required by the Act were performed, were carried on *ex parte* by the plaintiff, and on the 19th of January, 1875, an award was published, whereby the defendants were ordered to pay to the plaintiff 112*l.* compensation for the damage she had sustained, and a further sum of 111*l.* 5*s.* 8*d.* taxed costs.

13. The said award was in all respects a good and valid award, provided that the damage sustained by the plaintiff was a proper subject for arbitration and compensation within the meaning of the Public Health Act, 1848, and the other Acts therewith incorporated.

14. Neither of the sums of 112*l.* and 111*l.* 5*s.* 8*d.* have been paid by the defendants to the plaintiff.

15. That part of Whalley Road which is adjacent to plaintiff's house and land was at the time the footpath was raised as herein mentioned and is a street, unless the Court find, first, that it was a

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turnpike road, and second, rule as a matter of law that a turnpike road is excepted from the definition of street within the true intent and meaning of the Public Health Act, 1848, and other Acts incorporated therewith.

The questions for the opinion of the Court are:—

First, Whether the claim of the plaintiff was a claim within the true intent and meaning of the Public Health Act, 1848, and other acts incorporated therewith.

Second, And whether the arbitrator had authority to make such award, and whether the said award is good and binding upon the defendants. The Court to direct for whom judgment is to be entered with the costs of the cause and Special Case, unless upon application made on the hearing for good cause shewn the Court shall otherwise order.

Forbes, for the plaintiff.—The defendants are liable to make compensation here under section 144 of the Public Health Act, 1848, for the damage which has been suffered by the plaintiff has been caused by the exercise of the powers of that Act (1). By section 68 all streets

being highways within a district vest in the local board, and if in the exercise of the powers given by that section they cause damage, then they must compensate under section 144. The interpretation clause in section 2 shews that at first turnpike roads and county bridges were excluded from the jurisdiction of local boards, and a highway in section 68 was limited by section 13 of 15 & 16 Vict. c. 42 (2), to "highways repairable by the inhabitants at large." So that until the passing of the Local Government Act, 1858, the local board could not in any way interfere with this road. But section 41 of that Act (3), enabled a local board by agreement with the trustees of any turnpike road or with the surveyors of any county bridge to take upon themselves the maintenance, repair, &c., of such road or any part thereof; and it was by virtue of this Act that in 1865 the defendants agreed to undertake the maintenance, &c., of this footway. It, therefore, became then, and has since continued to be, repairable by the inhabitants at large, and anything done to it by the defendants became an act done under the Public

(1) Public Health Act, 1848, 11 & 12 Vict. c. 63.

Section 2. "The word street shall apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway, road, bridge, lane, footway, square, court, alley or passage, within the limits of any district."

Section 68. "That all present and future streets being, or which at any time become, highways within any district, and the pavements, stones and other materials thereof, and all buildings, implements and other things provided for the purposes thereof by any surveyor of highways or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the said local board of health. And the said local board shall, from time to time, cause all such streets to be levelled, paved, flagged, channelled, altered and repaired, as and when occasion may require; and they may, from time to time, cause the soil of any such street to be raised, lowered or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers."

Section 144. "That full compensation shall be

made out of the general or special district rates to be levied under this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this Act."

(2) 15 and 16 Vict. c. 42.

Section 13. "That the term highway in the sections of the Public Health Act, 1848, numbered respectively 68 and 69 in the copies of the Act printed by the Queen's printers, shall mean any highway repairable by the inhabitants at large."

(3) Local Government Act, 1858, 21 and 22 Vict. c. 98.

Section 41. "It shall be lawful for any local board by agreement with the trustees of any turnpike road, or with any corporation or person liable to repair any street or road or any part thereof, or with surveyors of any bridge repaired by any county, riding or division, to take upon themselves the maintenance, repair, cleansing or watering of any such street or road or any part thereof, or of any road over any county bridge and the approaches thereto, or of any part of the said roads within their district . . . on such terms as the local board and the trustees or corporation or person or surveyor aforesaid may agree upon between themselves."

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Health Act, 1848, section 68. The question then is, whether raising the footpath was authorised by the powers in section 41 of the Local Government Act, 1858, and it is contended that it was. The section intended to remove the exception as to turnpike roads and county bridges, and, where an agreement was entered into between trustees and the local boards, to make such roads vest in the latter body, just as all highways do under section 68 of the former Act.

[COCKBURN, L.C.J.—Any part of a road would naturally mean part of the whole road for some distance in length, not a longitudinal strip.]

Then an action would not lie here against the Board, as a body—*Mill v. Hawker* (4).

Crompton, for the defendants.—First, an action would lie here if the local board acted without authority. *The Southampton and Itchin Bridge Company v. The Local Board of Southampton* (5). Secondly, section 41 only applies to portions of the whole road; it cannot mean to allow a double jurisdiction over a road. Nor are the terms wide enough to apply to raising a road; they only mean repair and maintenance. Then the powers of section 68 of the Public Health Act, 1848, are not given by section 41, and so no claim to compensation under section 144 can be made. The local board merely acted for the trustees under this agreement, and by the Turnpike Acts no provision is made for compensation being given by anything done by the trustees within their Acts. The local board did not proceed under either Act, and could only be liable to an action.

Forbes, in reply.—The agreement in section 41 means a permanent one; so the footpath became vested in the local board for ever, and with that comes the liability which they have in respect of all highways vested in them.

[COCKBURN, L.C.J.—It is difficult to see that the legislature meant that they were to take on themselves any liability which the trustees had not.]

(4) 44 Law J. Rep. (Ex. Ch.) Exch. 49; s. c. Law Rep. 10 Exch. 92.

(5) 9 E. & B. 801; s. c. 27 Law J. Rep. Q.B. 128.

The plaintiff is entitled to compensation under the 1848 Act because the two Acts are incorporated, and it is just the same as if compensation were mentioned in the Act of 1858.

COCKBURN, L.C.J.—I think that our judgment must be for the defendants, and it is with the greatest regret I say so, because their defence is of the most shabby and dirty character.

I very seriously doubt if section 41 of the Local Government Act, 1848, has any application at all to the case, and without that section it is clear that the trustees of the turnpike road and the Board of Health have no authority to make any such agreement as that by virtue of which they raised this footpath.

The Board of Health have under that section authority to undertake the maintenance and repair of a part of a turnpike road, but I doubt whether the section can mean that they may divide the road longitudinally, and that one strip may be repaired by one authority and one by the other; that one may undertake the carriage road and the other the footway. But without laying that down as the only construction of the section, I decide this case on the other ground that it is not within section 144 of the Public Health Act, 1848. That Act excludes expressly from the management of local boards of health turnpike roads, and with regard to other highways places them under the local board, and makes that body liable to give compensation if damage is done by their proceedings. That provision for compensation has, therefore, reference only to roads that are not turnpike roads. Then by the Local Government Act of 1858 the local board is authorised to enter into an agreement with trustees of a turnpike road to take, maintain and repair parts of such roads.

The rights and liabilities the board so undertake can only be commensurate with those of the persons from whom it takes them. The question, therefore, is, would the trustees have been liable to make compensation in the present instance? There is no provision for it, and the Act certainly gives no summary

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mode of getting compensation by application to justices, the mode that has been here adopted.

If the trustees acted wrongfully, in a manner not authorised by their trust powers, an action might be brought against them no doubt; and so here, if the local board acting under this agreement have done wrong an action might be brought against them as against the trustees. It is not necessary to say here whether an action would lie under the present circumstances, it is enough that there is no power in the Acts to compel the local board to make compensation in the manner proposed.

MELLOR, J.—I am of the same opinion. I take rather a stronger view than my Lord on the first point, because I decidedly think that the trustees and local authorities cannot agree to divide the road into longitudinal sections. Turnpike roads are excluded from the first Act, but I can understand that it might be convenient to allow pieces of the road to be transferred from the one authority to the other, as being in that way more conveniently repaired; but not that the clause permitting this intended to introduce a double jurisdiction into the same area. I agree with the Lord Chief Justice on the other part of the case, that judgment must be for the defendants.

Judgment for defendants.

Solicitors—Ridsdale, Craddock & Ridsdale, agents for W. W. & W. J. Watson, Barnard Castle, for plaintiff; Johnson & Weatherall, agents for Charles Hall & Son, Accrington, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878. } WINGATE, BIRRELL AND COMPANY
May 14. } v. FOSTER.*

Marine Insurance—Policy—Construction—Deviation.

In an action on a policy of insurance on four steam pumps insured for a voyage on a salvage steamer, "at and from A. to the Alexandra steamer ashore near D., whilst

* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

then engaged at the wreck, and until again returned to A," it was proved that during the return voyage the steamer Alexandra was obliged by stress of weather to run to D. for refuge, and was lost with the pumps on board before she could arrive there:—

Held, that there had been a deviation from the risk insured, and that no action would lie on the policy.

This was an action against an underwriter upon a policy of insurance, to recover the value of three steam pumps insured by the plaintiffs, and lost under the following circumstances:—

The *Alexandra* steamer, bound from Cadiz to Dublin and Belfast with a cargo, went ashore at Clogher Head near Drogheda early in the month of January, 1877.

Pumps being required for the purpose of getting the vessel off, the plaintiffs, who are the representatives of the London and Glasgow Steam Pump and Salvage Company, were ordered to send their salvage steamer, *Sea Mew*, with four large pumps and apparatus, to the scene of the wreck.

The *Sea Mew* was accordingly sent, and the plaintiffs, on January 12, effected an insurance on the pumps. The insurance slip was as follows:—"Sea Mew (s.), salvage steamer, Ardrossan to *Alexandra* (s.) ashore Drogheda, whilst employed and back. 4 steam pumps, engines and fittings complete, valued 2,000*l.*" The defendant accepted the risk on behalf of himself and those for whom he was engaged, for 600*l.*

In the policy the risk was described as follows:—"Lost or not lost, at and from Ardrossan to the *Alexandra* steamer ashore in the neighbourhood of Drogheda, and whilst there engaged at the wreck and until again returned to Ardrossan." . . . "The risk beginning from the loading on board the *Sea Mew*, upon the said ship ^{and} wreck, including all risk of craft, and for boats to or from the vessel and whilst at the wreck, each being treated as separately insured."

The *Sea Mew*, with three pumps on board, left Ardrossan on the 11th of January, and arrived at the place where the vessel was stranded on the 12th.

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The pumps were placed on board the *Alexandra*, and she was finally raised and floated by an operation called "platforming" the wreck, on the 29th of January. On that day she commenced the return voyage to Ardrossan, towed by tugs, with the pumps still on board, and the *Sea Mew* towing behind for the purpose of steering. On the return voyage she encountered bad weather, and it was thought best to make for the port of Belfast for safety, and the course of the voyage was changed accordingly. While the expedition was making for Belfast the *Alexandra* foundered in consequence of some accident to the platform, and was totally lost with the pumps. This action was now brought upon the policy of insurance above referred to; the claim being resisted on the ground that there had been a deviation from the voyage insured against, and that the policy did not cover the goods while on board the *Alexandra*, nor during the deviation.

The action was tried before Field, J., and a special jury at London, Michaelmas Sittings, 1877. His Lordship gave judgment of nonsuit upon the plaintiffs' opening, on the ground that the facts stated (which were admitted by the defendant) shewed that the loss was not covered by the terms of the policy.

Against this decision the plaintiffs now appealed.

Cohen and J. C. Matthew, for the plaintiffs.—The policy must be reasonably construed. What was insured was the whole salvage risk. The voyage to Belfast was a necessary part of that salvage risk, and therefore must be considered to be covered by the policy—*Rhodocanachi v. Elliott* (1).

Butt and MacLeod, for the defendant.—In *Rhodocanachi v. Elliott* (1), the goods were insured "to England," and the terms of the policy shewed that the risk of the land transit must be included. In *Pearson v. The London Assurance Company* (2) the liberty to go to a dry dock

necessarily covered liberty to take the usual course to get there passing into the river. But it was held not to cover the risk attaching to the ship whilst in the river for any other purpose. Blackburn, J., in the Exchequer Chamber, 42 Law J. Rep. C.P. 164; s. c. Law Rep. 8 C.P. 548 (at p. 551), says, "If the parties wished to cover the risk while she was so moored, they ought to have provided for it by appropriate words in the policy." That is the defendant's argument here. See also in the same case Lord Cairns' judgment in the House of Lords, 45 Law J. Rep. C.P. 761; s. c. Law Rep. 1 App. Cas. 498.

J. C. Matthew, in reply.—*Pearson v. The London Assurance Company* (2) is distinguishable. The vessel was in the river for a purpose merely collateral to the risk—(See the judgment of Lord Penzance in the House of Lords). But here what is insured is the salvage risk taken as a whole, including, if necessary, the taking of the vessel to a place of safety. If an end is insured, the means to that end are covered by the insurance. Lord Mansfield, in *Stevenson v. Snow* (3), says, "These contracts are to be taken with great latitude; the letter of the contract is not so much to be regarded as the object and intention of it."

BRETT, L.J.—I must confess if I had had to try this case myself I should hardly have had the courage to do what my brother Field did. I should have left the main question to the jury, and then reserved the point for further consideration. My brother Field had a clearer vision, and I am of opinion he was right; and I think that no question could have been put to the jury the answer to which could have brought the loss within the terms of the policy. In order to shew what was not within those terms, I think it best to state what I think does come within them. Any loss at any part of the voyage described (for I consider this a voyage policy) would be covered by the policy, whether it occurred on the steamer or on the wreck. Now the first part of the description of the voyage cannot possibly

(1) 42 Law J. Rep. C.P. 247 (Ex. Ch.) 43 Law J. Rep. C.P. 255; s. c. Law Rep. 8 C.P. 649 (Ex. Ch.) Law Rep. 9 C.P. 518.

(2) 15 Com. B. Rep. N.S. 304; s. c. 33 Law J. Rep. C.P. 35.

(3) 3 Burr. at p. 1240.

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apply to the wreck. So far as the construction of the words go, a loss on the wreck would be covered, but it could not be so intended for it would be impossible. The beginning of the description of the voyage is "at and from Ardrossan to the *Alexandra*." Then it goes on to describe something which, though not actually a part of the voyage, must be taken as part of the voyage insured. The period of time during which the steamer is at the wreck is part of the voyage insured, just as in the case of *Rhodocanachi v. Elliott* (1), the journey through France was part of the voyage insured.

Therefore the policy would have covered, under that second part, the pumps while engaged at the wreck, whether they were on the steamer or on the wreck or in boats going from the steamer to the wreck, or from the wreck to the steamer at that place. But that part of the insurance is confined to the place where the wreck was, and is not applicable to any loss at any other place. To say that it is confined to loss upon the wreck before the wreck is afloat, and that the risk is to cease as soon as the wreck is afloat, while it is still at that place, I do not think is a conceivable interpretation, but I think it extends to any loss on the wreck at that place, but to no loss on the wreck beyond that.

At first I had some doubts whether, on the proof of certain facts and usages, it might not turn out that the words "and until returned to Ardrossan" might cover the circumstances of the present case.

It may be that the words would cover the pumps if taken back to Ardrossan, either on the wreck or on the steamer. I think it would be so for they are insured on the steamer and on the wreck; and the insurance is for a particular voyage, not for carriage on a particular vessel. If the words had been "from Ardrossan to the *Alexandra* and back," I should have had no doubt. The words are somewhat larger and suggested a doubt whether a period of time was not referred to rather than a particular track. But they certainly might be used to cover only the voyage back from the place of the wreck to Ardrossan. What is involved if we hold that this voyage was

covered by the policy? We must say that the policy covers another voyage besides the one described. What voyage? Such a decision would be open to the remark that the policy is made to cover a voyage of an undescribed extent, and in an undescribed direction. If it included a voyage to Belfast, it would equally include a voyage to Glasgow, or any other voyage reasonably connected with the subject-matter of the adventure. Are we to construe the policy, so as to add the risk of such a voyage? It seems to me that we cannot. In *Rhodocanachi v. Elliott* (1), as there was only one way of getting from the port of shipment to London, that was considered as really and truly a voyage from that place to London; and it was held that the policy could not be meant to apply to a voyage round by sea, but was only describing the voyage actually taken. In *Pearson's Case* (2) there was a term in the policy giving liberty to go to a dry dock, and that was held to include also liberty to go back again. It was a description of a track, and was held to include every usual mode of accomplishing the voyage. But something which is not part of the voyage, even if usual and necessary, cannot be covered by the policy. Though in construing what is in the policy one may prove what is the usual way of doing what is described, one may not add anything which is not in the description.

Therefore, even if it were shewn to be usual for pumps to be carried on board the wreck to a port of refuge, in cases of salvage, or if it were proved that it was absolutely necessary for the purpose of completing the operation, assuming that the defendants proved everything they could hope to prove, it would be a part of the operation which must be performed in a place not described in the track laid down by the policy. The evidence would not be given to determine how the acts described were to be done, but to add something of which there was no description; and although we might have acted on evidence shewing how the act described was usually done, here, inasmuch as the loss happened in a locality of which there is no description in the policy, we cannot hold that that locality

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is a place in which the loss is covered by the policy. We are therefore called upon to do that which we cannot do, and the judgment of my brother Field was right. As to the power of the Court to send the case back for a new trial, it is unnecessary to decide that question.

COTTON, L.J.—This appeal has been presented to us in two ways—first, it is said that on the facts judgment should have been entered for the plaintiffs, and secondly, that there ought to be a new trial, on the ground that all the necessary facts were not before the Court.

The real question is what liability has the defendant undertaken? That is to say, what is the construction of this document? Though it is a question of construction, it is necessary to have all the circumstances before us, not for the purpose of adding anything to the contract, but for the purpose of construing it by properly applying it to the facts of the case. In commercial documents this is especially necessary, for they may have some special meaning, and the Court must hear what is the usual course of dealing in carrying them out.

First, then, what is the construction of the document? Can the plaintiff say that this risk was covered? No reliance can be placed on the words "salvage steamer." It was merely a steam lighter, intended to carry the pumps, and not engaged for towing. Then we find there are two classes of risk referred to—first, the voyage from Ardrossan to the wreck and back, and then the risk while there engaged. That refers to operations at and on board the wreck, as is shewn by the words, "upon the said steamer ^{and} wreck." But we should be doing violence to the words if we held that they included a voyage on board the wreck. The words, "whilst there engaged at the wreck," must be limited to the actual place where the vessel was lying. Then we have the words, "until again returned to Ardrossan." If the plaintiffs can make out that the risk in question was covered, it must be under those words. But that would, in my opinion, be a wrong construction. It is argued

that there is nothing in the contract against it. But it is for the plaintiff to shew that the words actually include the risk.

The voyage to Drogheda being covered, these words clearly cover the voyage back to Ardrossan. But the voyage on which the loss occurred was not undertaken for the purpose of carrying the pumps back to Ardrossan, but for the purpose of taking the *Alexandra* to a port of safety. It is very like the case in the House of Lords. They had abandoned for the time the return to Ardrossan, and had undertaken another voyage.

That being the state of the case on the facts before us, are we to send the case back for a new trial? I should be very unwilling to do so in a case where both parties elected to deal with the case as a matter of construction without going into further evidence. I do not say that the Court ought not, in some circumstances, to do so; but they ought to be unwilling to do so. But it is not necessary here to say whether the Court ought, as a matter of discretion, to do so; for, in my opinion, the plaintiffs have not shewn that they could have proved any facts which would induce the Court to come to a different conclusion. Where something is covered by words as to which there is a contest, there facts may be material to explain what it is that the words are intended to cover. If a certain end is insured, the means to that end are covered by the insurance. If it covers a voyage into a dry dock we must see what is the usual course of transit into the dock. So again, as in the case of *Rhodocanachi v. Elliott* (1), where the words only cover a sea risk, but the voyage insured is from India to London by a ship which can only make the voyage part of the way, so that part of the transit must be over land, it is quite right to shew by parol that the transit being from Bombay to London, the voyage insured is a well-known method of carriage undertaken in that particular way. Here nothing of that sort is suggested. No new facts would alter the case, and I am of opinion that the decision of the learned Judge was right.

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THE SIGER, L.J.—This case comes before us on appeal upon the facts stated in the plaintiff's opening, which for the purpose of our ruling were treated and admitted as proved.

There are two questions to be decided, first, what is the reasonable inference from the facts as to the intention of the parties, apart from the policy; secondly, what is the true construction of the policy, with reference to the facts so stated and admitted? I agree that we must not scan too nicely words used in opening a case; but construing them in the most liberal manner, they amount only to this:—A steamer was ashore near Drogheda, and arrangements were made for pumps to be sent to the wreck for the purpose of raising her. To raise the wreck it is not an uncommon thing to platform it; on the other hand the pumps might have been used and the vessel raised without doing so. Again, it might well be imagined that, sometimes, after the vessel is raised, it may be proper to keep the pumps on board the wreck till she has been brought to a port of refuge. On the other hand, it is a common thing for a wreck to be raised by means of the pumps, and when it has been raised that other appliances should be used to stop the leak, and then there would be no further use for the pumps on board, and they might be sent back. It is impossible, on the facts stated (and I cannot gather that they could be in any material degree altered by evidence), to say that it was actually contemplated that the pumps should be used on the wreck, and afterwards in taking her to a port of refuge. That being so, the question arises whether, on the true construction of the policy, the underwriters have contracted, not only for the insurance of the pumps while used where the vessel was stranded and for the return voyage, but for any voyage that might be undertaken for the purpose of bringing the *Alexandra* to a port of refuge. I think we should be doing violence to the language used if we were to give it such an interpretation. The words of the policy to my mind are plain. The terminus of the voyage is distinctly mentioned, that is, the locality at which the

vessel was ashore. Then it describes the risk further, "whilst there engaged at the wreck." No doubt if the words stopped there, they would not cover the risk anywhere but on the steamer. But, in the later part of the description, we find the words "on the wreck." Therefore the policy does contemplate the use of the pumps, not only on board the *Sea Mew*, but also on the wreck, so far as the work is done where the vessel was stranded. This is clear from the words, "all risk of craft and for boats to and from the vessel, and whilst at the wreck," pointing strongly to the use of the pumps on the stranded vessel only where the wreck is situate. Then there are the words, "and until returned to Ardrossan." What is the meaning of that? It must mean returned from some place. But there is no place which could be intended, unless we take into consideration the words before, and hold that the return must be from the terminus of the voyage out. Stopping there, it would be impossible to hold that the parties contemplated not only to and from the wreck, and the use of the pumps at the wreck, but also any other voyage which the vessel might take for the purpose of the salvage, even though it might be entirely out of the intended course.

Of the two cases which have been cited, neither assists the plaintiffs; and one is very strongly opposed to their contention. I mean the case of *Pearson v. The London Assurance Company* (2). It might have been reasonably argued in that case that what was done was in the contemplation of the parties. It was proved that what was done was usual and proper under the circumstances. Then the policy covered loss by fire of the property described, "lying in the Victoria Docks, London, with liberty to go into dry dock."

The Court held that from the two localities mentioned in the policy a third locality might, by implication, be held to be covered, namely, the locality of the vessel in the river; for they held that the insurance covered the risk during the voyage to and from the dry dock. Then it was proved that it was necessary to remove the paddle-wheels, and that it

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was usual and proper to allow them to be put on in the river. But what says the Court? Blackburn, J., in the Exchequer Chamber, says, that if the parties had wished to provide for the special risk they should have provided for it by appropriate words in the policy; and the Lord Chancellor, in the House of Lords, says, "I agree with what was said by Blackburn, J., in the Exchequer Chamber, that if the parties wished to cover the risk while the ship was so moored, they should have provided for it by appropriate words in the policy. Whether the underwriters would have undertaken the risk, it is impossible to say, as they were not aware that it would arise, there was of course no provision applicable to it." And his Lordship goes on to say that "it would be a strong implication to raise against the underwriters, that they necessarily contracted by the policy to extend the locality to which the insurance against fire was expressly confined, upon the ground of a usual practice of dealing with large steam vessels under repair, which they did not know would have been resorted to on the part of the assured."

Those expressions seem to me entirely applicable here, and if any case could govern another, in which the words of the policy were not identical, that case would govern this.

Rhodocanachi v. Elliott (1) has been distinguished. That was an insurance of silk from Shanghai to London. Several parts of the transit are mentioned in the policy. The goods are insured "at and from Japan ^{and} Shanghai to Marseilles, ^{and} or Leghorn, ^{and} or London, *via* Marseilles . . . per overland or by Suez Canal." Evidence was given shewing that the words, "*via* Marseilles," implied a land journey. So also did the words "by *Messagerie Imperiale*," for the only course of transit by that service was that the goods should be sent through France overland. That evidence did not shew merely what the parties contemplated, but what was intended and imported by the words used.

I think, therefore, that the decision of the learned Judge in the present case was right. I do not see any question

that could have been left to the jury, and I do not see how a new trial could bring to light any new facts which could alter our decision.

Judgment affirmed.

Solicitors—Hollams, Son & Coward, for plaintiffs;
Waltons, Bubb & Walton, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878.

May 22. }

SCHUSTER v. FLETCHER.

Ship and Shipping—General Average—Remuneration to Shipowner for identifying and arranging Sale of wrecked Cargo—Commission.

A shipowner, who upon the stranding of his ship incurs trouble in arranging for the salvage, forwarding, and identification of the cargo, and in the distribution of the proceeds of the sale of the unidentified portions of the cargo among the consignees, is not entitled to claim as general average, under an average agreement between himself and the consignees, remuneration for such services, nor to be paid a commission on the sale of the cargo or on his disbursements.

This was an action by one of the shippers of cargo against the shipowner to recover his proportion of a sum charged against him in the statement of a general average adjustment.

The action was really brought to test the validity of one particular charge, and by order of a Judge the following report was made by a special referee appointed under section 56 of the Judicature Act, 1873:—

2. The plaintiffs are merchants in London. The defendant is the sole owner of the ship *Victoria Nyanza*.

3. In December, 1873, the plaintiffs shipped on board the *Victoria Nyanza* at Calcutta for delivery at London under bills of lading 135 chests of indigo, and the ship sailed for London having on board a valuable cargo of indigo, tea, jute and linseed, the indigo being the most valuable portion.

4. On the 4th of April, 1874, the *Victoria Nyanza* while prosecuting her voy-

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age to London stranded at Etaples near Boulogne.

5. The defendant was at once informed by telegraph of the disaster, and he forthwith communicated by telegraph with Messrs. G. H. Fletcher & Co., of Liverpool, a firm of which he had formerly been but was not then a member.

6. G. H. Fletcher & Co. at once communicated to the Liverpool Salvage Association, and obtained from that association the services of Captain Chisholm and Captain St. Croix, two gentlemen of experience in salvage operations, who on the 5th of April started for Etaples.

7. G. H. Fletcher & Co. also on the 6th of April sent out their own manager, Mr. Bromehead, to the same place, and the defendant sent him a power of attorney to act for him, and opened a credit of 5,000*l.* in his favour at Boulogne to provide for expenses there. The defendant also procured the necessary pumps, tackle and other appliances to be sent out from England for the purpose of salvage operations.

8. Under the directions of Mr. Bromehead, with the assistance of Captains Chisholm and St. Croix, a part of the cargo was taken out of the ship as she lay stranded (an operation of considerable difficulty) and sent on to Boulogne. On the 25th of April the ship was got off and towed into Boulogne harbour, whence she ultimately sailed to Liverpool.

9. The whole of the cargo was saved and transhipped at Boulogne, and brought forward by the defendant to London and the freight earned.

10. The first portion of the cargo reached London about ten days after the stranding, and the whole by the middle of May.

11. On the 25th of April, 1874, an average agreement, a copy of which is annexed hereto, was entered into between the defendant and the several consignees of cargo. The several consignees in accordance with that agreement paid sums of money to the defendant, the plaintiffs paying 1,212*l.*

12. The cargo as it arrived was landed and warehoused at the London Docks.

13. Some portions of the cargo proved difficult of identification by reason of the

shipping marks having become obliterated. Other parts it was impossible to identify. All the goods which were identified were given up to the consignees under the terms of the average agreement. The goods which were not identified were sold by the defendant, by arrangement with the consignees thereof, through a broker who received his brokerages.

14. The defendant incurred considerable trouble in chartering ships to carry on the cargo from Boulogne to London, and in sending out lighters and necessary appliances to Boulogne, and in the identification of so much of the cargo as was identified, and in the endeavour to identify the residue, and in ascertaining and answering the enquiries of and arranging with the consignees, and in preparing for the sale of and selling the unidentified cargo and distributing the proceeds.

15. Mr. Elmslie, of the firm of Elmslie & Son, the average staters mentioned in the average agreement hereinbefore mentioned, prepared an average statement dated the 16th of November, 1875, a copy of which statement is annexed hereto.

16. In that statement all disbursements by the defendant are included and duly distributed among the several interests, including charges for the services of Captains Chisholm and St. Croix, and of the Liverpool Salvage Association and of Mr. Bromehead, and the accounts paid to the dock company.

17. The statement also includes (on page 58) a charge as follows:—"G. H. Fletcher & Co., agency, arranging for salvage operations, receiving cargo, meeting and arranging with consignees, receiving and paying proceeds, and generally conducting the business, 2,500*l.*" This charge the plaintiffs object to, and seek to recover back their proportion thereof.

18. The sum of 2,500*l.* does not represent any sum which the defendant has paid or rendered himself liable to pay to G. H. Fletcher & Co. It was arrived at and distributed in the following manner:—Mr. Elmslie formed the opinion upon all the circumstances of the case that 2,500*l.* was a reasonable remuneration to the defendant as shipowner in respect of his services hereinbefore mentioned, and in

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respect of his advances for disbursements. And he proceeded to distribute that sum as follows:—He took thereout a sum amounting to 2½ per cent. on the proceeds of the unidentified goods sold, and debited this to cargo in the cargo column. He took thereout further a sum amounting to 2½ per cent. upon the total disbursements, and this he debited to the several interests rateably in their respective columns. The balance of the 2,500*l.* he debited to general average in the general average column. The figures shewn on page 58 are the result.

19. The effect is that the sum of 2,500*l.* thus distributed is made up of three heads of charge.

(1) A commission on the sale of unidentified cargo.

(2) A commission on disbursements.

(3) A charge by way of remuneration for trouble in respect of the matters mentioned in paragraph 14.

20. There was no contract on the part of the consignees or any of them to pay the defendant the remuneration claimed, or any part thereof, under any of the heads above-mentioned, unless such a contract is to be found in the average agreement above-mentioned.

21. No custom has been proved entitling a shipowner under such circumstances to any remuneration under any of those heads. But a charge for remuneration by a shipowner in respect of his trouble and labour in such case, has for the last few years been often inserted in average statements and with increasing frequency. The charge has often been allowed, and sometimes resisted by underwriters.

22. Where unidentified goods have to be sold, and the sale is managed, not by the shipowner himself, but by the shipbroker or some third person, a commission to such person (in addition to the selling broker's brokerage) is charged and allowed.

23. Where money for disbursements upon salvage of cargo is provided, not by cargo owner or shipowner, but by some third person, commission upon such disbursements is charged and allowed.

24. Where in case of wreck the shipowner abandons the voyage, and the Salvage Association of London, Liverpool, or

elsewhere, intervenes and saves the cargo, a sum by way of remuneration, under the name of office charges, in addition to disbursements analogous to the third head of charge in the present case, is always charged by and allowed to the association.

25. With reference to the first head of claim. If the defendant is entitled in point of law to charge a commission on the sale of unidentified goods, the commission of 2½ per cent. charged, being an ordinary merchant's commission, is not an unreasonable commission to charge.

26. With reference to the second head of charge, the defendant was never out of pocket throughout the transactions hereinbefore mentioned to any large amount or for any considerable length of time, and unless he be entitled by reason of any general rule to charge a commission on disbursements, there are no special circumstances in the present case making it reasonable to do so in this instance.

27. With reference to the third head of charge, if the defendant is entitled in point of law to remuneration for his trouble in and about the matters hereinbefore mentioned, a sum of 200*l.* is a reasonable remuneration in respect thereof.

The average agreement, after reciting that the shipowner alleged that he had paid and expended, or become liable to pay and expend large sums of money, and had incurred great expenses and made certain sacrifices in and about the saving and preservation of the said ship and cargo, and the forwarding of the same cargo to London, and otherwise in consequence of the said stranding, and that part of such sums of money, expenses and sacrifices would be a charge upon the cargo of the said ship, and that other portion thereof will be a charge on the said ship or on the freight of the said goods, and that other portion thereof will be a charge in the nature of general average on the said ship, her cargo and freight; witnessed, among other things, that "when and so soon as the said sums of money, expenses, sacrifices and damages shall have been duly adjusted, and the respective amounts or proportions due to the said G. H. Fletcher (the shipowner) from or in re-

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spect of the goods so delivered to them respectively, whether for general average or charges or otherwise on account of the said sums of money and expenses expended or incurred by the said G. H. Fletcher as aforesaid, or on account of such sacrifices or damage to the said ship or goods as aforesaid, has been duly ascertained, they (the said consignees) will respectively pay to the said G. H. Fletcher the amount or proportion so due in respect of their said goods."

J. O. Mathew (H. Davidson with him), for the plaintiff.—The charge here which the plaintiff disputes is one for the personal services of the shipowner. But there is no contract or custom under which such a charge can be made, and those described in paragraph 14 cannot be the subject of general average. The owner is clearly bound to bring the goods forward; and the salvage associations sent out the captains and all appliances, and payment for that is allowed.

[COCKBURN, L.C.J.—What is the sacrifice on the owner's part?]

None; all that he did was to order means to be taken to save ship and cargo, and he did it to earn his freight and in pursuance of his contract of affreightment. As to the unidentified goods, the charge for the sorting of the goods by the dock servants is of course and unobjectioned to; but by ordering a broker to sell those that could not be identified, the shipowner gains no right to charge any commission, for he does this, instead of abandoning them, so as to earn his freight, which he then becomes entitled to deduct before dividing the proceeds of the sale rateably among the consignees. The broker is paid, and so would any person not interested in the matter be paid for his services if employed as mentioned in paragraph 22, but the shipowner has done nothing by which a contract that he should be paid is imported.

McLeod, for the defendant.—The shipowner was not bound to do all that he did, and, therefore, having undertaken it for the benefit of the consignees, his remuneration ought to be allowed as general average. He might have availed himself of the provisions of the Merchant Shipping

Act, 1862, s. 68, and deposited the goods in a warehouse with a lien for his freight.

[COCKBURN, L.C.J.—I don't think the statute would apply to such a case as this. It is when the consignee makes default.]

The consignees here would make default because they would be unable to identify their goods. But the shipowner here has taken all this trouble with the knowledge and assent of the consignees. They entered into the agreement for the average adjustment to be made on this basis.

J. C. Mathew, in reply.—The recital in the agreement is that the defendant alleged he had expended money and made sacrifices, and it is in consideration of his having done so that the consignees agree to an average adjustment. But there is nothing to shew that it was intended to enlarge the ordinary meaning of general average, and it is not an agreement to pay exceptional charges.

COCKBURN, L.C.J.—Our judgment in this case must be for the plaintiff. I think the charge is one that cannot be made. It has been put under two heads, the expense of getting the ship's cargo away from the ship, and of bringing the cargo to England. That cannot be made under general average. General average presupposes some sacrifice for the preservation of the general adventure to have been made, and is stated in order that the loss may not fall on the individual making the sacrifice in the first instance, but be borne *pro rata* by all. That, however, is not the case here. The shipowner brings the ship off the shore, and also forwards the cargo that he may earn his freight. If a ship is stranded in a distant country, he either abandons her and the voyage altogether, or gets other ships, if it be possible, to carry the cargo on. Here, as it seems to me, he was only doing that which was for his own benefit, and was in pursuance of his contract with the owners of the goods on board. He was not justified in abandoning the ship and cargo unless it were perfectly hopeless to try and save her; and he is bound to bring the ship and cargo into port if he can do so.

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With regard to the expenses incurred by the shipowner as to the distribution of the goods which had not been identified, that I agree in thinking was also for his own benefit. As to the goods he was bound to deliver them, and if he did not, he would get no freight; and as to distributing this particular portion, he has taken no special trouble about it, merely employing a broker to sell, who is paid his regular commission for his services.

MELLOR, J.—I am entirely of the same opinion on both points. On the latter point it was ingeniously argued that where a party stands by and sees the shipowner doing something more than he would do for his own interest, he becomes somehow bound to pay him for what he does. But I think that there is no contract implied or express, and there was no custom to pay this charge.

Judgment for the plaintiff.

Solicitors—Hollams, Son & Coward, for plaintiff;
Waltons, Bubb & Walton, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1878.
Jan. 14, 15, 16. } LOHRE v. AITCHISON
May 18. } AND ANOTHER.*

Marine Insurance—Policy—Partial Loss—Cost of Repairs to Ship—Measure of Damages—Salvage Expenses—Liability of Underwriter.

Plaintiff, who was the owner of a ship, effected a policy for 1,200l. with the defendants on his vessel, valued at 2,600l., against the usual sea risks on an out and home voyage from O. to L. The policy contained the usual suing and labouring clause. During the voyage the ship sustained damage at sea, the cost of which, after the usual deduction of one third new

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

for old, together with certain particular average charges covered by the policy, amounted to the sum of 3,178l. 11s. 7d. The plaintiff had, in addition to this expenditure, to pay 519l. for salvage services and general average expenses. The ship being old, the effect of these repairs was to make her a much stronger and better ship than she was before the damage. In an action on the policy the defendants contended that the loss was to be estimated by the depreciation of the ship as a saleable chattel, and not by the cost of the repairs; and also that in the case of a partial loss the assured could not be liable for more than a total loss with benefit of salvage:—

Held (affirming the decision of the Queen's Bench Division), that the measure of damages when the shipowner elected to repair, was, as in all cases, to be ascertained by the cost of the repairs less the proper deduction of "one third new for old," even though the result might be to make the underwriters liable for more than a total loss with benefit of salvage.

Held also (reversing the decision of the Queen's Bench Division), that, though the damage done was so great as to exhaust the policy, and the assured had refused to abandon, he was entitled to recover, under the suing and labouring clause, a proportion of the salvage expenses beyond the 1,200l.

This was an appeal from a decision of the Queen's Bench Division on a Special Case, reported at 46 Law J. Rep. Q.B. 715, where the Special Case is set out at length.

The Court below decided that the measure of damages where the shipowner elected to repair was to be ascertained by the cost of the repairs, less a proper deduction on account of new timber for old, even though the result might be to make the underwriters liable for more than a total loss with benefit of salvage. They also held that, as the damage done was so great as to exhaust the policy, and the assured had refused to abandon, the latter was not entitled to recover under the suing and labouring clauses a proportion of the salvage expenses beyond the 1,200l.; the salvage expenses not being incurred with any view to the benefit of

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the underwriters nor enuring to their benefit.

Against this decision the plaintiff appealed; and the plaintiff gave notice of a cross appeal against so much of the judgment as debarred the plaintiff from recovering a proportion of salvage and general average expenses beyond the sum of 1,200*l*.

The appeal was heard on the 14th, 15th, and 16th of January.

Benjamin and J. O. Mathew, for the defendants, employed substantially the same arguments as in the Court below. In addition to the authorities there referred to they cited *Benecke's Principles of Marine Insurance*, p. 46, seqq.; *Phillips on Insurance*, ss. 1422, 1428, 1340, 1551; *The North of England Iron Steamship Insurance Company v. Armstrong* (1); *Arnould on Marine Insurance*, 5th ed., p. 947; *Marshall on Marine Insurance*, 5th ed., by Shee, p. 503.

Cohen and Hollams, for the plaintiff, in addition to the authorities referred to in the Court below, cited *Roux v. Salvador* (2), *Irving v. Manning* (3), *Phillips*, ss. 1268, 1742, 1743; *Arnould*, p. 907.

Our. adv. vult.

The following judgment of the Court was, on the 18th of May, delivered by—

BRETT, L.J.—This was a special case. The material facts were, that the action was brought by the plaintiff, the owner of the ship *Alf*, on a voyage policy effected with the defendants for 1,200*l*. on ship valued at 2,600*l*., the policy being in ordinary form, containing a suing and labouring clause. The ship, during the voyage insured, encountered severe weather. According to paragraph 5 of the case, "On the 30th of January, the ship then being in great danger of being completely lost and in a helpless condition, and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her into tow without any

agreement being come to as to remuneration for the service, and took her into Queenstown." For these services the ship's freight and cargo were sued in the Admiralty Court, when salvage was awarded. The ship's proportion of salvage and general average charges was 515*l*. The ship was surveyed, estimates were made, a contract was entered into. The ship was repaired; she was metalled, which she had not been before. The amount expended on the ship, exclusive of metalling, was 4,414*l*. Deducting one third new for old in all matters to which such deduction is properly applicable, this amount was reduced to 3,178*l*. The case then contained the following paragraph 14, from the full force of which we have no power to derogate. We are bound to accept it in its ordinary sense in full as correct. It is as follows:—

"All the works, except the metalling, &c., were undertaken for the purpose of making the ship staunch and strong and seaworthy, which she had ceased to be by reason of the sea damage she had sustained, and they were reasonably necessary for that purpose. The effect of these works was to make the ship a very much stronger and better ship, and of very much greater value than she had been before she sustained damage." The value of the ship after repairs was 7,000*l*. The case then stated the contentions of the parties; but it is unnecessary further to refer to them, as they were not pressed in argument as correct. Before us the substantial contention on behalf of the plaintiff was that he was entitled to be paid, in respect of the loss arising from the expenses of repairs, 1,200*l*., the full amount insured, and besides and beyond that sum, a proportion of the salvage and general average charges of 515*l*., to be recovered by virtue of the suing and labouring clause. It was contended on behalf of the defendants on several grounds that they were only liable to pay in respect of the loss a proportionate part of 1,200*l*., and that they were not liable to pay any part of the 515*l*. under the suing and labouring clauses.

The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in

(1) 39 Law J. Rep. Q.B. 81; s. c. Law Rep. 6 Q.B. 244.

(2) 3 Bing. N.C. 266.

(3) 2 H.L. Cas. 287.

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ordinary form, and of adjusting that amount when ascertained. Several disputes have for a long period been determined according to recognised rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our view of the binding force of those rules, and the reasons why they have binding and exclusive force. They are rules which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or on customs proved before the Courts so clearly or so often as to have been long recognised by the Courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by decisions and customs are part of the contract. And, though a Court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as parts of the contract, or as agreed modes of carrying it out. It was argued on behalf of the defendants that there was in this case an actual total loss with benefit of salvage. The rules for determining whether or not there has been an actual total loss within the meaning of an ordinary policy are well established, and are of the nature of those above described according to recognised rules. All the rules, therefore, proposed by Mr. Benjamin are inadmissible. There cannot be a total loss of a ship when it is safe in the hands of the owner, still bearing the character of a ship, however greatly damaged. There is an actual total loss if by perils insured against, the ship has wholly disappeared, or is so damaged as to have lost the character of a ship, or, though still a ship, has by capture or a justifiable sale, become wholly lost to the owners. But in the present case the ship was saved and restored to her owners as a ship, though greatly damaged; salvage, indeed, has been awarded

to salvors for saving her as a ship, and there has been no sale. Moreover, if there had been a sale it could not have been justified, or this loss made by it a total loss, because the rule as to that is that a sale by the master cannot be justified as against his owners or as against underwriters, nor a sale even by the owners constitute a total loss as against underwriters, if the ship, being disabled, can be repaired, so as to be a sea-going ship, at an expense less than her value when repaired. The contrary is found in this case.

It was further argued that the ship was, if not an actual, at least a constructive total loss. The rule for determining this question is also a settled rule. It would in the circumstances of this case be the same as that just enunciated with regard to a justifiable sale. In this case, therefore, no abandonment could have been supported, even if notice of abandonment had been given. But no such notice was given, and it is impossible to maintain that there was a constructive total loss. There was, therefore, no total, but only an average or partial loss in this case, and that being so, there can be no benefit of salvage. Upon a partial loss no such claim arises. The questions, therefore, on the first part of this case, are reduced to these: what is the proper mode of ascertaining the amount of a partial loss arising in respect of the expense of repairing a damaged wooden ship, and what is the proper mode of adjusting such a loss under a valued policy. Now, as to the first, there is an established mode of estimating the amount. The ship must be repaired, or estimates may be procured for repairing her, so as to make her as nearly as possible equal to what she was before the damage caused to her by the perils insured against, and in either case at such reasonable cost as the shipowner can by reasonable effort procure. The underwriter is responsible for the repair or restoration of the damaged or destroyed part of the ship or article belonging to it with materials, workmanship, style and finish, corresponding to its original character—*Phillips*, s. 1428. It has been found by experience that no carpentering

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can be so skilful as to replace exactly the damage which has occurred. If a ship be from age or construction a weak ship it may, although she was seaworthy at the commencement of the risk, be impossible so to repair her as to make her equal to what she was before, or even a sea-borne ship, without either by the superior strength of material used in the same manner as the old materials, or necessary change of plan of construction, making her a stronger and, therefore, a more valuable ship than she was before. It has further been found by experience that it is almost impossible to ascertain with any exactness the difference between the value of the ship before the damage and the value added to her by repairs. A general usage which the law follows as founded on public convenience has, therefore, applied a certain rule in all cases—*Phillips on Insurance*, s. 1431. This rule is also one of those before described, and, therefore, is the only rule. The rule is that where timbers or other materials are replaced by new (or are treated upon estimate as so replaced) the vessel when repaired (or when treated as repaired) is considered to be better than before; and, accordingly, the assured must himself be at one third part of the expense of the labour and the materials for the repairs, and this deduction is said to be "on account of new for old." When the damage has been repaired the established mode of estimating its amount is, in case of wooden ships, to deduct one third from the whole expenses, both of labour and materials, which the repairs have cost, and to assess the damage at the remaining two-thirds. This is termed "deducting one third new for old, &c." To avoid discussion in each particular case the amount of deduction is fixed at one third—*Arnould on Insurance*, last ed., p. 901. The amount, therefore, of the partial loss, arising in respect of the expense of repairing a damaged wooden ship, is the reasonable cost of so repairing her as to make her as nearly as possible equal to what she was before the damage caused to her by the perils insured against, less one third new for old, that is to say, less one third of the expense of the labour and materials used in making

the repairs; and this mode is equally applicable whether the ship is by the repairs which are necessary to make her equal to what she was before the damage made only a little or very largely of greater value than she was before the damage. The amount of the partial loss caused by the repairs in this case was, therefore, 4,414*l.*, less one third new for old, or, as found in paragraph 16 of the case, 3,178*l.*

The next question is—how is this amount or loss to be adjusted? Here, again, it must be repeated that there is a recognised long-adopted rule, and that it is, therefore, the only one. The relation between the amount of so much of the ascertained loss caused by expenses of repairing as is to be borne by the underwriters and the value of the ship at the commencement of the risk, must first be established. In a valued policy that value of the ship is the valuation in the policy and no other. In an open policy that value must be ascertained by evidence. Then, in order to adjust the loss, the underwriters as a whole are, and each underwriter is, to pay an amount bearing the same relation to the sum insured by them or him as the amount of the ascertained loss bears to the value of the ship at the commencement of the risk. When the amount of the ascertained loss by repairs is less than the value of the ship at the commencement of the risk, or, which is equivalent, to the value of the ship stated in the policy, the relation is expressed in business by a percentage expression, as that the loss is 20 per cent., or 50 per cent., or 90 per cent. Then the underwriter is said to be liable to pay the same percentage of the sum insured. According to the rule, therefore, if the percentage of the loss to the original value of the ship is 99 per cent. then the underwriter must pay 99 per cent. of the sum insured. This, by the argument adduced to us, was admitted, but it was urged that the rule cannot be applied, because it is wholly unjust to apply it, if the relation of the amount of the loss to the original value of the ship is 100 per cent. or greater than 100 per cent.; and in order to re-

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place the rejected rule many new ones were suggested. But if the rule were the only rule, the only logical conclusion would be that if the first relation is 100 per cent. or more than 100 per cent. so must the second relation be, and the underwriter must pay accordingly 100 per cent. or more than 100 per cent. of the sum insured. There is, however, another, and, to a certain extent, a controlling rule. The liability of insurers on a single loss is without question limited to the amount insured (and the expenses of suing, &c.), and the payment of the whole amount for a single loss discharges them from further liability—*Phillips on Insurance*, s. 1742. Where the relation of the ascertained loss to the value of the ship at the commencement of the risk or to the value stated in the policy is greater than 100 per cent. the underwriter, who by the rule for adjustment would have to pay more than 100 per cent., is by the rule of limitation of liability absolved from paying more than 100 per cent. But there is nothing to prevent this liability to the extent of 100 per cent. The defendants, therefore, here were bound to pay in respect of the loss arising from the ascertained expense of repairs, 1,200*l.*, the whole sum insured, although the loss was, according to the phraseology of insurance law, only a partial as distinguished from a total loss under the policy. The next question is, whether the defendants are not bound also to pay a further and additional sum in respect of an alleged obligation to do so by reason of the suing and labouring clause. That depends, considering the subject generally, upon the construction of the suing and labouring clause; and in the application of the clause to a particular case, upon whether the occasion upon which the alleged expenses were incurred was such as is within the clause, and whether the expenses were of such a character as are within the clause. Now the general construction of the clause has been held to be, and we think is, that if by perils insured against, the subject matter of insurance is brought into such danger that without unusual or extraordinary labour or expense a loss will very probably fall on the underwriters,

and if the insured or his agents or servants exert unusual or extraordinary labour, or if the insured is made liable to unusual or extraordinary expense in or for efforts to avert a loss, which, if it occurs, will fall on the underwriters, then such underwriter will, whether in the result there is a total or a partial loss or no loss at all, not as part of the sum insured, but as a contribution independent of, and even in addition to, the whole sum insured, pay a sum bearing the same proportion to the cost or expense incurred as the sum they would have had to pay if the probable loss had occurred, or the loss which, because the efforts have failed, has occurred, bears to the sum insured. "There is a question," says Willes, J., in *Kidston v. The Empire Marine Insurance Association* (4), whether the clause ought to be limited in construction to a case where the assured abandons or may perchance abandon, so that the expense incurred is not only in respect of a subject matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes or may become theirs, or whether it extends to every case in which the subject of insurance is exposed to loss or damage, for the consequences of which the underwriters would be liable, and in warding off which labour is expended. The question manifestly depends upon the construction of the clause, and quite apart from the proved usage we think the latter is the construction." The proof given in that case by underwriters and others was that there has been in the business of marine insurance a well-known and definite meaning affixed by long usage between the assured and the underwriters to the term "particular average" as distinguished from the term "particular charges." "Particular average" denotes actual damage done to or loss of part of the subject matter of insurance, but it does not include any expenses or charges incurred in recovering or preserving the subject matter of insurance. The decision in *Kidston v. The Empire Marine Insurance Association* (4), was that

(4) 35 Law J. Rep. C.P. 250 (at p. 254); s.c. Law Rep. 1 C.P. 8.

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a loss within the clause was not excluded by a clause exempting from average loss: the reason given being that a loss within the clause is different from and is in no case to be considered as part of the loss by reason of actual damages to the subject insured. "By this clause," says Arnold, summing up the authorities, "the insurers undertake an additional liability over and above the insurance properly so called, and quite of a different nature"—*Arnold*, Vol. II. p. 780, last ed. "The assured may recover under a marine policy the value at which the subject is insured, and also for the amount of expenditures in addition to a total loss. This liability is stipulated for by the provision that the assured may labour, travail and sue for the safeguard and recovery of the insured property, to the expenses of which the insurers agree to contribute"—*Phillips on Insurance*, s. 1742. These authorities and the decision in *Kidston v. The Empire Marine Insurance Association* (4), seem to us to shew that the clause in question is a wholly independent contract in the policy from the contract to pay a certain sum in respect of damage done to the subject matter of insurance, and, consequently, that it applies whatever be the amount of such damage; and whether indeed any such damage occurs or not. Nothing is said in any of the authorities, and there is nothing in the wording or nature of the clause to shew that an intention must be present in the mind of those who make the effort to benefit thereby the underwriters. The absence or presence of such an intention cannot diminish or add to the value or effect of the services; such intention therefore is upon reason and authority an immaterial circumstance. The only condition necessary to give a valid claim under it are danger of damage to the subject insured by reason of perils insured against, and unusual or extraordinary efforts made, or expenditure incurred in consequence of such efforts made, to attempt to prevent such damage. Whether the present occasion was one to give rise to a valid claim under the suing and labouring clause depends upon whether there was probable danger of loss to the underwriters. Looking at

paragraph 5 of the case, that cannot be doubted. Whether the expense in respect of which the claim is made is such as is within the suing and labouring clause depends upon whether the liability or obligation to pay for such salvage services as were here rendered is within the clause. Now services which can be rewarded as salvage services can only be such as are rendered when danger exists, and when they are rendered in order to avert danger. They cannot, whilst the master, or others in due charge, are on board, be properly rendered without the consent of the captain or those in charge. The only difference between them and similar services rendered without a claim for salvage is, that they are rendered without an agreement, express or implied, as to the prices at which they are to be paid for. They are rendered upon the terms that they are to be performed without payment if without success, and to be rewarded by a judgment of the Admiralty Court if successful. But the nature and object of them are precisely within the proposition above enunciated. They are unusual and extraordinary efforts made in a time of danger and made in an attempt to avert danger, which, if the subject to which they are rendered is insured, would, if it ensued, cause loss to the underwriters. It is not necessary, as has been observed, that there should be a specific intention to benefit the underwriters. Although salvage services may be rendered without knowledge that the subject saved is insured, they yet are of the same value to the underwriters; they fulfil the conditions just as much as services given on other terms of remuneration. "Salvage," says Arnold, p. 778, last ed., "in so far as it is a claim to which the insurer is liable, designates an expenditure necessarily laid out in preserving the subject of an insurance from a loss for which the insurer would be liable under the policy, and is recoverable from him in virtue of an express clause in the policy, inserted for such a case, and known as the 'sue and labour' clause." With this we agree. Nothing is said about intention. It follows that in this case the defendants were bound to pay in addition to the 1,200*l.* the amount for

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which they were liable in respect of the repairs done to the ship, their proportion of the 515*l.*, the amount of "average charges" incurred on behalf of the ship.

That seems to be, as urged on behalf of the plaintiff, the same proportion of 515*l.* as 1,200*l.* bears to 2,600*l.*, or, twelve twenty-sixths of 515*l.* It follows that the appeal on behalf of the defendants must be dismissed, and the appeal on behalf of the plaintiff must be allowed.

Judgment for the plaintiff.

Solicitors—Hollams, Son & Coward, for plaintiff; Waltons, Bubb & Walton, for defendant.

1878. }
March 23. } HUNT v. THE WIMBLEDON
April 6. } LOCAL BOARD.

Contract—Corporation by Statute for Public Purposes — Public Health Acts, 1848 and 1875 (11 & 12 Vict. c. 63, and 38 & 39 Vict. c. 55)—Corporate Seal necessary.

*By section 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), every contract by the local Board of Health, whereof the value exceeds 10*l.*, and by section 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), every contract by an urban authority, whereof the value exceeds 50*l.*, shall be in writing and sealed with the seal of such board or authority as the case may be.*

The defendants who were a local board within section 85 of the Act of 1848, and an urban authority within the meaning of section 174 of the Act of 1875, were found by a jury to have authorised their surveyor to employ the plaintiff, an architect, to prepare certain plans for offices they intended to erect, but which they did not erect, and to have ratified the act of their surveyor in procuring them, and such offices were found also by the jury to be necessary for the purposes of the defendants, and the plans necessary for the erection of the offices.

The plans were ordered when the Public

*Health Act, 1848, was in force, but were not finished until that Act had been replaced by the Act of 1875. There was no contract under seal with the plaintiff, nor ratification under seal of any contract with him, and the value of the work done exceeded 50*l.*:—*

Held, that as the enactments requiring a seal were compulsory and not merely directory, and had not been complied with, the defendants were not liable to pay for the plans, notwithstanding the findings of the jury.

This was an action by an architect for the value of plans which he had made for new offices which the defendants contemplated erecting in the early part of 1875. The defendants were the local board under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and after the 11th of August, 1875, when the Public Health Act, 1875 (38 & 39 Vict. c. 55), came into operation and repealed the Act of 1848, the defendants were an urban authority under the Act of 1875. It appeared at the trial, which took place before Lindley, J., at Westminster, during the last Hilary Sittings, that the defendants' surveyor directed the plaintiff in May, 1875, to make the plans, and that the plans were seen and approved of by the board, and advertisements for tenders were published, but the amount of the tenders being too high the intention of erecting offices according to such plans was abandoned. There was no resolution of the board authorising the employment of the plaintiff, but the surveyor stated that the board left it to him to employ an architect to prepare the plans, and knew and sanctioned his employing the plaintiff for that purpose.

The amount claimed by the plaintiff exceeding 50*l.*, and there being no contract under the seal of the board, as required by section 85 of the Public Health Act, 1848, which was in force when the plans were ordered, or as required by section 174 of the Public Health Act, 1875, which was the governing Act when the plans were finished, it was urged on the part of the defendants that the plaintiff could not recover.

The jury found that the board autho-

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raised their surveyor to employ the plaintiff to prepare the plans, and that the board ratified the act of their surveyor in procuring such plans. They also found that new offices were necessary for the board, and that the plaintiff's plans were necessary for the erection of the offices for which they were designed, and they assessed the damages to which the plaintiff was entitled (if he were entitled to recover any from the defendants) at 94*l*.

Judgment was reserved until after argument on further consideration (1).

Patchett (on March 23) moved for judgment for the plaintiff.

Marriott and *Paterson* shewed cause, and contended that the claim being for money due under a contract by a local board under the Public Health Act, 1848 (11 & 12 Vict. c. 63), or under a contract by an urban authority, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the defendants were not liable as the contract was not under the corporate seal of the defendants, as required by section 85 of the first Act, and section 174 (2) of the last Act, which

(1) The statement of defence alleged, *inter alia*, that the contract (if any) was made under the Public Health Act, 1848, and that none of the regulations stated in that Act with respect to contracts made by a local board, under that Act, had been observed. At the trial it was agreed that the plaintiff's particulars of demand, and the statement of defence should be amended, if necessary, so as to apply to an employment of the plaintiff, and contract with him in September, 1875, and to a defence that such contract was under the Public Health Act, 1875, and that the regulations of that Act as to contracts by an urban authority under that Act had not been observed.

(2) The following are the enactments referred to, viz., 11 & 12 Vict. c. 63. s. 85, "And be it enacted that the local Board of Health may enter into all such contracts as may be necessary for carrying this Act into execution; and every such contract, whereof the value or amount shall exceed ten pounds, shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board, by whom the same is entered into and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal, and shall specify the work, materials, matters or things to be furnished, had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall fix and specify some pecuniary penalty to be paid in case the terms of the

sections for this purpose were substantially the same. They contended that

contract are not duly performed; and every contract so entered into and duly executed by the other parties thereto shall be binding on the local board, by whom the same is executed and their successors, and upon all parties thereto, and their executors, administrators, successors or assigns to all intents and purposes. Provided always, that the said local board may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty be mentioned in any such contract, or in any bond or otherwise for such sums of money or other recompense as to such local board may seem proper. Provided also, that before contracting for the execution of any works, under the provisions of this Act, the said local board shall obtain from the surveyor an estimate in writing as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same, also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise. Provided also, that before any contract of the value or amount of 100*l*. or upwards is entered into by the said local board, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same, and the said local board shall require and take sufficient security for the due performance of the same."

38 & 39 Vict. c. 55. s. 173, "Any local authority may enter into any contracts necessary for carrying the Act into execution."

Section 174, "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely—

"1. Every contract made by an urban authority, whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority.

"2. Every such contract shall specify the work, materials, matters or things to be furnished, had or done, the price to be paid and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.

"3. Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing as well of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same, also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work or for executing and also maintaining the same in repair during a term of years or otherwise.

"4. Before any contract of the value or amount

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the funds came from the ratepayers, and that the defendants could only contract so as to bind such funds in the way required by these enactments, which were compulsory and not merely directory—*Frend v. Dennett* (3). They also argued that the power to contract which had been given by the statute to the board, could not be delegated, and that the surveyor, therefore, could have no authority from the defendants to contract for them with the plaintiff.

Patchett and *E. Clarke*, *contra*, contended that the contract in the present action was not a contract to which either section 85 of the Public Health Act, 1848, or section 174 of the Public Health Act, 1875, applied, and further that these enactments were merely directory, and at all events as the contract was not executory but the work had been done and the benefit under it had been received by the defendants, they were liable to the plaintiff for the value of such work. [The following cases were referred to—*Cook v. Ward* (4), *The South of Ireland Colliery Company v. Waddle* (5), *In re The County Palatine Loan and Discount*

of one hundred pounds or upwards is entered into by an urban authority, ten days' public notice at least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same, and such authority shall require and take sufficient security for the due performance of the same.

"5. Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed, and their successors, and on all other parties thereto, and their executors, administrators, successors or assigns, to all intents and purposes. Provided that an urban authority may compound with any contractor or other person in respect of any penalty incurred by reason of non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such authority may seem proper."

(3) 4 Com. B. Rep. N.S. 576; s. c. 27 Law J. Rep. C.P. 314, and, in Equity, 6 Law Times, N.S. 73.

(4) 46 Law J. Rep. C.P. 554; s. c. Law Rep. 2 C.P. Div. 255.

(5) 37 Law J. Rep. C.P. 211, and on appeal 38 Law J. Rep. C.P. 338; s. c. Law Rep. 3 C.P. 463, and on appeal Law Rep. 4 C.P. 617.

Company, Cartmell's Case (6), *The Ashbury Railway Carriage and Iron Company v. Riche* (7), *In re The Leeds Banking Company, Howard's Case* (8), *Sanders v. The St. Neot's Union* (9), *Clarke v. The Cuckfield Union* (10), *Orook v. The Corporation of Seaford* (11), *Nowell v. The Mayor of Worcester* (12), *Reuter v. The Electric Telegraph Company* (13), *Pearce v. Morrice* (14) and *Nicholson v. The Bradford Union* (15).]

Our. adv. vult.

The following judgment was given, on April 6, by

LINDLEY, J.—This is an action brought to recover compensation for certain plans made by the plaintiff for offices contemplated by the defendants, but never in fact erected.

The plans were made by the directions of the defendants' surveyor, and when made they were submitted to the defendants' Board, and were so far approved and adopted that quantities were taken out, and advertisements were issued for tenders for the erection of offices according to the plans. The tenders, however, proving too high they were not accepted, and the offices designed by the plaintiff were not constructed. The plans, therefore, were of no further use to the defendants. Other offices have, however, been constructed for them from other plans.

The jury have found that the defendants' board authorised their surveyor to employ the plaintiff to prepare the plans, and ratified the act of their surveyor in

(6) 43 Law J. Rep. Chanc. 588; s. c. Law Rep. 9 Chanc. 691.

(7) 44 Law J. Rep. Exch. 185; s. c. Law Rep. 7 H.L. Cas. 653.

(8) 36 Law J. Rep. Chanc. 42; s. c. Law Rep. 1 Chanc. 561.

(9) 8 Q.B. Rep. 810; s. c. 15 Law J. Rep. M.C. 104.

(10) 21 Law J. Rep. Q.B. 349.

(11) Law Rep. 6 Chanc. 551.

(12) 9 Exch. Rep. 457; s. c. 23 Law J. Rep. Exch. 139.

(13) 6 E. & B. 341; s. c. 26 Law J. Rep. Q.B. 46.

(14) 2 Ad. & E. 96.

(15) 35 Law J. Rep. Q.B. 176; s. c. Law Rep. 1 Q.B. 620.

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procuring them, and the jury have further found that some new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of the offices for which they were designed, and they have assessed the damages to which the plaintiff is entitled (if he is entitled to any from these defendants) at 94*l*.

Under these circumstances the plaintiff would clearly be entitled to judgment were it not for the circumstance that the defendants are a corporation, and that their power of contracting is regulated by Act of Parliament. The Act which was in force when the plans were ordered was the Public Health Act, 1848. This Act was repealed and replaced by the Public Health Act, 1875, before the plans were finished. But the 85th section of the first Act, although broken into paragraphs and differently printed, was substantially re-enacted by sections 173, 174 of the second Act; and having carefully compared the above sections, I can find no difference, material to the present case, between section 85 of the Act of 1848 and sections 173, 174 of the Act of 1875, except that 50*l*. is substituted for 10*l*. as the limit for contracts, which do not require any particular formalities.

It is admitted that the defendants were a local board within the meaning of section 85 of the Act of 1848, and an urban authority within the meaning of section 174 of the Act of 1875, and it is admitted that there was no contract under seal with the plaintiff, and no ratification under seal of any contract with him. Neither was there any resolution expressly authorising the preparations of the plans, or expressly referring to and ratifying their preparation for the board. The question I have to determine is whether, under the above circumstances, and having regard to the above enactments, the defendants are liable to pay for the plans in question.

Now, in the first place, it is to be observed that the defendants are not a trading or commercial corporation having gain for its object; they are created for the purposes mentioned in the Public

Health Acts, and they are, in fact, the representatives of and trustees for the inhabitants of Wimbledon for such purposes. I cannot, therefore, regard as applicable to this case those numerous decisions which shew that incorporated companies having gain for their object, are liable in respect of contracts not under seal, provided they are necessary for and incidental to the purposes for which they are created. Such cases, for example, as *The South of Ireland Colliery Company v. Waddle* (5) and *Reuter v. The Electric Telegraph Company* (13) do not, in my opinion, govern this case. Neither can I treat the defendants as a corporation to which no Act of Parliament is specially applicable. It is not necessary in order to decide this case to try to reconcile the conflicting decisions upon the general question, whether a corporation not governed by any special Act of Parliament is liable on unsealed contracts of which it has had the benefit, where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed, under circumstances, which, under the equitable doctrine of part performance applicable to the contract, will I apprehend bind such a corporation—*Crook v. The Corporation of Seaford* (11); but, in other cases, it is extremely doubtful whether the mere fact that the contract, not otherwise binding on the corporation, has been wholly or partly performed, renders the corporation liable to be sued, either on the contract or on the *quantum meruit*. *Nicholson v. The Bradfield Union* (15), *Clarke v. The Cuckfield Union* (10), and *Haigh v. The North Frierley Union* (16), are the leading authorities in favour of the corporation being liable; and *Waghorn's Case* (17), before Mr. Justice

(16) E. B. & E. 873; s. c. 28 Law J. Rep. Q.B. 62.

(17) The case of *Waghorn v. The Wimbledon Local Board* has not been reported. It was brought by a quantity surveyor, who had been employed by the defendants as architect to take out the quantities of plans for buildings connected with a cemetery belonging to the defendants as a burial board. As such the defendants acted under

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Manisty, may be added to them. On the other hand, *The Mayor of Ludlow v. Charlton* (18), *Lamprell v. The Billericay Union* (19), *Smart v. The West Ham Union* (20) at law, and *Kirk v. The Bromley Union* (21), and *Crompton v. The Varna Railway Company* (22) in equity, are leading authorities to the contrary.

In this case, however, I have to construe and apply a special Act of Parliament, and although some of the provisions of the above-mentioned sections are not, in my opinion, applicable to such a contract as I have here to deal with, the provision requiring a seal where the contract is for more than 10*l.* or 50*l.*, as the case may be, is I think applicable to it, and having regard to the objects and terms of these sections and to the case of *Frend v. Dennett* (3), I am unable to hold that the clause requiring a seal is a merely directory clause.

In *Nowell v. The Mayor of Worcester* (12) other clauses requiring other things to be done by the board were held to be directory, only because the plaintiff could not ascertain whether they were done or not. This reason has no application to the clause requiring contracts to be sealed, and it appears to me that I should be depriving the ratepayers of the protection intended to be afforded them by the statutes with which I have to deal, if I held the defendants liable to pay for

the various Burial Acts (see 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134, &c.), none of which contain any clause relating to contracts by the burial board, similar to section 85 of the Public Health Act, 1845, or section 174 of the Public Health Act, 1875. As a burial board, however, the defendants were incorporated; but the jury having found that the contract was made in fact by their authority, Manisty, J., ruled that the defendants were liable though the contract was not under their corporate seal, and he accordingly entered judgment for the plaintiff.

(18) 6 Mee. & W. 815; s. c. 10 Law J. Rep. Exch. 75.

(19) 3 Exch. Rep. 283; 18 Law J. Rep. Exch. 282.

(20) 10 Exch. Rep. 867, and 11 Exch. Rep. 867; s. c. 24 Law J. Rep. Exch. 201, and 25 Law J. Rep. Exch. 210.

(21) 2 Philli. 640; s. c. 17 Law J. Rep. Chanc. 127.

(22) 41 Law J. Rep. Chanc. 817; s. c. Law Rep. 7 Chanc. App. 562.

work done under a contract required by these Acts to be under seal, and not in that form. The observations of Baron Rolfe, in *The Mayor of Ludlow v. Charlton* (18), are, in my opinion, very pertinent to cases of this description, and thoroughly concurring as I do with those decisions, which have relaxed the old rule as to the necessity for a seal to bind certain classes of corporations, I do not feel myself at liberty to depart from the plain words of the statutes by which this case is governed. Notwithstanding, therefore, the answers given by the jury to the questions put to them, I give judgment for the defendants, with costs.

Judgment for defendants.

Solicitors—W. J. Foster, for plaintiff; W. H. Whitfield, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. May 30. { THE QUEEN, on the prosecution
of JULIAN SMITH, v. THE JUSTICES OF THE CHEERTSLEY
DIVISION OF THE COUNTY OF
SURREY.

Intoxicating Liquors, Sale of—Licensee to Sell Beer, &c., for Consumption off the Premises—Refusal by Justices—Statement of Ground of Refusal—Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 69.

[For the report of the above case, see 47 Law J. Rep. M.C. 104.]

[IN THE HOUSE OF LORDS.]

1878. { CHATTERTON AND ANOTHER
March 7, 28. { (appellants) v. CAVE (re-
spondent).

Dramatic Copyright—Infringement—Materiality of Part Appropriated—3 & 4 Will. 4. c. 16. s. 2—Action referred to Decision of Judge—Explanation by Judge of his Finding.

To support an action for infringement of dramatic copyright under 3 & 4 Will. 4. c. 15. s. 2, it must be proved that the defendant has taken a substantial and material part of the plaintiff's production.

Where by agreement the jury were discharged and the cause submitted to the decision of the Judge,—Held, that on a motion for a new trial or to take a verdict for the plaintiffs, it was competent for the Judge to explain to the Court the reasons and precise meaning of his finding.

This was an appeal from a decision of the Court of Appeal, reported 46 Law J. Rep. C.P. 97; s. c. Law Rep. 2 C.P. Div. 42, affirming the decision of the Court of Common Pleas reported 44 Law J. Rep. C.P. 386; s. c. Law Rep. 10 C.P. 572.

The action was brought by the appellants, under 3 & 4 Will. 4. c. 15, as duly registered assignees from Leopold David Lewis of an English drama entitled "The Wandering Jew," to recover penalties for the alleged infringement by the respondent of their copyright in the play.

At the trial before Lord Coleridge, C.J., at the Middlesex sittings after Trinity Term, 1874, it appeared that there was a dramatised version in French of the well-known French novel, "Le Juif Errant," and that the plaintiffs' drama was a translation of or adaptation from the French drama. The defendant had also brought out an English drama called "The Wandering Jew," the representation of which constituted the alleged infringement of the plaintiffs' copyright.

By agreement between the parties the jury were discharged, and the Lord Chief Justice undertook to read the two English plays and the French original, and to direct how the verdict should be entered, reserving leave to either side to

move for a new trial or a verdict on any point of law which might arise.

The finding of the Lord Chief Justice was as follows:—

"I find in this case that two scenes or points of the drama of the plaintiffs have been taken direct from the drama of which Mr. Lewis is the author and the plaintiffs the assignees, without recourse to either the French drama or the French novel, originals common to the dramas of both plaintiffs and defendant.

"I find this, first, in respect of the final scene of the defendant's drama; and secondly, of the appearance of the 'Wandering Jew,' and the stage business connected with that event, which are to be found in the second scene of the second act of the defendant's drama, and the fourth scene of the first act of the plaintiffs' drama. I find that the drama of the defendant is not, except in these respects, a copy from or a colourable imitation of the drama of the plaintiffs.

"I direct the verdict to be entered for the defendant. I assess the damages at 40s. if upon argument, as provided by the terms agreed to at the trial, the Court should be of opinion that the verdict ought to be entered for the plaintiffs."

The plaintiffs then moved the Court to enter a verdict for the plaintiffs on this finding, on the ground that the Lord Chief Justice, having found that the defendant had in fact taken part of the plaintiffs' play, ought to have directed a verdict for the plaintiffs. At the hearing the Lord Chief Justice explained the grounds on which his direction was founded, and said—"What I meant to convey was that in two points or situations there had been an imitation of the plaintiffs' drama by the defendant. These points so copied were not parts of the dialogue or composition of the plaintiffs' drama, but were in the nature of dramatic situations or scenic effects. It appeared to me that, looking to the general character of the two dramas respectively, the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the the defendant's drama from any portion

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of the plaintiffs." The rule was accordingly discharged.

This decision having been affirmed by the Court of Appeal, the plaintiffs now brought the present appeal to the House of Lords.

Mr. Napier Higgins and Mr. Poulter (Mr. C. N. Watts and Mr. A. B. Terrell with them), for the appellants.—The general rule with regard to dramatic copyright is that neither mere similarity nor the fact that the plays of the plaintiff and defendant are both taken from a common original would justify a jury in finding that part of the plaintiff's play has been taken, but if the jury do so find, then without any question as to the quantum or materiality of the part taken, the penalty of 40s. imposed by 3 & 4 Will. 4. c. 15. s. 2 is incurred—*Planché v. Braham* (1). It is a recognised principle of construction that words not contained in statutes must not unnecessarily be imported into them—*The Ornamental Woodwork Company v. Brown* (2), and that when the same word occurs more than once, different interpretations are not to be put upon that word. The statute forbids the representation of any production "or any part thereof;" and in order to support the respondent's contention it would be necessary to insert the words, "material" or "substantial," which do not occur in the statute. Further, performance of the production at any place of dramatic entertainment in "any part of" the United Kingdom is forbidden; and if the word "material" is inserted in the one case, it must be in the other, and the plaintiff would be obliged to prove the population and importance of the town or village where the alleged infringement of his rights had taken place. The *minimum* penalty imposed by the statute attaches irrespective of the question whether the plaintiff has suffered any actual loss or damage; if, however, any substantial damage can be shewn, then the Court may award to the plaintiff an increased penalty. In *Clementi v. Goulding* (3) it was held that an action

was maintainable under 8 Ann c. 19, for pirating a single sheet of music. See also *D'Almaine v. Boosey* (4), *Leader v. Purday* (5), *Chappell v. Sheard* (6), *Chappell v. Davidson* (7).

The real question is, wholly irrespective either of the amount taken or of the damage inflicted, whether there was an intention on the part of the defendant to appropriate any part of the plaintiffs' play; if so, it is not a right direction to a jury to go further and ask them whether the part taken is, in their opinion, material. In the present case the Lord Chief Justice Coleridge acted in the capacities of both Judge and jury, and gave what certainly was a special verdict, which he afterwards verbally explained. This special verdict consisted of two separate findings—first, that as a matter of fact two points of the plaintiffs' play had been appropriated by the defendant; and, next, as a matter of inference that there had not been a taking of such a material part as the statute must have intended only to forbid. We accept the finding as to the fact, which is in the plaintiffs' favour, but we are at liberty to contest the inference. Neither a jury nor an arbitrator can after verdict or award given be called on to explain their meaning, and it was not competent for the Lord Chief Justice sitting as a jury to give a verbal explanation of his finding—*The Duke of Buccleuch v. The Metropolitan Board of Works* (8).

The right of exclusive representation on the stage must be distinguished from ordinary literary copyright. This distinction has been recognised by the Legislature, the words "or any part thereof" do not occur in any Copyright Acts before 3 & 4 Will. 4. c. 15. The object of a play is to amuse and entertain, whereas the object of a book may be to instruct or convince people by the writer's arguments. A book may be quoted for purposes of criticism or otherwise without any wrong to the author, but a play requires a much more stringent

(4) 1 You. & C. Ex. 288; s. c. 4 Law J. Rep. Exch. Eq. 21.

(5) 7 Com. B. Rep. 4; s. c. 18 Law J. Rep. C.P. 97.

(6) 2 Kay & J. 117.

(7) Ibid. 123.

(8) 41 Law J. Rep. Exch. 137; s. c. Law Rep. 5 E. & L. App. 418.

(1) 4 Bing. N.C. 17; s. c. 7 Law J. Rep. C.P. 25.

(2) 2 Hurl. & C. 63.

(3) 2 Campb. 25; s. c. 11 East 244.

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protection. A play depends for its success not on the mere written words, but on accessories and stage effect. Situations expressed in words, which when read appear trivial, may on the stage be most impressive, e.g. the famous sleep walking scene in *Macbeth*, which consists of about 150 words, and is not material to the development of the plot, and yet is one of the most striking situations in dramatic representation. It would in many cases be impossible for a plaintiff to prove to the Court the materiality of the part taken from his play, and the only safe rule is to forbid the taking of any part irrespective of materiality. To uphold the decision of the Court below would, it is submitted, subject theatrical managers to grave injustice.

Mr. Digby Seymour and Mr Little (Mr. Lumley Smith with them), for the respondent.—The statute 3 & 4 Will. 4. c. 15 was intended to extend to dramatic and musical productions the protection afforded by previous statutes to literature. It must receive, like other statutes, a reasonable construction. "Part" must mean not "particle," but a substantial and material part—*Saunders v. Smith* (9), *Pike v. Nicholas* (10), *Jarrol v. Houlston* (11), *Bradbury v. Hotten* (12).

In the case of *Planché v. Braham* (1) it was left to the jury to say whether or not the liability was incurred by a material appropriation, and they having found that the part appropriated though small was material, the verdict was not disturbed.

In adapting two different versions from a common original, identical variations from the original might be introduced by mere coincidence of ideas. It would be very inconvenient and unjust if the similarity as regards some incidental expression, or piece of stage business or effect of a subsequent adaptation, should be held to be an invasion of a previous copyright.

(9) 3 Myl. & Cr. 711; s. c. 7 Law J. Rep. Chanc. 227.

(10) 39 Law J. Rep. Chanc. 435; s. c. Law Rep. 5 Chanc. 251.

(11) 3 Kay & J. 708.

(12) 42 Law J. Rep. Exch. 28; s. c. Law Rep. 8 Exch. 1.

Lord Coleridge acted both as jury and as Judge. In the former capacity he gave a finding as to facts which was in favour of the respondent. In his capacity of Judge he was fully entitled to explain the finding to the Divisional Court, his position was not analogous to an arbitrator, who having given his award is *functus officio*, but he was in the same position as a Judge who has tried a case with a jury.

Mr. Poulter, in reply.

LORD HATHERLEY.—In this case the appellants were the plaintiffs, and the respondent defendant, in an action brought in the Court of Common Pleas by the plaintiffs, who claimed to be proprietors of a dramatic piece called "The Wandering Jew," and who alleged against the defendant that he had caused to be represented divers parts, scenes, stage-play and dramatic business of such piece at a place of dramatic entertainment without the consent in writing, or at all, of the plaintiffs, contrary to the provisions of the 3 & 4 Will. 4. c. 15. s. 2. The defendant pleaded not guilty, and also that the plaintiffs were not proprietors of the work.

The case came on for trial before Lord Coleridge, when it was agreed "that the jury should be discharged, and that Lord Coleridge should read the original French novel and the French play, and the plaintiffs' and defendant's versions, and should order how the verdict should be entered, having power to hear evidence on such points as he desired." Some points of law had been raised on behalf of the defendant, as to the date and sufficiency of the assignment from Leopold Davis Lewis to the plaintiffs, and it was part of the said agreement "that leave was reserved to either party to move on any point of law that had arisen or might arise."

On the 2nd of September, 1874, the Lord Chief Justice delivered to the solicitors of the parties his finding. [His Lordship read it.]

On the 7th of November, 1874, a rule was granted by the Court of Common Pleas calling on the defendant to shew cause why the verdict should not be set aside and a verdict entered for the plain-

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tiffs, pursuant to leave reserved, or a new trial had between the parties, on the ground of misdirection in this, that the Judge, upon the finding, should have caused the verdict to be entered for the plaintiffs, as representation by the defendant of part of the plaintiffs' play was found. This rule came on to be argued before the Court, consisting of Lord Chief Justice Coleridge, Mr. Justice Brett, Mr. Justice Grove and Mr. Justice Lindley, who unanimously concurred in discharging the rule with costs. At the hearing on this occasion, Lord Chief Justice Coleridge stated verbally that what he meant to convey by his finding was that, looking to the general character of the plaintiffs' and defendant's dramas, the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiffs'.

The plaintiffs appealed from this judgment to the Court of Appeal, and on the 30th of November, 1876, that Court, then consisting of the Lord Chief Justice of England, Lord Justice Mellish, Lord Justice Amphlett and Lord Justice Bramwell, unanimously affirmed the judgment of the Court of Common Pleas, and from this decision the plaintiffs have appealed to your Lordships' House.

Under these circumstances it appears to me that your Lordships must regard as established the facts found by Lord Chief Justice Coleridge under the reference made by the order of the 19th of June, 1874. I take these facts to be—first, that the defendant did take two scenes of his drama, namely, those specified in Lord Coleridge's note, direct from the drama the right of property in which is in the appellants; secondly, that such taking was not a substantial and material taking of any one portion of the plaintiffs' drama.

An attempt has been made to limit this finding to the written note of the Lord Chief Justice. It has been indeed contended that it was not competent to him to explain his written note by word of mouth. It was urged that his position, under the agreement which was come to

between the parties, was similar to that of a jury which has delivered a verdict, or of an arbitrator who has delivered his award. But in the first place it was not incumbent on the Lord Chief Justice to deliver any such written note at all; it would have been sufficient for him to direct judgment to be entered for the defendant, and to state the facts upon which he came to the conclusion, by word of mouth. He was not in the position of a jury who, being discharged, or having retired after verdict, cannot be again summoned together, or of an arbitrator whose authority is at an end when the award is delivered. His note, coupled with the direction which it contains for entering the verdict for the defendant, is not contradicted but explained by his verbal statement, made at the hearing of the argument on the rule *nisi* in the Common Pleas. The finding so explained was adopted by both the Court of Common Pleas and the Court of Appeal, and it appears to me that your Lordships will not feel justified in reviewing that which may be regarded as a verdict on the matter of fact.

The argument, however, before your Lordships has turned mainly on the construction to be put upon the statute of 3 & 4 Will. 4. c. 15 (the Dramatic Copyright Act), which extends the protection given in respect of published works to dramatic performances, not published otherwise than by their representation. It was necessarily admitted by the counsel for the appellants, that, in the case of ordinary copyright of published works, the plaintiff would not succeed in an action for an alleged invasion of his copyright if it were found, as here, that the passages taken were neither a material nor a substantial part of his work; but it was said there was a distinction between the two classes of property protected, a distinction recognised by the Legislature in the framing of the Acts relating to these respective subjects, and it was pointed out that whilst books (including by a definition in the Acts single sheets of original composition) were protected, "parts" of books were not specially referred to, whereas in the Dramatic Copyright Act "parts" of dramatic works are

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specially mentioned in the clause prohibiting their use by others than the proprietor; and again, it was called to our attention that on the plaintiff's establishing his title in any action, and the infringement by the defendant, the Act as to dramatic copyright directs that not less than 40*s.* damages shall be awarded by the jury. It was suggested that these differences indicated an intention to prevent the invasion of dramatic copyright independently of the quantity or materiality of the portion of dialogue or dramatic incident proved to have been copied by the defendant.

Now it appears to me that this argument goes much too far. As was said by the counsel for the respondent, the appellants would wish to read the word "part" in the Dramatic Copyright Act as "particle," so that the crowing of the cock in "Hamlet," or the introduction of a line in the dialogue, might be held to be an invasion of copyright entitling the plaintiff to 40*s.* damages, and consequently, as the law stood I believe at the time of the passing of the statute of 3 & 4 Will. 4, to the costs of his action.

There is indeed one obvious difference between the copyright in books and that in dramatic performances. Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like,—and if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, "a fair use" only be made of the publication, no wrong is done and no action can be brought. It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others or to be used in such a way as a book may be used, but still the principle *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book.

The minimum of damages to be awarded when the fact of damage and the right to damages has been once established, was no doubt fixed because of the difficulty of proving with definiteness what amount of actual damage had been sustained by

perhaps a single performance at a provincial theatre of a work belonging to a plaintiff, whilst at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it.

It was urged that a wholly worthless drama might be unprotected, as every part of what was wholly worthless would be in itself worthless. This is really only a play upon the word "worthless." The drama may be worthless in the judgment of people of any degree of refinement, and yet attractive to others who can afford to pay for the privilege of witnessing its representation, and the fact of any considerable portion being pirated by another author would indicate that some value at least must be attributed to it in this lower sense. In the case before us we have the verdict of the Judge, selected by the parties, on the fact; and the unanimous concurrence of the other Judges before whom the case was brought justifies, I think, that finding; and I think that your Lordships will not be disposed to disturb the finding which has been so come to.

The case of *Planché v. Braham* (1) was very much pressed upon the attention of this House, but, though the portion there taken was minute, it must be remembered that it consisted of songs, the words of which were adopted, without license (in preference to those which had been otherwise published), by a celebrated singer, and probably much of the value of the work might be due to its association with that singer's name. These songs would perhaps be one of the chief points of the drama's success, and therefore if wrongly introduced in the defendant's piece might materially damage the value of the plaintiff's drama.

I think,—regard being had to the whole of this case, to the finding of the Lord Chief Justice that the parts which were so taken were neither substantial nor material parts, and the impossibility of damage being held to have accrued to the plaintiff from such taking, and the concurrence of the other Judges before whom the case was brought,—that this appeal should be dismissed, and dismissed with costs.

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LORD O'HAGAN. — In this case the unanimous judgment of the Court of Appeal, which the appellants ask your Lordships to reverse, affirmed the unanimous judgment of the Court of Common Pleas, in favour of the respondent. I have no doubt that the decision was correct, and that the appeal should be dismissed with costs.

The plaintiffs were possessed of the right of exclusively representing a drama called "*The Wandering Jew*," and they complained that the defendant had represented another piece, with the same title, which appropriated from it certain scenes, in violation of that right. They therefore claimed a penalty under 3 & 4 Will. 4. c. 15.

It appeared at the trial before Lord Coleridge, Lord Chief Justice of the Common Pleas, that "*Le Juif Errant*" of Eugène Sue had been dramatised in French, and afterwards in English, by a writer who had assigned his interest to the plaintiffs; and it was alleged that the defendant had also dramatised it, and had infringed their copyright by the performance of his adaptation, which was partly taken from the drama vested in them.

Upon the imperfect information before us, I am not sure that I should have been prepared entirely to concur with the Lord Chief Justice as to the grounds of the verdict which he entered; but the consent of the parties clothed him with all the functions of a jury, and his finding as to facts appears to me, in the present position of the case, unimpeachable and conclusive. The reference was made to him in the largest terms. He was to read the novel and the plays, and to receive such evidence as he might deem material; and thereupon he was to pronounce a verdict. He has done so. He has found for the defendant, and he has stated the views which appeared to him to warrant his decision.

If the matter had rested there the appellants' contention would have been at least more sustainable, for the written finding does not contain any express averment as to the materiality of the "scenes" or "points" taken from the drama of Mr. Lewis. But when the

plaintiffs, in pursuance of leave reserved at the trial, moved the Court of Common Pleas to have the verdict set aside, and a verdict entered for them, the Lord Chief Justice explained the finding verbally, and more fully informed his learned brethren with reference to it.

Now, before we approach the single legal question in the case, we must dispose of a point which, although the last raised in argument, ought to be first considered, for the purpose of ascertaining the principles on which our decision should be based. The finding declares that the two "scenes" or "points" were taken direct from the drama of Mr. Lewis; but, as I have said, it makes no express averment as to their materiality and importance. The judgment, however, very clearly says that their extent was so slight, and their effect so small, as to render the taking perfectly immaterial. Can we consider both the allegations, or are we bound to have regard to the finding alone? I am clearly of opinion, with the whole Court of Appeal, that both the statements, and not one only, must be taken into account for the purpose of determining as to the correctness of the verdict. And I concur with the statement of Lord Justice Mellish:— "It does not matter whether we take the finding from what the Chief Justice has written or what he has said. It seems to me that on the question of fact the plaintiffs are concluded."

The appellants have argued as if the finding was a judgment, conclusive until reversed or modified; or a special verdict containing an exhaustive statement of all the facts from which a legal inference may be drawn. It is neither the one nor the other. The Lord Chief Justice was not required or authorised by the arrangement at the trial to frame a special verdict or to enter a judgment. He was simply substituted for the discharged jury, and empowered, on such evidence as might have been presented to the jury, to find a verdict. All points of law were reserved, and either party was to have liberty to move the Court, according to circumstances. The Chief Justice had no need to do more than simply to direct the entering of the ver-

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dict, and the preliminary statements of the finding, with which he thought proper to preface it, were not necessarily, and did not purport to be, a representation of all the conclusions of fact on which it was founded.

When the question was raised in the Common Pleas, the learned Judge set out fully the reasons which had dictated his direction; and it seems to me impossible to maintain that he was precluded by the document he had signed from communicating to his colleagues an essential portion of those reasons, or that your Lordships can now be required to put it out of your consideration.

I am not at all prepared to say that if the written finding stood alone it should not, even so, have been affirmed. Although it has not any explicit allegation as to the character of the "scenes" or "points" which it finds to have been taken, the immateriality must, I think, have been implied to make the averment of fact and the conclusion of law reasonable and consistent with each other. The learned Judge appears to have believed that it would be implied accordingly, but his judgment put the matter beyond controversy; and it is unnecessary to consider what might have been our opinion on the finding *per se*, if it had not been supplemented and supported by that unequivocal judgment.

Suppose the case had been tried by a Judge of another Court, under similar circumstances, and he had reported to the Common Pleas, on a new trial motion, the reasons of his finding, they must have been accepted in their integrity and at their true legal value, and your Lordships must have so accepted them; and how is the matter altered because Lord Coleridge is the Chief Justice of the Court, and reports directly to it by word of mouth?

When a jury has formally delivered its verdict and been discharged, or an arbitrator has signed and sealed his award and become *functus officio*, it would be manifestly dangerous, as it is legally impossible, to vary the one or the other by subsequent statements of those who have pronounced them. But the position of the Lord Chief Justice was wholly dif-

ferent in this respect from that of a jury or arbitrator; and his declaration in Court lost nothing of its authority because it had not more distinct expression in his finding.

I repeat, therefore, that in my opinion the case must be decided by reference at once to the finding and the judgment; and, this being so, we have the Lord Chief Justice acting as a jury at the instance of the parties, and ascertaining two things as matters of fact; first, that the "points" were taken from the drama of the plaintiffs; and, secondly, that they were so trifling and immaterial as to render the taking a nullity. The facts being so established, I think that your Lordships will not have much difficulty in disposing of the case.

The plaintiffs contend that, under the 2nd section of the Act, making it penal to represent any protected drama, "or any part thereof," the defendant is liable for copying the scenes or points of the plaintiffs' production, although they were so valueless that, in the words of the Lord Chief Justice, "there was no substantial and material taking of them."

No doubt, any scene, or point, or incident, or line, or word, in a drama, is a part of it; and no doubt it is the duty of a Court of construction to carry out the plain intentions of the Legislature strictly, even though it may not approve of them as sound in principle, or wise in policy, or just in operation. But we should scrutinise carefully the terms of a statute before we lend ourselves to administer it with ill results, and see whether it forces us inevitably to produce them; and we may properly consider how other Acts *in pari materia*, or of a like kind, have been dealt with by Courts of justice, that we may be guided to make our interpretation reasonable and correct. Here the section we are required to interpret provides that a penalty shall be incurred for a proceeding "contrary to the intent of the Act or right of the author;" and, to ascertain the intent to be enforced and the right to be protected, we are at liberty to look at the preamble, which recites the 54 Geo. 3. c. 151, and declares it to be expedient "to extend the provisions of the said Act." And

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the extension is made, not by any enlargement of the effect of those provisions, but by their application to a class of persons and to productions different from those to which they had originally been applied.

It is clear that the Legislature intended to afford the protection already given to copyright in books to the authors and owners of dramatic productions; and it seems quite proper to apply the same principle of construction to statutes which aim at objects substantially the same. And this the more if the application enables us to avoid a plainly absurd or inconvenient conclusion.

I shall not trouble your Lordships by discussing in detail the many authorities which have been cited as to the interpretation to be put upon the Acts which regulate copyright in books. They seem one and all to assume, or to affirm expressly, that to render a writer liable for literary piracy, he must be shewn to have taken a material portion of the publication of another: the question as to its materiality being left to be decided by the consideration of its quantity and value, which must vary indefinitely in various circumstances. As Lord Chancellor Cottenham said in *Bramwell v. Halcomb* (13): "It is useless to refer to any particular cases as to quantity." The quantity taken may be great or small, but if it comprise a material portion of the book, it is taken illegally. The question is as to the substance of the thing, and if there be no abstraction of that which may be substantially appreciated, no penalty is incurred.

In all the cases the matter is dealt with as one of degree. In all, quantity and value are both the subjects of consideration; and in none of them has an infringement been established without satisfactory evidence of an appropriation possibly involving a substantial loss to one person and a substantial gain to another; although, as was observed by Lord Chief Justice Tindal in *Planché v. Braham* (1), "the damage to the plaintiff is not the test of the defendants' lia-

bility," and the penalty is to be paid, "even if there is no actual damage."

It is true, as was pressed upon your Lordships, that the Act of Geo. 3 does not contain the words, "or any part thereof," which are inserted in the statute of Will. 4. But this does not appear to me to create any real distinction between them. Some such words must necessarily be implied in the earlier statute. Otherwise the author of a book could not bring his action unless there had been a piracy of the whole of its contents; and any partial appropriation of them could not authorise the claim for a penalty. No one has suggested a construction so manifestly inconsistent with the clear purpose of the Legislature; and it seems to me that all the authorities as to a partial taking are fairly applicable to the Dramatic Copyright Act; and if so, an infringement of it, to be penal, must be material and of a substantial kind.

I need not add anything to the observations of my noble and learned friend as to the distinction between literary and dramatic copyright.

The question in every case must be a question of fact; and a jury cannot be constrained to find every infinitesimal taking to be the taking of a part of a dramatic production within the purview of the statute. "Part," as was observed, is not necessarily the same as "particle," and there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutable liability. Here we have two findings: one that the scenes were taken, and the other that they were of no substance or effect on the "total composition" of the drama. If the argument of the appellants be maintained, the first finding was in itself conclusive, and upon it a Judge would have been compelled to direct a verdict for the plaintiffs. In that view the second was entirely irrelevant and immaterial. But reason and authority combine to shew its relevancy, and its necessity to the determination of the cause, and, having been made, it seems to me binding on your Lordships. There was certainly evidence to go to a jury, or to a Judge acting as a jury, in support

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of the respondent's views; and I see no ground on which the verdict found on that evidence is impeachable, even though we should doubt its absolute correctness. I do not think, as I have said, that we can now consider whether the "points" were taken from the French drama or from the English. On that matter the learned Lord Chief Justice appears to have differed somewhat from his brethren; but it is enough for us to have had it ascertained that those "points," whencesoever derived, were of such a character as to form no "part" of the drama, the appropriation of which could constitute an offence.

The case of *Planché v. Braham* (1) was pressed upon your Lordships as the chief authority in support of the appellants. I have considered that case, and I think it is an authority the other way. There the defendant used the words of two or three songs of the plaintiff as the vehicle of some airs in an English version of Weber's opera of "Oberon," and the action was brought under the 3 & 4 Will. 4. c. 15. The rest of the version had been written by another person. There was no question as to the appropriation of the songs; and Lord Chief Justice Tindal left it to the jury to say whether there had been a representation of a part of the plaintiff's dramatic production. The jury found, and I think rightly found, that there had been; and gave a verdict for the statutable penalty. Serjeant Wilde moved to set the verdict aside, on the ground that as there had been no representation of a part of the plaintiff's piece—the words of the songs adapted to the music being immaterial to the development of the drama—the defendant was entitled to judgment. But the Court affirmed the verdict, holding that the question before it must "in all cases" be determined by a jury. "It is difficult," said the Chief Justice, "to say what is or is not a representation of a part of a dramatic production . . . and it must be left to a jury to determine the fact." All the Judges concurred in this opinion, and refused to interfere, without regard to the merits of the finding, because the question was within the jury's

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province, and had been properly left to their decision.

The ruling of Lord Coleridge appears to me to be sustained by this case in all its parts. As a Judge he declined to direct the jury in the defendant's favour, merely because there had been a taking of the "points;" and in that refusal the judgment in *Planché v. Braham* (1) expressly approves his course. On the reference to him as a jury, he found the fact that those points did not constitute a part of the drama; and the same judgment declares that such a finding, having been legitimately made by the proper tribunal, ought not to be disturbed.

The judgments of the Court of Appeal and the Court of Common Pleas must, in my opinion, be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN.—I am also of the same opinion. The 3 & 4 Will. 4. c. 15, contains only two sections. The first section enacts that the author of any dramatic piece or his assignee shall have as his own property the sole liberty of representing or causing to be represented any such production at any place of dramatic entertainment in any part of the British dominions, and shall be deemed and taken to be the proprietor thereof. Had the statute stopped there, the proprietor of the dramatic work would have had a right to recover damages against any one who infringed his right of property by representing the production, or so much of the production as to infringe his right of property in it; but there might have been frequently difficulty in getting a jury to find more than nominal damages, and the plaintiff would get no costs. At least those who framed the Act seem to have thought so; for by the 2nd section it is provided that if any one represents any such production, or any part thereof, the damages shall be at least forty shillings, with double costs.

The case was argued at your Lordships' bar, by the counsel for the appellants very much as if these words were equivalent to "represent a drama of which any particle has been taken from the production." But this is not so. There

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may be a representation of part, so as to infringe on the author's right of property, though the person representing it was quite unconscious that he was taking anything from the plaintiffs' drama, and, indeed, was not aware that he had composed one—*Read v. Conquest* (14). On the other hand, an idea may be taken from a drama and used, in forming another without a representation of the second being a representation of any part of the first. For example, I have no doubt that Sheridan, in composing "The Critic," took the idea from "The Rehearsal;" but I think it would be an abuse of language to say that those who represent "The Critic" represent "The Rehearsal," or any part thereof; and if it were left to me to find the fact, I should, without hesitation, find that they did not.

On the other hand, in composing "The Trip to Scarborough," Sheridan took so much from "The Relapse," that if it were left to me to find the fact, I should find that those who represent "The Trip to Scarborough," do represent parts of "The Relapse."

In the present case, however, in which both plaintiffs and defendant avowedly took all their materials from the French drama and novel, it was essential for the plaintiffs to shew that the defendant had not merely taken the materials from the same source as the plaintiffs, but that he had taken a part of the plaintiffs' drama ready made. Still this was not the issue, but whether in representing his drama the defendant represented the plaintiffs' drama or any part thereof. That, according to *Planché v. Braham* (1), is a question of fact, depending, amongst other things, on more or less. Had this case gone to its regular termination, the Lord Chief Justice must have left it to the jury to say whether there had or had not been a representation of part of the plaintiffs' drama. He would have had to give such directions as seemed to him proper to guide the jury in determining that question, and either party might have had those directions reviewed in the Court in banc. It was apparently

(14) 11 Com. B. Rep. N.S. 479; s. c. 31 Law J. Rep. C.P. 153.

felt that (even if the jurors were all able to read French) a satisfactory verdict, depending on the comparison of three plays and a novel, could hardly be expected from twelve jurors, and therefore it was (I think very reasonably) agreed that the Lord Chief Justice should determine how the verdict was to be entered, "either party to have leave to move the Court upon his finding. Plays or novel to be referred to by the Court on the argument. All points of law reserved." Though it is not expressly agreed that the Lord Chief Justice should state to the Court on what principles he comes to his conclusion, it is clearly intended that in some way or other he should do so, for otherwise no point of law could be reserved. The usual way in which a Judge communicates to a Court what he has ruled is by a statement which, if he is a member of the Court, is generally verbal; and, if he is not a member of the Court, is generally in writing; but in either case, if it is not sufficient, the statement is supplemented. A common way in which this is done is, that a member of the Court sees the Judge, getting from him his verbal explanations, and reporting them to his brethren.

In this particular case the Lord Chief Justice in the vacation wrote, and I presume communicated to the parties, a statement which has been called his finding. He there stated that he found that two scenes or points had been taken direct from the plaintiffs' drama, but nevertheless directed the verdict to be entered for the defendant. On this (if unsupplemented) the only point of law that could arise would have been whether two points in the defendant's drama being taken direct from the plaintiffs' drama, it necessarily followed as a matter of law that the representation of the defendant's drama containing those two points was a representation of part of the plaintiffs' drama within the meaning of the statute. I have already expressed my opinion that this did not necessarily so follow. But if no other point was raised for the Court, this would have been a very imperfect fulfilment of the Lord Chief Justice's reservation of all points of law. The Lord Chief Justice very properly (in my

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opinion) reported a farther explanation, which is contained in the report of the case.

The Court of Appeal said that his decision must be taken to be in his finding, as explained by him during the discussion before the Court of Common Pleas. I think this was quite right, and that your Lordships should do so too. And this enables the plaintiffs to raise farther points, and to contend not only that a representation of a drama, two points in which were taken direct from the plaintiffs' drama, was necessarily in point of law a representation of part of the plaintiffs' drama (on which I have already expressed my opinion as being against the plaintiffs), but also that in coming to the conclusion that it was not such a representation, the Lord Chief Justice acted on wrong grounds. If the Lord Chief Justice had left the question to the jury, and told the jurors in his summing-up that it was proper for them to consider exactly the same things which he says were the grounds of his own decision: if he had told them that, in considering the question whether the defendant had represented part of the plaintiffs' drama, they were to consider not only whether the defendant took these two points direct from the plaintiffs' drama, but also the nature of the two points which were not parts of the dialogue or composition of the plaintiffs' drama, but were in the nature of dramatic situations or scenic effects; and that they were also to consider the general character of the two dramas, and the extent to which one was taken from the other, and its effect upon the total composition, and then to say for themselves whether, in representing the defendant's drama, the defendant represented what was a part of the plaintiffs' drama, which was, as *Planché v. Braham* (1) decides, a question, to some extent, of degree; would such a summing-up have been a misdirection? If it would, I am inclined to think that the finding, though by a Judge alone, would have been liable to question in the nature of an application for a new trial; but it is unnecessary to decide that, if, as I think, such a direction would have been unexceptionable.

I do not say that this direction would have been exhaustive. In other cases there may be other considerations proper to be left to a jury; but every one of those above-mentioned was proper in the present case, and I see nothing requisite for the decision of this case which has been omitted.

LOED GORDON concurred.

*Order appealed against affirmed,
and appeal therefrom dismissed
with costs.*

Solicitors—H. W. Chatterton, for appellants;
Lewis & Lewis, for respondent.

[IN THE EXCHEQUER DIVISION AND IN
THE COURT OF APPEAL.]

1877.	} THE ATTORNEY-GENERAL v. LAMPLOUGH.*
June 11, 18.	
1878.	
Jan. 3.	

*Statute—Repeal—Special and General
Words—Effect of Repeal of Special Words
on General Words.*

*In order to ascertain the effect of a re-
pealing statute the repealed words must be
looked at.*

*Where in any statute special words are
followed by general words, any subject-
matter which is aptly described by the
special words, comes within the purview of
the statute by force of the special words,
and not of the general words. If, therefore,
the special words are repealed, the subject-
matter ceases to be within the purview of
the statute, though aptly described by the
general words in the absence of the special
words.*

This was an information for selling a bottle containing a certain preparation to be used and applied as a medicine or medicament for the prevention, cure or relief of disorders and complaints incident to and affecting the human body,

* *Coram* Kelly, C.B.; Uleasby, B.; and Huddleston, B. In the Court of Appeal, *coram* Bramwell L.J.; Brett, L.J.; and Cotton, L.J.

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called "Lamplough's Effervescing Pyretic Saline," wherein the defendant had or claimed to have an occult secret or art for the making and preparing the same, without a paper cover, wrapper or label provided by the Commissioners of Stamps, duly stamped for denoting the duty charged on such bottle.

The second count alleged that the defendant had, or claimed to have, an exclusive right or title to making the said medicine.

The third count alleged that the defendant held out or recommended the medicine as beneficial in certain maladies of the human body.

The defendant pleaded that he was not guilty.

At the trial before Cleasby, B., in the Easter sittings, 1877, it was proved that Lamplough's Effervescing Pyretic Saline was a powder which, when mixed with water, produced a liquid impregnated with carbonic acid gas, and also contained ingredients ordinarily used for medical purposes, that it was advertised as beneficial in the case of numberless disorders, and that it was sold without a stamp affixed to it.

For the Crown it was contended that the saline was taxable under the joint effect of the statutes, 52 Geo. 3. c. 150. s. 2 and 3 & 4 Will. 4. c. 97. s. 20 (1) on the grounds stated in the information.

For the defence it was urged, and this

(1) By the 52 Geo. 3. c. 150. s. 2, any person, whether licensed or not, vending medicine set forth in the schedule annexed to the Act, without paper covers provided by the Commissioners of Stamps, was made liable to a penalty of 10*l*. The schedule mentions (*inter alia*) the following:—

"Waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state to be used for the purpose of compounding or making any of the said waters." And there were general words at the end of the schedule as follows: "And also all other pills, powders, lozenges, tinctures, potions, cordials, electuaries, plaisters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs, and waters, chemical, and official preparations whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure or relief of any disorder or complaint incident to, or in anywise affecting the human body, made, prepared, uttered, vended or exposed for sale, by any person or persons

was practically admitted by the Crown, that the saline was "a composition in a solid state to be used for the purpose of compounding or making water impregnated with carbonic acid gas." It was further argued that in consequence of this, the saline would, but for the repealing statute, have been taxable under that part of the schedule which was now repealed, and not under the general words at the end of the schedule; and therefore by the repeal the saline was exempted.

A verdict was entered for the Crown, leave being reserved to enter it for the defendant if the saline did not fall within the operation of the Acts.

A rule *nisi* having been obtained in the Exchequer Division by the defendant—

The Solicitor-General (Sir H. Giffard) and Dicey shewed cause.—The effect of the repealing statute is simply to strike out the words "waters, &c.," from the schedule. It does not affect the general words at the end of the schedule, and

whatsoever, wherein the person making, preparing, uttering, vending or exposing for sale, the same, hath, or claims to have, any occult secret or art for the making or preparing of the same, or hath or claims to have any exclusive right or title to the making or preparing the same, or which have at any time heretofore been, now are or shall hereafter be prepared, uttered, vended or exposed to sale under the authority of any letters patent under the Great Seal, or which have at any time heretofore been, now are, or shall hereafter be by any public notice or advertisement, or by any written or printed paper, or handbills, or by any label or words written or printed, affixed to, or delivered with any packet, box, bottle, phial or other inclosure containing the same, held out, or recommended to the public by the makers, vendors or proprietors thereof, as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure or relief of any distemper, malady, ailment, disorder or complaint incident to, or in any wise affecting the human body."

By 3 & 4 Will. c. 79. s. 20, it is enacted that—

"From and after the 10th of October, in the year one thousand eight hundred and thirty-three, so much of the said schedule as is contained in the following words:—(that is to say): "Waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state to be used for the purpose of compounding or making any of the said waters, shall be and the same is hereby repealed."

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these general words include "Lamplough's Pyretic Saline."

Herschell and E. Brodie Cooper.—The repealed Act, as it stands, must first be looked at, and then the effect of the repeal considered. The repealed Act imposed a duty on artificial mineral waters, and the object and effect of the repealed Act was to remove the duty from that class of the enumerated articles. The repeal acts upon every part of the schedule necessary for its purpose, and excludes artificial mineral waters, both from the enumerated articles and the general words.

The Solicitor-General in reply.

Cur. adv. vult.

The following judgments were delivered on June 18:—

HUDDESTON, B.—The question in this case is, whether, with reference to 52 Geo. 3. c. 150, and 3 & 4 Will. 4. c. 97. s. 20, the article called Pyretic Saline was liable to duty. The 52 Geo. 3. c. 150 imposed certain duties on articles mentioned in the schedule, which was a list alphabetically arranged, consisting of twelve columns of printed matter, with a general clause at the end embracing a great variety of nostrums and quack medicines; amongst others, "waters," "lozenges," "toothpowders," "plaisters," "pills," "liniments," occur in alphabetical order. At the end after these comes a general clause, including all other pills, powders, &c. We have to consider what was the effect of the repealing statute, and I am of opinion that the words of the schedule of the first statute must be read as if the words "waters," &c., were taken out of the schedule, and the statute must be read in every respect as if those words were not in it. Mr. Herschell argued that, supposing a statute passed in which the Legislature took any specific item, Arquebusade Water for instance, out of the schedule, we ought not to hold that Arquebusade Water would afterwards come within the words "all other pills," &c. My answer is, that if the Legislature intended to repeal the duty on Arquebusade Water, they would have said so in so many words. If they do not

choose to do that, then it must fall within the general rule I have mentioned. My view of the effect of a repealing statute is not without authority. I find in the case of *Kay v. Goodwin* (2) Tindal, C.J., says: "I take the effect of repealing a statute to be to obliterate it as completely from the records of parliament as if it had never existed; it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted and concluded, while it was an existing law." That I apprehend would apply equally to words in a schedule which the Legislature repeals. And there is also an authority in the case of *Surtees v. Ellison* (3), in which Lord Tenterden says: "It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed), as if it had never existed." If, therefore, I look now at the effect of the present revised statute, I take it that these words "waters," and so on, are clearly out of the statute. Then it is quite obvious that Lamplough's Pyretic Saline would come within the general words of the schedule. But that is assuming that Lamplough's Pyretic Saline might have been included in the word "waters"—I am by no means prepared to say that it is, on the contrary, I think that prior to the Statute of 1833, Lamplough's Pyretic Saline would not have come within those words "waters," and if I am right in that view of the case, then clearly it would be taxable. Lamplough's Pyretic Saline is a composition which consists of tartaric acid, bicarbonate of soda, and chlorate of potash in the following proportions: tartaric acid, 45·7; bicarbonate of soda, 52·4; and chlorate of potash, 1·9. The chlorate of potash is a chemical salt, and it is not a constituent of natural mineral salts; it is used as a medicine for fevers, and that gives this article, as it is said, its medicinal character. It produces no part of the effervescence which is produced by the mixture of tartaric acid and bicarbonate of soda evolving carbonic acid gas; but it is clearly to be looked upon in the

(2) 6 Bing. 576.

(3) 9 B. & C. at p. 752.

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nature of medicine, and when I see that it is advertised as efficacious in almost every species of ill that human flesh is heir to, I say it is a medicine made agreeable by the carbonic acid gas evolved by the mixture of acid and alkali; but it is nevertheless a medicine coming within the general words in the schedule, namely, a nostrum or medicine recommended to the public by public notice or advertisement, or by written or printed papers, or handbills, or by any label or words, written or printed, affixed to or delivered with any packet, box, bottle, phial and so on. Upon both these grounds I am of opinion that our judgment should be for the Crown.

CLEASBY, B.—The question is, whether under the Act of Parliament as it now stands, the duty is chargeable.

And taking the Act as it now stands by itself (the part repealed being struck out) and construing the words in the ordinary way, there is no doubt that the duty is chargeable. The enumeration in the body of the schedule has nothing to do with pyretic saline, and the general words of the schedule clearly comprehend it as a chemical preparation, to be taken internally, and recommended for the cure of disease. It is answered that we are not to construe the Act as it stands in the ordinary way, because the effect of doing so would be, that if a specific item, for instance, "Ware's Asthmatic Drop," was repealed, it would be revived by the general word "drops" in the tail of the schedule. But this reasoning is faulty, because it assumes that the Legislature would deal with a specific item in this way by repealing it singly. It may be said they would probably enact that it should be no longer chargeable, or, if they used the language of repeal, they would go on and say that nothing in that concluding part of the schedule should make it chargeable. The particular item and the general one "waters," are two different things. The item waters had been dealt with exceptionally before, and by section 4 of the statute 52 Geo. 3. c. 150, it had been enacted that, as regards waters in the schedule sold to be drunk on the premises, victuallers, confectioners, &c., need

not have a license as they must for other articles mentioned in the schedule, but need only sell in stamped bottles. It is sufficiently clear that these waters drunk on the premises of victuallers, confectioners, &c., would be beverages, and not, properly speaking, medicinal waters, for the cure of particular diseases. In dealing, therefore, afterwards with waters which only required to be impregnated with mineral alkali or carbonic acid gas, and would be such as could be sold by victuallers, &c., the language of absolute repeal, and thus striking out of the statute, would be appropriate, because the word "other" would still appear to retain the same meaning, and include all curative waters recommended as such, as distinguished from waters merely impregnated with mineral alkali or carbonic acid gas, and made taxable merely because they are so. The item waters in the schedule may be read as an enactment that all waters shall be taxable if impregnated with mineral alkali or carbonic acid gas, and afterwards this enactment is repealed and waters are not taxable if or because so impregnated. This mode of reading it removes all difficulty. The effect of repeal by the legislature as blotting out what is repealed as if it never existed (as regards transactions subsequent to the Act) is stated in the strongest manner by Tindal, C.J., *Kay v. Godwin* (2): "I take the effect of repealing a statute to be, to obliterate it as completely from the records of Parliament as if it had never existed, and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law." Lord Tenterden, in *Surtees v. Ellison* (3), says: "It has been long established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule, and we must not destroy that by indulging in conjectures as to the intention of the legislature." In the present case it appears to me that this effect may be given to it, and was intended to be given and ought to be given to it; and that it is not a sufficient reason for not giving it

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in this case, because in a different case which might be put, it would be found necessary to depart from the usual rule. I think judgment should be for the Crown.

KELLY, C.B.—I have the misfortune to differ from my learned brethren in this case. The whole argument for the Crown appears to me to be based upon the confounding of two things essentially different. First, the confounding of an Act of Parliament with a particular clause in the Act of Parliament; and, secondly, the confounding of one particular article or preparation with a class of articles or preparations. The state of the law appears to have been this, down to the 29th of August, 1833,—A duty was imposed upon a great number of medicines and other articles, such as toothpowder and cosmetics, so that we ought not to regard the provisions of this Act of Parliament of 1812, and particularly the general words of the schedule, as referring to medicines only.

The first question which arises is, what is the effect of the two provisions taken together, the first with regard to the particular articles or classes of articles expressly specified to be liable to duty, and then the provision that all other articles are to be liable to duty which shall be by advertisement recommended to the public, and so forth. I cannot entertain a doubt that the articles made taxable by the general words of the schedule are different from the particular articles enumerated and specified in the schedule itself; otherwise I can give no effect whatever to the word "other." But then it is contended that this article is not within the particular clause in the schedule commencing "waters, videlicet." It is said that, although carbonic acid is evolved by the components of this article, it contains chlorate of potash, and so does not come within the definition of a composition used for the purpose of making a water impregnated with soda or with carbonic acid gas. I think, however, that although the water may be impregnated with forty other ingredients in a combined condition, or in a separate and distinct chemical condition, that cannot alter the effect of the words. What

right have I to set aside those words, and treat them as if they were not within the Act of Parliament, because there is something besides carbonic acid gas which gives a different character to the soda and which gives a different character to the carbonic acid gas? Upon that sort of speculation, by superadding words that are not in the Act of Parliament in question, the whole effect of the Act is to be done away with. I, therefore, hold that upon those clear and express words of the Act of Parliament, this being a composition used for making a water impregnated with soda or carbonic acid gas, it was by this Act of Parliament of 1812 one of the enumerated and specified articles made liable to duty, and therefore did not come within the general words. In dealing with the question whether it comes within those general words, I ought to refer to section 4 of the Act of 1812, which provides that confectioners and other dealers in articles of this description, who shall only sell any of the artificial or other waters mentioned in the schedule to be drunk in their own houses or shops, need not take out a license provided the waters so sold are covered with stamped wrappers or labels. That may apply to some of these waters, but it only provides a species of immunity to a certain class of dealers in articles of this description, and would only qualify the enactment to that extent.

Then comes the repealing statute, "waters, namely, all artificial mineral waters, and all waters impregnated with soda or mineral alkali or with carbonic acid gas," and so on. Now what was the effect of the repeal? I assume here that this article was taxable under the words "waters impregnated with soda, or mineral alkali or with carbonic acid gas," because if it were not taxable under those words, I agree that it would be under the general words of the schedule, and that being so, what is the effect of the repeal?

The Crown must contend for this strange conclusion, they must contend for this construction of the Act of Parliament, that when in express terms a particular article is rendered liable to duty it is also under another clause of the same Act of Parliament to be liable to duty. It would

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be the same if it had happened to two or three of the tooth powder articles as to this particular article. Where an Act of Parliament repeals a clause, it is not that the Act of Parliament is repealed which imposes the duty, but the clause of the Act of Parliament imposing the duty is repealed. We have only to substitute the word "clause" for "Act of Parliament," and then the *dicta* in *Surtees v. Ellison* (1) and *Kay v. Godwin* (2) apply, that where an Act of Parliament is repealed, the effect of the repeal is that it is to be taken as if the statute had never been enacted, except as to transactions begun or prosecuted while it was an existing law. Substitute, therefore, the word "clause" for "Act of Parliament," and this clause is to be taken as if it had never existed, and if that be so, it must be taken as if those articles had never been taxed. What effect has that upon another and totally different clause which it is admitted applied before the repealing Act of Parliament to totally different subjects which did not affect the particular preparation in question? No Judge ever laid down as law that where a particular clause in an Act of Parliament is repealed the whole Act must be read as if that clause had never been enacted. All that can be said is that the clause is to be taken as if it never had been enacted, and if this clause had never been enacted then no duty would ever have been imposed upon this article. Where an article has been expressly taxed, where it has been expressly enumerated and specified in the schedule, and where the particular part relating to the particular article has been repealed, I cannot say that the moment the repeal took effect it gave a different meaning to another clause of the Act of Parliament which taxes an additional and totally different description of articles. The repeal of that clause has indeed the effect of treating the clause of the Act of Parliament as if it had never been enacted, but the additional clause still remains what it was (that is to say), it relates to all descriptions of articles which are not enumerated. Taking the articles enumerated and specified which are liable to taxation, the result is that as to one of them the law has been repealed, and the

article is no longer liable to taxation, but with regard to a thousand articles the subject of another clause of the Act of Parliament, that clause remains in force, and it remains in force with the same meaning and the same effect that it had from 1812 when it was enacted. It does not include it now because it did not include it then, and there are no words in the Act of 1833 to make it include the before specified and enumerated articles. The general clause of the Act of Parliament introduced by the words, "and also all other pills, powders, 'waters,'" and so forth, applies to an additional and different class of articles. They were liable to taxation from the year 1812 to the year 1833, and are so at the present day.

On these grounds I think our judgment ought to be against the Crown; but the majority of the Court being of the contrary opinion, the judgment will be in favour of the Crown.

Judgment for the Crown.

The defendant appealed.

Herschell and Ince (Brodie Cooper with them) (on Jan. 23), for the appellant.—The Pyretic Saline is taxable under the specific words of the schedule, and not under the general words at the tail, which only include "all other medicines," &c., i.e. those other than those before specified. It cannot be that the effect of the repealing statute is to wipe out the repealed words so that they cannot be looked at; such effect would in many cases be absurd. Supposing the words "Waller's Ointment" had been specifically repealed, could the ointment be taxed under the words at the end. To take another case. Suppose a tax were imposed on "race horses, cab horses, &c., &c., and all other horses," and a subsequent Act struck out "race horses," could it be argued for a moment that race horses would be taxable under the words "all other horses?" You must look at the repealed words before you can see the effect of the repealing words.

The Solicitor-General and Dacey, contra.—The things enumerated in the specific part are to be taxed under any circumstances, those in the tail of the schedule

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are to be taxed when puffed for their occult qualities, &c.; the effect of the repeal is to make waters which are sold merely as drinks not taxable, but if they are puffed as medicines they fall under the words at the tail and become taxable. The repealed words cannot be looked at, they must be considered as if they had never been in the statute book.

[BRAMWELL, L.J.—Suppose an Act of Parliament enumerates certain offences and says there shall be a fine of 10*l.* for the commission of them, and a second Act is passed which says that the former Act is to be repealed, but that the offences therein enumerated shall be punishable with a fine of 5*l.*, if your construction were right there would be no crimes mentioned as they would have to be struck out of the statute book.]

BRAMWELL, L.J.—On the question of fact as to whether Lamplough's Pyretic Saline is a substance used for the purpose of compounding and making a water impregnated with carbonic acid gas we must, after the evidence that has been given, find that it was such a substance. It therefore falls within those substances specifically enumerated in the schedule to 52 Geo. 3. c. 150. s. 2.

The question of law then arises whether or no the effect of 3 & 4 Will. 4. c. 97. s. 20, which repeals so much of the schedule as is contained in the specific words under which this substance falls, is to cause the Pyretic Saline to fall under and be taxable under the general words of what has been called the tail of the schedule. Now no doubt if the repealed clause had never been in the schedule, the saline would have come within the tail as a preparation recommended to the public by advertisement, but we must consider the matter with reference to the enactment as it was made. The effect of the enactment was to make this substance taxable under the special words and not under the general words; for "compositions to be used for the making of waters impregnated with carbonic acid gas" were to be taxable under any circumstances whether recommended by advertisement or not; it was, therefore, not

taxable by virtue of the tail of the schedule.

Now comes the repealing Act, which says in effect, that so much of the said schedule as is contained in the words "waters, videlicet, all artificial mineral waters, and all waters impregnated with soda, or mineral alkali or with carbonic acid gas, and all compositions in a liquid or solid state to be used for the purpose of compounding or making any of the said waters, *whether the same be sold under letters patent or recommended by public advertisement, &c., or not,*" shall be repealed. Those last words which had to be read in before must still be retained.

The Crown says that, notwithstanding the repeal of those words, all preparations which are aptly described by the tail are taxable; that the effect of the repeal is merely to wipe out the specific part of the schedule from the statute book. It seems to me to be clear to demonstration that that cannot be so. If the construction contended for is right you get this extraordinary consequence—namely, that the Act at one time means one thing and at another time another. It is of course right enough to say that words repealed are to be treated as non-existent with respect to the subject-matter, but that is a very different matter from saying that you are not to see what the words are which have been repealed. The case of the horses put by Mr. Herschell, and that of the penalty I referred to during the course of the argument, put, I think, the matter in a very clear light.

Now let us look at the substance of the matter. When we come to see what was the intention of the Legislature, I cannot have a doubt as to the case. It is clear that the Legislature intended to exempt waters in all cases, even though puffed as having occult properties. Otherwise the Legislature would have said in the repealing statute, "except such as fall under the general words at the close of the schedule."

BRETT, L.J.—There are two questions to be considered here. First, under what part of the schedule to 52 Geo. 3. c. 150. s. 2 would this substance be taxable?

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That is a question of fact. Secondly, what is the effect of the repealing statute 3 & 4 Will. 4. c. 97. s. 20? This latter question is one of law.

Now the schedule is a mere question of drafting, it is quite as much a part of the statute as if it had been incorporated into the clause; and we must also take it that where special words are used followed by general words, that that also is only a matter of drafting, and we must read the statute as if all those substances which come under the special part were inserted instead of the special part, and all substances which do not come under the special part were added to the last to take the place of the general part. If that were done, in what part of the list would this saline come? I am clearly of opinion that it would come under the former part, that which has been repealed.

That being so, what is the effect of the repeal? Here we have to deal with a judgment which says that you must not look at the repealed part at all. I cannot think that such a doctrine is applicable here. The question is, what is the effect of the repealing statute? and you cannot tell without looking at the statute with which the repealing statute deals. I do not say that the repealing statute can never alter the meaning of the unrepealed part of a statute which it partly repeals, for if the former Act says that such and such things shall not be subject to taxation, and the latter repeals the word "not," it is obvious that the effect is to alter the meaning of the rest of the former. But where the repealing statute repeals one of several enactments, it is clear that it cannot thereby alter the meaning of the other enactments. Here it is suggested that the repealing statute alters the effect of an enactment to which it does not refer, namely, the tail of the schedule. That cannot possibly be. The judgment must be reversed.

COTTON, L.J.—I am of the same opinion. As a mere matter of construction I think that the tail of the schedule means to include something additional to what is in the previous part. The words are, "and also all other pills, &c." What can "other" mean except "other than those

previously mentioned?" This saline was previously mentioned under the head of "compositions in a liquid or solid state to be used, &c.," and that head has been expressly repealed.

Judgment reversed.

Solicitors—The Solicitor of the Inland Revenue, for plaintiff; Crouch & Spencer, for defendant.

[IN THE HOUSE OF LORDS.]

1878. } CHALONER (appellant) v.
April 12. } BOLCKOW (respondent).

Mining Lease—Covenant to pay Rent—Deduction for Rates—37 & 38 Vict. c. 54. s. 8.

A mining lease contained a covenant by the lessee to pay rent "free from all deductions whatsoever," and that the lessee "also shall and will pay or cause to be paid all manner of taxes, rates, assessments, charges and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed or imposed upon the said demised mines and premises, the landlord's property tax only excepted," the lessee having been assessed, and having paid the general district rate and poor rate in respect of the demised mines claimed under section 8 of the Rating Act, 1874, to deduct one moiety of the amount so paid from his rent:—Held, that the lessee had not "specifically contracted" to pay the rates in question within the meaning of the 8th section, and was therefore entitled to deduct the amount claimed from the rent.

This was an appeal from a decision of the Court of Appeal, affirming a decision of the Common Pleas Division in favour of the defendant.

The appeal was heard upon the following Special Case:—

1. By indenture dated the 19th day of February, 1855, the late Robert Chaloner

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demised to Henry William Ferdinand Bolckow, the defendant in this action, and John Vaughan, since deceased, divers mines of ironstone and iron ore therein mentioned for the term of seventy years from the 11th day of October, 1853, at certain rents and reservations therein named.

2. The said indenture contains the following clause: "All which said several and respective rents and sums of money hereby reserved and made payable as aforesaid are to be paid free and clear of and from all cesses, taxes, rates, charges and impositions whatsoever laid or imposed, or hereafter to be charged, laid or imposed upon the said demised premises, or any part thereof, either by Act of Parliament or otherwise howsoever, except landlord's property tax."

3. The said lease also contains a covenant by the lessees that they will pay or cause to be paid to the lessor, his heirs or assigns, the said rents, "free from all deductions whatsoever." And "also shall and will pay or cause to be paid all manner of taxes, rates, assessments, charges and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise, be taxed, rated, charged, assessed or imposed upon the said demised mines and premises, the landlord's property tax only excepted."

4. The plaintiff is, and at all times material to this case has been, the assignee of the reversion, and the defendant is the surviving lessee and occupier of the demised premises.

5. On the 11th of April, 1876, a half-year's certain rent, to the amount of 500*l.*, became under the said lease due and payable from the defendant to the plaintiff in respect of the demised premises, subject to the facts hereinafter mentioned.

6. The defendant has paid the sum of 462*l.* 10*s.* to the plaintiff; and it is admitted that the defendant is entitled to deduct the sum of 4*l.* 3*s.* 4*d.* for landlord's property tax; but the defendant claims to deduct the further sum of 33*l.* 6*s.* 8*d.* on the following grounds:—

7. The defendant has been assessed

and rated to, and on the 5th day of February, 1876, paid the current general district rate and poor rate in respect of the said demised mines, amounting to the sum of 66*l.* 13*s.* 4*d.*, which is made up as follows:—

	£	s.	d.
General District Rate . . .	33	6	8
Poor Rate.	33	6	8

Of the sum so paid the defendant claims, under section 8 of "The Rating Act, 1874," to be entitled to deduct a moiety or 33*l.* 6*s.* 8*d.* from his rent. The said sum of 33*l.* 6*s.* 8*d.* does not exceed, in respect of the said general district rate and of the said poor rate, what one-half of the rate in the pound of such poor rate and general district rate would amount to if calculated upon the rent, royalty or dues so payable as aforesaid by the defendant to the plaintiff.

8. The plaintiff disputes the defendant's contention, and claims the balance of rent due under the lease, free from such deduction; and it has been agreed to have the question of the defendant's liability raised in a special case without pleadings.

The question for the opinion of the Court, who are to be at liberty if they think fit to refer this case back to any person they shall name, to find any facts which it may in their opinion be desirable to have added, is—

Whether the defendant is entitled to deduct from the rent due under the said lease the sum of 33*l.* 6*s.* 8*d.* on the ground aforesaid.

The judgment of the Court is to be entered as the Court shall direct.

The Solicitor-General and Mr. A. L. Smith (Mr. C. Russell with them), for the appellant.—The case of *Morgan v. Craushay* (1) decided that under the statute of Elizabeth, 43 Eliz. c. 2, iron mines were not rateable to the relief of the poor. The Rating Act, 1874 (2), was accordingly

(1) 40 Law J. Rep. M.C. 202; s. c. Law Rep. 5 E. & I. App. 304.

(2) By 37 & 38 Vict. c. 54. s. 8, it is enacted that where any poor or local rate which at the commencement of this Act any lessee, licensee or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him

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passed, imposing a liability to rates on mines hitherto unrated, and authorising the lessee, when mines hitherto exempt became rateable during the continuance of his lease, to deduct from his payments of rent one-half of such rate, "unless he has specifically contracted to pay such rate in the event of the abolition of the exemption." The covenants in the present lease amounted to such a specific contract within the meaning of the Rating Act, 1874 (2), to pay these rates. No form of words could have more clearly provided for the payment of future liabilities from which the mines were exempt at the time of the lease, and which might be imposed by future Acts of Parliament. The case of the *Duke of Devonshire v. The Hæmatite Steel Company* (3) is distinguishable from the present case, as the language of the covenant did not explicitly refer to liabilities to rates which "shall at any time or times hereafter" be imposed.

Mr. W. H. Holl and *Mr. R. V. Williams*, for the respondent, were not called upon to argue.

LORD HATHERLEY.—I think none of your Lordships think there is any error in the judgments under appeal.

The case of the *Duke of Devonshire v. The Barrow Hæmatite Steel Company* (3) seems to me very much in point. It is quite true that the words of the covenant in that case were not so strong as in the present case, there being nothing which could extend to a future liability to rates. But the remarks made by Lord Chief Justice Cockburn in the Queen's Bench Division may be adopted in this case. "That statute takes away the exemption from rating, which mines other than coal mines formerly enjoyed ;

in respect of such mine during the continuance of his lease, grant or license, or before the arrival of the period at which the amount of the rent, royalty or dues is liable to revision or re-adjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the exemption) deduct from any rent, royalty or dues payable by him one-half of any such rates paid by him.

(3) 46 Law J. Rep. Q.B. 435 ; s. c. Law Rep. 2 Q.B. Div. 286.

nevertheless, the 8th section provides for mining leases which were in existence when the statute was passed, and enacts that as a general rule the lessee may deduct from the rent royalties or dues payable by him, one-half of any rate imposed upon him, but the exception is introduced, that where the lessee has specifically contracted to pay the rates in the event of the abolition of the exemption, the contract between him and the lessor shall hold good. In my opinion we must give due effect to the words "specifically contracted ;" and I understand the meaning of the 8th section to be that when the contract existing at the time of the passing of the Act is general only, that is, when the tenant is liable to all rates and taxes, and is to pay to the lessor a certain rent or royalty, he is to be at liberty to deduct one-half of the rates imposed upon him by virtue of the statute ; but that if the parties to the lease have in direct terms provided for the contingency of the Legislature taking away the exemption, the lessee shall be liable to pay the whole of the rent and royalty as he did before the statute was passed. I think that in order to exempt the lessor from the deduction of one-half the rate the contract of demise must contain some specific reference to the possible abolition of the exemption by Parliament, and that when no such reference is inserted, and the language is general, as in the lease before us, it cannot be said that a specific contract exists within the meaning of the 8th section. It is possible that this construction may operate contrary to the intention of the parties ; but the Legislature has chosen to engraft upon existing contracts of demise a very plain enactment, and to this enactment we must give its proper effect" (4).

Here the Legislature enacts that in future certain things are to be subject to the provisions of an earlier Act, as if they were expressly mentioned therein. It deals with the rateability of iron mines in a peculiar way ; it does not impose a new liability, but merely brings the pro-

(4) 46 Law J. Rep. Q.B. at p. 97 ; s. c. Law Rep. 2 Q.B. Div. 288.

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party within the older enactment. Thus the word "exemption" acquires a certain degree of appropriateness. The 8th section says that as an abstract matter of right the rate should fall equally upon the owner and the occupier; but taking it as possible—for the matter has frequently been a matter of discussion—that parties to leases may have foreseen the change in the law, and inserted covenants that if the exemption should be removed the lessee should himself pay the rate, all such covenants are excepted from the operation of the Act.

Now it appears to me that the meaning of the word "specific" is the reverse of "general." You cannot give to a general covenant the force of a specific agreement with regard to a particular tax, and a covenant in a lease to pay "all taxes, rates, assessments, charges and impositions whatsoever," cannot be regarded as a "specific" covenant. I therefore conclude that this lease contains nothing equivalent to a specific contract.

The question was asked by the Solicitor-General, how could the contingency of the existing law by the passing of this Act of Parliament be provided for otherwise than by the words actually used. I answer that it might have been provided for by a covenant to pay all rates, &c., charged or hereafter to be charged, "particularly all parochial rates which may be imposed by the Legislature having a tendency to bring the property within the statute of Elizabeth." I also think that the words, "in the event of the abolition of the said exemption" point to the case of parties anticipating the Legislature doing what it has since done, and making particular provisions against such a contingency. These considerations appear to me sufficient to shew that the judgment of the Court of Appeal was right, and that it should be affirmed, and the appeal therefrom dismissed with costs.

LORD BLACKBURN.—I am entirely of the same opinion. The case turns entirely upon the construction of the 8th section of the Act, and mainly of the words within the parenthesis. I cannot think

the question quite clear, but I have no doubt or hesitation in pronouncing upon the question as to what is the right construction of the statute.

The Legislature thought it right to impose poor rates upon the occupiers of iron mines; but it seems to have been pointed out that in many cases a higher royalty might have been obtained on account of the existing exemption than if the occupier was rateable, and therefore they divided the burden between the owner and the occupier in the case of all existing leases. It was also known that many leases contained a covenant that the lessee should pay all present and future rates, and that the alteration of the law might fall hardly upon the landlord where the rent had been calculated with a view to that arrangement. Some of these covenants were general, but others expressly provided for an alteration of the law. The Legislature accordingly made a kind of compromise. The rate was divided between the landlord and the tenant, unless it had been "specifically contracted" that in case of the exemption being abolished the former should be entirely exempted.

I have arrived at the conclusion that the agreement in the present case is not a specific contract, and I therefore agree in the unanimous opinion of the Judges in both the Courts below.

LORD GORDON concurred.

*Judgment appealed from affirmed,
and appeal dismissed with costs.*

Solicitors—W. C. Hall, agent for Frere & Co., for appellant; Van Sandau & Cumming, agents for J. T. Belk & Farrington, Middlesborough for respondent.

[IN THE COURT OF APPEAL.]

1878. }
May 1, 2. } ACATOS v. BURNS & MAC IVER.*

Ship and Shipping—Non-delivery of Cargo—Cargo damaged by inherent Vice—Right of Captain to sell at an intermediate Port—Duty of Captain to give Notice to Shipper.

In an action against a shipowner for non-delivery of a cargo of maize, which had become heated, and was sold by the defendants at an intermediate port during the voyage, the jury found that the cargo was damaged by its own inherent vice; that it was impossible for the defendant to carry it to the port of destination; that the sale was what a prudent man would have done under the circumstances; but that there was no such urgent necessity for the sale as to give no time or opportunity to give notice to the plaintiff, the owner of the cargo:—

Held, on these findings, that the defendant had no right to sell without the plaintiff's consent, and that the action would lie.

This was an appeal from a judgment given at the trial before Baron Huddleston.

The plaintiff is a merchant carrying on business in London, and the defendants are shipowners at Liverpool. The plaintiff by his agent caused to be shipped on board the defendants' steamship *Sidon* 439 quarters of Indian corn or maize to be carried from Constantinople to Liverpool.

The bill of lading described the maize as "shipped in good order and condition," "to be delivered in like good condition at Liverpool," certain perils excepted.

The vessel sailed on the 1st of March, and arrived at Smyrna, where she had liberty to call, on the 3rd of March. On arrival there the maize was found to be in a heated and dangerous condition. The master of the vessel had it examined by a surveyor on the 10th of March, and in consequence of his report discharged it into lighters. Afterwards the *Sidon* filled

up with other cargo, and proceeded on her voyage.

The defendants' agent at Smyrna informed the agent of the plaintiff at Constantinople by telegraph of what had occurred, and the plaintiff replied that he wished the grain brought on to Liverpool by the *Sidon*, but offered to pay the expense of any measures the captain might take to cool it. A second survey was made on the 11th of March, and the plaintiff was again communicated with, but declined all responsibility with respect to the unloading the cargo, and ordered it to be forwarded to Liverpool. The plaintiff's agent endeavoured to make arrangements for forwarding the maize by some other vessel, but was unsuccessful, and a third survey of the cargo was made on the 27th of March by Lloyd's agent at Smyrna, who reported unfavourably, and recommended an immediate sale.

The defendants' agent at Smyrna thereupon telegraphed to the plaintiff's agent at Constantinople: "Have held survey which reports grain unfit for shipment, and which will be sold to-morrow by public auction for benefit of whom it may concern."

To this the following answer was returned on the 28th of March:—

"Shippers protest strongly against sale of grain. Want stuff to remain in lighters until they come down personally."

Notwithstanding this telegram, the cargo was put up to public auction on the 28th of March, and sold to one Buscowitch for a sum of 77l. 3s. The agent of the shippers arrived at Smyrna on the 29th for the purpose of inspecting the maize; and found that it had been already sold.

Buscowitch dried the cargo and sold it at a profit of 20l.

The present action was brought by the plaintiff for non-delivery and wrongful sale of the maize.

The defendants denied that the maize was shipped in good condition, and justified the sale on the ground that at Smyrna it was found to be in such condition from its own inherent vice, and from causes within the exceptions in the

* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Brett, L.J.

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bill of lading, that its further transport was impossible, and its presence on board the ship dangerous to the ship and their cargo.

They also made a counter-claim for damages for the wrongful shipping by the plaintiff of maize which he knew to be in a dangerous condition, and for freight *pro rata*. Subject to such counter-claim they admitted that a sum of 77l. 3s. was due from them to the plaintiffs in respect of the nett proceeds of the sale of the maize at Smyrna.

At the trial before Huddleston, B., in answer to questions put to them by the learned Judge, the jury found among other things that the damaged state of the maize at Smyrna was due to its being shipped in bad condition.

That it was impossible to carry the corn on to Liverpool in the *Sidon*.

That the defendants did what prudent men would think most reasonable to be done under the circumstances.

That no substantial portion of the cargo could have arrived in England as Indian corn.

That the sale was not of such urgent necessity as to leave no time or opportunity to give notice to the merchant.

On these findings judgment was entered for the plaintiff on the claim for 77l. 3s., and it was agreed that if the sale was wrongful, twenty per cent. on this amount would be a reasonable addition by way of damages.

Judgment was also given for the plaintiff on the counter-claim.

From the above judgment the plaintiff now appealed, claiming to be entitled to damages beyond the 77l. 3s. The defendants gave notice of a cross appeal with respect to the counter-claim.

Watkin Williams and Macleod, for the plaintiff.—The captain of the vessel is bailee of the cargo for the owner, and may not sell unless it is impossible to obtain the owner's consent. Here the jury by their findings have shewn that it was not impossible to communicate with the owner of the cargo before selling, and therefore the sale was wrongful.—*The Cobequid Marine Insurance Company*

v. Barteaux (1); *Tronson v. Dent* (2); *The Australasian Steam Navigation Company v. Morse* (3).

Charles Russell and Warr, for the defendants.—The captain of a vessel is not merely an ordinary bailee of the goods; he is more. He is agent to do what is expedient for the benefit of all concerned. The extent of his authority depends upon circumstances, and on the findings of the jury he would have been entitled to sell even if the owner had been communicated with and had refused his consent. *Tronson v. Dent* (2) is not applicable to this case, for there the damaged goods could have been carried to their destination in a merchantable state. *Notara v. Henderson* (4) shews that the duty of the shipowner to the owner of the goods is put too high on the part of the plaintiff. See also *The Gratitude* (5).

[BRETT, L.J.—The strongest case you have to meet is that of *The Australasian Steam Navigation Company v. Morse* (3).]

In that case there was no finding by the jury that the sale under all the circumstances was expedient. As to the counter-claim, the defendants claim as for a breach of a warranty that the goods were fit to be shipped—*Brass v. Maitland* (6); *Pearson v. Winsor* (7); *Parsons on Shipping*, p. 256; *Storey on Bailments*, sects. 562, 563; *Angell on Carriers*, 201 note. The defendants also claim freight *pro rata*—*The Soblomsten* (8).

Watkin Williams, in reply.—*Brass v. Maitland* (6) is explained and followed in *Farrant v. Barnes* (9); the liability of the shipper in such cases is for negligence. Here there was no knowledge on the part of the shippers of the danger, and no negligence.

(1) Law Rep. 6 P.C. 319.

(2) 8 Moo. P.C. 419.

(3) Law Rep. 4 P.C. 222.

(4) 39 Law J. Rep. Q.B. 167, and 41 Law J. Rep. Q.B. 158; s. c. Law Rep. 5 Q.B. 346; and Law Rep. 7 Q.B. 225.

(5) 3 C. Rob. Adm. Rep. 240, at p. 259.

(6) 6 E. & B. 470; s. c. 26 Law J. Rep. Q.B. 49.

(7) 2 Sprague, 35 (Admiralty Court of Massachusetts).

(8) 36 Law J. Rep. Ad. 5; s. c. Law Rep. 1 Ad. & E. 293.

(9) 11 Com. B. Rep. N.S. 553; s. c. 31 Law J. Rep. C.P. 137.

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As to the damages, the plaintiff is entitled to the full amount realised by the purchaser of the corn, on the principle of *Armory v. Delamire* (10).

[BRAMWELL, L.J.—I think we must take it that the defendants' counsel, very wisely, agreed that if the sale was tortious twenty per cent. should be added to the amount recovered.]

BRAMWELL, L.J.—I am of opinion that this appeal must succeed. The plaintiff is right in his contention. The sale of the goods was tortious; for my view of the facts is this:—

The goods were in lighters, and the defendants had some idea, or expectation, or hope, that they might be taken on by some other ship. That hope continued till the time when the defendants sent the telegram of the 27th of March, 1876, which was as follows:—"Have held survey which reports grain unfit for shipment, will be sold to-morrow by public auction for benefit of whom it may concern."

That is the first notice given to the plaintiff (that is, to his agent at Constantinople), that the maize will not be sent on but will be sold. The defendants give him notice that the maize will be sold, and before he can express an opinion or raise an objection, it is actually sold. It is clear, under the circumstances, that the defendants had no authority to sell. But the difficulty presents itself, what were they to do? I don't think we need give a general answer to that question, but may confine ourselves to the special circumstances.

The corn is safe in lighters; and the jury have found that there was no urgent necessity for a sale. The defendants might, therefore, have asked whether they should sell or not. If the plaintiff refused to allow a sale, and gave no directions, the defendants would have to dispose of it somehow at the plaintiff's cost and risk, and not at their own. But they gave the plaintiff no opportunity of deciding, and it cannot be said that the maize was sold under the legitimate powers of the captain of the vessel.

(10) 1 Sm. L.C. 315.

The next question is, what are the damages? The measure of them is not what was realized by the sale, but what the goods would be worth to the owner if they had not been sold. I am by no means sure that if the question had been left to the jury they would have found that the maize was of greater value than the sum it actually fetched. Probably, however, they might; and when Mr. Watkin Williams proposed to take the opinion of the jury, so as to preclude questions from arising afterwards, the damages were agreed at 100l. If, therefore, the sale was tortious, it follows that the damages must be increased to that amount.

As to the counter-claim, the statement is such, that if there were a warranty in point of law that the goods were in a state which made them safe for shipment, that is, that they could be safely carried, the facts are sufficiently stated to shew a breach of the warranty. But I am of opinion that there was no such warranty. We might admit *Brass v. Maitland* (6) to be good law, and yet say that it does not govern this case. For the quality of the article tendered for shipment was as well known to the shipowner as to the shipper. I am, therefore, of opinion that there was no such warranty, and on that ground the counter-claim fails. As to the claim for freight *pro rata*, it is pretty well established that the shipowner has no claim to it except where the original voyage is given up by consent and the goods unloaded by consent at an intermediate port. I am aware of the danger of laying down a general rule; and also that to this there may be exceptions; but, subject to such exceptions, that is in my opinion the rule.

BAGGALLAY, L.J.—I agree as regards the question whether the sale was wrongful or not. In order to justify the sale under the circumstances, there must be not only an absolute necessity, but an inability to communicate with the owner of the cargo.

This is laid down clearly in *The Australasian Steam Navigation Company v. Morse* (3).

As to the possibility of communicating

Acotou v. Burns (App.).

with the owner of the cargo, there can be no doubt of it, for certain communications were made. The survey by Lloyd's surveyor was communicated to him; and afterwards the second survey. But the owner gave no consent; on the contrary, he sent a protest against selling, and directions for forwarding the cargo. If it is suggested that there was a further notice as to the sale on the 29th of March, the answer is that it was a notice that there would be a sale next day. There was no time to stop the sale, and the answer to the message did not arrive till the cargo had been sold. It is clear, therefore, that the sale was wrongful.

I entertain some doubts as to what was the result of the consent of the counsel as to damages after the verdict of the jury. It did appear to me, and I have my doubts about it still, that what happened was this: that it was agreed that supposing the sale to be tortious, and that the damages ought to be measured by the amount realised by Buscovitch, then twenty per cent. was to be added. If that view were right, I should be disposed to think 77*l.* was enough. But the rest of the Court take a different view, and think that 100*l.* is the proper sum. I therefore yield to their opinion.

As to the claim of freight *pro rata*, I think there is no warranty whatever for such a claim; and as to the costs in the Court below, we have no authority to deal with them.

BRETT, L.J.—The question here is, what verdict ought to have been entered on the findings, and we must assume that those findings were correct, and should look at the evidence merely to see what is the meaning of the findings.

The question is, had the captain of the vessel authority to sell? Was the sale a lawful or a wrongful sale? On the findings we must take it that the goods were perishable, and that they had an inherent vice at the time when they were shipped, which was the sole cause of their perishing. Before they got to Smyrna they were found to be perishing, and at Smyrna they were in a perishing condition, and if nothing had been done they would have entirely perished. The

sale was a reasonable sale, so far as the nature and condition of the goods was concerned. But it was a sale without the consent of the owner of the maize, and the question is, whether the captain, under such circumstances, and having regard to another circumstance which I will mention presently, had authority to sell the cargo. As to the first point suggested, that the captain's authority to sell is to be measured differently according as the goods were perishable by their own inherent vice, or became so through the perils of the sea, I can see no ground for any such distinction; the captain's authority to sell is the same in either case. *Prima facie* there can be no doubt the captain has no such authority. But he may have authority to sell the goods, under certain circumstances, which may arise from something happening to the ship; or from something happening to the cargo itself. That has happened in the present case. But the law looks with jealousy on any sale by the captain without the consent of the owner. If he does so sell, it is for him or the ship-owner to shew circumstances of such a nature as to give him authority, and, as a general rule, he has no such authority unless he can shew that there was urgent necessity for the sale.

Now urgent necessity is a thing which may have many ingredients. There may be urgent necessity for a sale on the ground that the goods if not sold would perish, or on the ground that if not sold they would have to be warehoused and kept at such expense that, as a matter of business, it would be wrong to keep them, and that the captain has no means of communicating with the owner so as to take his instructions. But it seems to me that, though the goods are perishable and actually perishing, if the captain has a reasonable opportunity of taking the owner's directions before the goods actually perish, or before there comes a strong probability of their perishing, he cannot sell without communicating with the owner of the goods and obtaining his directions. And if he does obtain such directions, and they amount to a refusal to sell, he cannot sell contrary to the owner's express directions.

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What he should do it may not be expedient to enunciate precisely. But, clearly, he has no right to sell. He has no right to sell after receiving directions to the contrary, and he has no right to sell without directions to do so, if he has an opportunity of obtaining such directions. The jury here say that there was no such urgent necessity for a sale as to give the defendant no time to communicate with the plaintiff and receive an answer. Therefore, the present case is not within the rule. It ought to be remarked, having regard to the case in the Privy Council, that if in this case the question about urgency had not been asked, but only the third question, the defendant would have been entitled to succeed; it would have been taken to have included the question whether there was time to have communicated with the plaintiff and obtained an answer. So the particularity of the questions left by the learned Judge has ousted the defendant of his defence.

The law was properly laid down by the Privy Council, and though their decision does not bind us, we are always glad to follow it. The law is laid down in the case of *The Cargo ex Hamburg* (11) and in *The Bonaparte* (12). It is thus stated by Knight Bruce, L.J., in the latter case, as explained in *The Cargo ex Hamburg* (11):—"If according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

That is an express decision that the captain must communicate with the owner of the goods.

Then in the *Australasian Steam Navigation Company v. Morse* (3) in a most careful and elaborate judgment, Sir Montague Smith says: "The general principles of law are not in dispute, viz., that the authority of the master of a ship to sell the goods of the absent owner is

derived from the necessity of the situation in which he is placed; and, consequently, that to justify his thus dealing with the goods he must establish,—first, a necessity for the sale; and second, inability to communicate with the owner, and obtain his directions. Under these conditions and by force of them the master becomes the agent of the owner, not only with the power, but under the obligation of acting for him; but he is not in any case"—mark this negative—"entitled to substitute his own judgment (not for the judgment, but) for the will of the owner in the strong act of selling his goods where it is possible to ascertain" (not his judgment, but) "his will."

The law is there distinctly and rightly laid down. However stupid and obstinate the owner may be, the captain has no right to sell the goods against the owner's will more than any other man. If he has time to ascertain the owner's will, he is bound to communicate with him; and if he does not the sale is wrongful. The captain here has failed to shew what he ought to shew; namely, that there was so urgent a necessity as to justify a sale without the consent of the owner being applied for.

If the sale was wrongful, the amount for which the goods were sold at the intermediate port is not the true measure of damages, but the amount of the injury done to the owner. That was agreed at 100*l.*; and the agreement is binding. As to the claim for freight *pro rata*, it is not worth discussing. As to the warranty, neither *Brass v. Maitland* (6) nor any other case shews that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of the shipment.

Judgment for the plaintiff.

Solicitors—Tatham, Obelin & Nash, for plaintiff; Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for defendants.

(11) 2 Moo. P.C. N.S. 289.

(12) 8 Moo. P.C. 459.

[IN THE QUEEN'S BENCH DIVISION.]
1878. } THE BISHOP OF ST. ALBAN'S AND
May 21. } OTHERS v. BATTERSBY.

Lease—Covenant by Lessee not to use Premises as a "Beer Shop"—Sale of Beer not to be consumed on the Premises—Breach—Forfeiture.

The defendant was assignee of a lease, granted in 1868, which contained a covenant (inter alia) that the lessee would not permit a certain house "to be used as a beershop." The defendant, who carried on the business of a grocer at this house, had subsequently obtained a license for the sale of beer to be consumed off the premises; and in pursuance of the license beer was sold on the premises, but not drunk thereon:—Held, that there had been a breach of the covenant.

SPECIAL CASE stated for the opinion of the Court by consent of the parties.

1. By indenture made the 7th of May, 1818, certain trustees demised to the Haydock Collieries Industrial Co-operative Society (Limited), therein called the lessees, their successors and assigns, a plot of ground for 999 years, at the rent of 10*l.* 10*s.*, payable quarterly.

2. By the said lease, the lessees, for themselves, their successors and assigns, covenanted with the trustees, their heirs and assigns (amongst other covenants), as follows; that they, the lessees, their successors and assigns, would not "permit any house or houses which may have been erected on the said premises to be used as a beershop or public-house, or any theatre, or public show or exhibition."

3. The lease contained a proviso for re-entry by the lessors, in case the lessees, their successors or assigns, should not well and duly keep (amongst others) the above covenant.

4. All the estate and interest of the said trustees (the lessors) are now vested in the plaintiffs by divers mesne assignments.

5. All the estate and interest of the said lessees became and are now vested in the defendant by divers mesne assignments.

6. Pursuant to one of the covenants in

the said indenture, certain buildings, consisting of a shop and bakehouse, were, after the date thereof, erected by the lessees on the said plot of land.

7. The defendant, who is a grocer and baker, carries on business as such in the aforesaid shop and premises, in partnership with his brother, Aaron Battersby, and has continued to do so ever since the premises became vested in him as aforesaid.

8. In the month of September, 1876, the said Aaron Battersby duly applied for and obtained, in pursuance of 11 Geo. 4. and 1 Will. 4. c. 64, an excise retail beer license for the sale of beer to be consumed off the premises.

9. In the month of October, 1877, Aaron Battersby applied for a renewal of the said license, and on the 11th of that month a fresh excise beer retailer's license, headed under the same Acts, and in the same form as the aforesaid license so obtained by him in September, 1876, authorising and licensing him to continue till the 10th of October in the following year, to sell by retail at the said shop and premises, beer, ale and porter, to be consumed off the premises, was accordingly duly granted to him. The plaintiffs were no parties to the granting of the said license, and had no notice of the same.

10. The said Aaron Battersby and the defendant, from the date of the granting of the said license in September, 1876, down to the 12th of November, 1877, in addition to carrying on their ordinary business as grocers and bakers, at the said shop and premises, have been in the habit of selling there, under and in pursuance of the said several licenses, beer by retail to be drunk and consumed off the premises; but no part of the beer sold by them at the said house, shop or premises has ever been drunk or consumed therein or thereon.

11. The plaintiffs have brought this action for recovery of the possession of the aforesaid shop and premises, in consequence of the aforesaid sale of beer thereat by retail, on divers days between the 11th of October and the 12th of November, 1877, contending that the said acts of the defendant constitute breaches

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of the aforesaid covenant, and causes of forfeiture under the proviso.

12. The defendant contends that none of the said acts of the defendant constitute a breach of the said covenant, or any cause of forfeiture, and that, under the circumstances hereinbefore stated, the plaintiffs are not entitled to recover in this action.

The question for the opinion of the Court was whether any of the said acts of the defendant in October or November, 1877, constituted a breach of the said covenant, and also a cause of forfeiture under the said proviso, such as to entitle the plaintiff to recover possession of the premises.

W. G. Harrison (Charles Bowen with him), for the plaintiffs.—The question is whether the defendant kept a "beershop" on the premises. A shop is defined to be a place for the sale or manufacture of goods; and where a house is licensed for the sale of beer, and beer is sold there, the house becomes a shop for the sale of beer. The fact that the house was also used for the sale of grocery does not make it the less a beershop.

J. Digby, for the defendant.—A covenant of this kind ought to be construed strictly, and the term "beershop" was generally understood at the time when this lease was entered into to be synonymous with "beerhouse," that is to say, a place where beer is sold to be drunk on the premises. In *Burn's Justice of the Peace*, vol. i. (edit. 13), p. 64, Tit. "Ale House," it is said, "a beerhouse or shop is a house in which beer, ale, &c. is sold by retail to be drunk or consumed on the premises." In *The London and North-Western Railway Company v. Garnett* (1), it was held that the sale of beer to be consumed off the premises was no breach of covenant not to use premises as a "beerhouse." See also *Jones v. Bone* (2) and *Pease v. Cotes* (3).

Under 11 Geo. 4. and 1 Will. 4. c. 64,

(1) 39 Law J. Rep. Chanc. 26; s. c. Law Rep. 9 Eq. 26.

(2) 39 Law J. Rep. Chanc. 405; s. c. Law Rep. 9 Eq. 674.

(3) 36 Law J. Rep. Chanc. 57; s. c. Law Rep. 2 Eq. 688.

a license to sell beer by retail enabled the party licensed to sell for consumption on as well as off the premises; the law, however, was altered by 4 & 5 Will. 4. c. 85. s. 15, which stated that a license granted under the former Act, without a certificate of good character, should not authorise the sale of beer to be consumed on the premises. The license here did not authorise the drinking of beer on the premises to which the terms "beerhouse" and "beershop" have been equally applied, and the object of the parties manifestly was to prevent the noise and nuisance which might be occasioned to the premises by persons assembling to drink thereon.

Harrison replied.

COCKBURN, L.C.J.—I quite agree with one part of Mr. Digby's contention, viz., that we must interpret the meaning of the words used in the covenant, according to the sense in which they were understood at the time when the lease was made. If, at that time, there had been no such thing as a beershop in contradistinction to a "beerhouse," I should have agreed with the view put before us on behalf of the defendant. At the time, however, when this lease was granted a different state of things had arisen to what existed before, namely, a house used exclusively for the sale of beer to be drunk off the premises, and the term "beershop" is, in my opinion, large enough to embrace such a place. Such a construction is I think in accordance with the intention of the Legislature, and it is not for us to cut down the meaning of a word used by the parties to a contract, although such a sale of beer as this may not have been intended to have been embraced. Accordingly I am of opinion that our judgment should be for the plaintiffs.

MELLOR, J.—I quite agree with the opinion expressed by the Lord Chief Justice. The term used must I think be interpreted so as to prevent the sale of beer at all, even though the beer sold was not to be consumed on the premises. As this is a case of forfeiture I am sorry for the consequences so far as the defendant is concerned, that is to say, if

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the latter was under the honest belief that he was acting within the terms of his lease; but, as I am forced to the conclusion that the lease has been forfeited by the conduct of the defendant, my judgment must be in favour of the plaintiffs.

Judgment for the plaintiffs.

Solicitors—Lee & Brodie, for plaintiffs; Maples, Teesdale & Co., agents for H. S. Oppenheim, St. Helens, for defendant.

ciently appear in the written judgment of the learned Judge.

B. T. Williams and Rowlands, for the plaintiff.

McIntyre, Arthur Williams and Lewis, for the defendants.

Our. adv. vult.

On June 7 the following judgment was delivered:—

LUSH, J.—These actions were brought to charge the defendants respectively as executors *de son tort* of one Alfred Borquet, the late husband of the defendant in the second action, under the following circumstances.

The deceased was manager of the spelter works of Messrs. Vivian & Sons, of Swansea, and in that capacity he lived in a house of Messrs. Vivian in the neighbourhood of the works, which had been appropriated to persons occupying his position. He died intestate and insolvent on the 22nd of June, 1877. Shortly after his decease and before administration could be taken out, the widow was required to remove from the premises of Messrs. Vivian, in order to make way for the succeeding manager; and it was necessary to dispose in some way or other of the furniture. By direction of a solicitor, acting either for her or for Mr. Nettle, who subsequently took out administration (it did not distinctly appear which), part of the furniture was removed to a small house which the widow had taken, and which furniture she intended to buy for her own use, and the residue was taken to the sale-rooms of the defendant Leeder, an auctioneer. Leeder effected the removal of both portions, and in expectation of administration being shortly taken out, he by direction of the same solicitor advertised the furniture in his sale-room to be sold by auction on the 19th of July.

Difficulties afterwards occurred in respect to the administration. The widow renounced, and in the end Mr. Nettle, who had in the first instance refused to undertake the responsibility, consented to become administrator, and letters of administration were granted to him on the 3rd of August. In consequence of

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June 7.

PETERS v. LEEDER.
SAME v. BORQUET.

Executor de son Tort—Intestacy—Compulsory Vacation of Premises—Removal of Goods by Widow and Auctioneer before Administration—Action—Liability.

*B. was manager of some iron works, and as such lived in a house in the neighbourhood. B. died intestate and insolvent on the 22nd of June, 1877. Shortly after his decease and before letters of administration could be taken out, the widow was required to vacate the premises, and it became necessary to remove the furniture which belonged to the deceased. Accordingly, part of it was taken by her to a smaller house, and afterwards purchased, and the residue were removed to an auctioneer's premises and afterward sold by auction. The proceeds of the auction, as well as the valuation price of the goods retained by the widow, were duly handed over to the administrator appointed after the removal and before the sale. Actions having been brought both against the widow and the auctioneer, charging them respectively as executors *de son tort*,—Held, that they were not liable, on the ground that there had been no wrongful intermeddling with the assets, or dealing with them in such a way as denoted an usurpation of the functions of an executor.*

These actions were tried before Lush, J., at the Cardiff Spring Assizes, and now came on to be heard on further consideration. The facts and arguments suffi-

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this delay, the sale which Leeder had advertised for the 19th of July was suspended, and the goods remained in his sale-rooms till the 10th of August, when they were sold, by auction, by him under the instructions of the administrator.

An inventory and valuation of the whole of the furniture had been made by Leeder before the date of letters of administration, and afterwards the widow paid the solicitor, who then acted for the administrator, the valuation of the goods which she had taken. Leeder also paid over to him the proceeds of the goods sold by him.

On the 11th of July, before it was ascertained who would administer to the estate, these actions were brought—the one against Leeder, charging him as executor *de son tort*, by reason of his having removed, valued and advertised the goods for sale; and the other against the widow, in respect of her having received into her possession and used the portion of the furniture which she intended to purchase, and which she afterwards did purchase and pay for as above stated. The question is, whether such a dealing with the assets, under the circumstances above described, constitutes both or either of the defendants an executor *de son tort*.

I am of opinion that it does not. An executor *de son tort* is "one who takes upon himself the office by intrusion, not being so constituted by the deceased, nor for want of such constitution substituted by the Court to administer." (See *Williams on Executors*, cap. 5.)

The definition implies a wrongful intermeddling with the assets, a dealing with them in such a way as denotes an usurpation of the functions of an executor, an assumption of authority which none but an executor or administrator can lawfully exercise. It is obvious that it is not every intermeddling with the goods of the deceased which is wrongful. Acts which are not destructive of the property, and which do not otherwise amount to a conversion of goods, are wrongful or not according to the intent. Milking the cows, feeding the horses, locking up the goods, doing repairs, and such like acts, if done as an assertion of dominion and act of ownership, would

be wrongful; if as an act of necessity or an office of kindness and charity, would be meritorious. So the removing and holding possession of the goods, if done for the purpose of keeping them in safe custody till a lawful representative should appear, is rightful; if for the purpose of making away with them, is wrongful. (See "*Godolphin*," part 2. c. 8. ss. 3, 6.) And in case of necessity, a stranger may even sell part of the goods or collect sufficient of the debts for the purpose of burying the deceased, without being chargeable as executor *de son tort*. (See the authorities 1 *Williams on Executors*, c. 5.) In the present case the removal of the furniture from the residence of the deceased to some place of deposit was a necessity. If that necessity had not existed, the widow would have been guilty of no wrong by remaining there, and using the furniture as before, until an administrator should be appointed; nor would the quality of her acts have been altered if, being obliged to remove, she had taken all the furniture to another house and used it there. As her house would not contain the whole, it was necessary to place a portion of it somewhere else, and as it was known that everything would have to be sold, the most reasonable course was to take it direct to a sale-room. If the defendant Leeder had acted upon the advertisement, and sold the goods in his possession at the time advertised, that would have been a tortious act, which would have made him liable as executor *de son tort*. But he did not sell, or attempt to sell. When it appeared no administration could be taken out by the 19th, the day fixed for the sale, he postponed the sale and did not hold the auction till he was lawfully authorised to do so. I am satisfied upon the evidence that his intention throughout was to hold the goods at the disposal of the person who should become administrator, and that his making a valuation and advertising the goods for sale, although it afforded evidence which if unexplained might have made him liable, was nothing more than a preparation for a contemplated legal sale—a sale which it was known must take place as soon as administration should have been granted.

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I am equally satisfied that the widow never intended to claim as her own the furniture which she took, but that her intention was to purchase and pay for it as soon as there was a representative capable of selling.

The acts done by the defendants with such an intention do not in my opinion render either of them liable as an executor *de son tort*.

My judgment, therefore, must be for the defendant in each action with costs.

Judgment for the defendants.

Solicitors—Hacon & Turner, agents for C. H. Glascodine, Swansea, for plaintiff; Crowder, Anstie & Vizard, agents for Brown, Collins & Wood, Swansea, for defendants.

1878. } CALAMINUS v. THE DOWLAIS
May 10. } IRON COMPANY (LIMITED).
June 7. }

Ship and Shipping—Contract for Iron to be delivered during specified Months—Equal Monthly Quantities—Action for Demurrage.

The defendants contracted to buy from the plaintiff from 5,000 to 6,000 tons of iron ore, to be delivered at Cardiff "during the months of June, July, August and September." It appeared from the correspondence between the parties which led to the contract that the plaintiff had arranged with correspondents at Carthage for the supply and shipment of the ore. By the 28th of July 4,623 tons of ore were delivered to and accepted by the defendants, and on the 29th of July the *Nero* arrived with 767 tons more, notice at the same time being given to the defendants of her readiness to discharge. There was considerable delay in discharging the *Nero*, she having made an exceptionally short voyage, and for her detention beyond the lay days, the plaintiff had to pay demurrage to the extent of 150*l.*, which he now sought to recover from the defendants. The jury found that the tender was a reasonable one, but the defendants contended that the quantity ought to have been distributed rateably over the four months, and that, not being

bound to accept the *Nero's* cargo till September, they were not liable to pay the demurrage sued for:—

Held, that the contract gave the option to either party to deliver or to demand the amount contracted for; and as no provision was made for exercising the option at any given time, whether in the first month or the last, the plaintiff could not tell, until the option was exercised, how many tons should be delivered in any month; also, that the circumstances shewed that the parties could not have contemplated equal monthly quantities.

This was an action tried before Lush, J., on the South Wales Circuit at the Spring Assizes, and adjourned to London for further consideration. The facts sufficiently appear in the headnote, and in the judgment of Lush, J., delivered on the 7th of June, after having taken time to consider.

J. W. Bowen (*A. L. Smith* and *Rowlands* with him) moved for judgment on behalf of the plaintiff.—The question here is, what is a proper delivery under the contract? Nothing is said in the contract as to specific deliveries; and it was for the jury to decide whether the amounts delivered were reasonable or not—*Brandt v. Lawrence* (1). Moreover, the retention by the defendants of the bill of lading precludes them from taking any such objection. They cited *Leigh v. Paterson* (2).

McIntyre and *Dunn*, for the defendants.—The quantities contracted for ought to have been rateably distributed over the four months; consequently the defendants, not being liable to accept the cargo till September, cannot be called upon to pay the demurrage now sought to be recovered from them. [They cited on this point *Bergheim v. The Blaenavon Iron and Steel Company* (3) and *Roper v. Johnson* (4)]. The finding of the jury, that the tender was a reasonable one,

(1) 46 Law J. Rep. Q.B. 237; s. c. Law Rep. 1 Q.B. Div. 344.

(2) 8 Taunt. 540.

(3) 44 Law J. Rep. Q.B. 92; s. c. Law Rep. 10 Q.B. 319.

(4) 42 Law J. Rep. C.P. 65; s. c. Law Rep. 8 C.P. 167.

Calaminus v. Doulais Iron Co.

is immaterial; they should have been directed as a matter of law that the quantities contracted for should have been rateably distributed over the four months. Again, the receipt of the bill of lading was no acceptance of the cargo. The defendants never dealt with the property; and it has been held that the mere retention of a bill of lading does not amount to an acceptance—*Meredith v. Meigh* (5), approved of in *Ourrie v. Anderson* (6). Suppose the vessel had not arrived till October, the receipt and retention of the bill of lading would clearly not have been an acceptance of the cargo.

Our. adv. vult.

On the 7th of June the learned Judge delivered the following judgment:—

LUSH, J.—The question in this case is whether the defendants are liable to repay to the plaintiff as damages for not accepting, when tendered, a cargo of ore by the *Nero*, the demurrage which he has been obliged to pay for nineteen days' detention, beyond the lay days allowed by his charter.

The difference arises out of a contract entered into between the parties on the 9th of May, 1877, and which, so far as is material to the present question, is in these words: "Bought of Mr. A. Calaminus (the plaintiff) from 5,000 to 6,000 tons of manganiferous iron ore on the following conditions:—Price 20s. per ton of 20 cwt. C J Y Cardiff, for 30s. 9% iron and 15s. % manganese; 4½d. for every unity of iron above or below 30%; 9d. for every unity of manganese above 15%. We to be at liberty to reject the cargoes if under 15%.

"Delivery. During the months of June, July, August and September next, except in case of force major or war, which might prevent shipping.

"Discharging at the rate of 200 tons per day for steamers, and fifty to sixty tons for sailing vessels, from day ship is ready to discharge.

"Payment. Freight to ship as per

(5) 2 E. & B. 364; a. c. 22 Law J. Rep. Q.B. 401.

(6) 2 E. & B. 592; s. c. 29 Law J. Rep. Q.B. 287.

charter, and remainder to you in cash on delivery."

It appeared by the correspondence between the parties which led up to the contract, that the plaintiff had arranged with correspondents at Carthage for the supply and shipment of the ore.

The delivery in June amounted to 2,593 tons, and these cargoes were accepted without objection. On the 16th of June the *Lingi* sailed with 812 tons. She arrived, and was ready to discharge on the 20th of July. On the 14th of July the *Pellegro* sailed with 612 tons, and she was ready to discharge on the 28th of July.

On the 6th of July the *Benedetto* sailed with 606 tons, and was ready to discharge on the same day—the 28th of July.

The average voyage from Carthage for sailing ships is five weeks. The last two vessels—the *Pellegro* and the *Benedetto*, it will be observed, took, the one twenty-four and the other twenty-three days, thus following more rapidly than might have been expected upon the *Lingi*, and crowding into the month of July cargoes expected to arrive in August. It therefore happened that by the 28th of July the plaintiff had tendered 2,030 tons more, which, with the 2,593 tons delivered in June, made up 4,623 tons within the two months. Although the defendants had a large extent of wharfage at Cardiff, they had, when these vessels arrived, so great a number of cargoes in hand, both in steamers and sailing vessels, discharging ore under other contracts, that they were unable for a considerable time to give a berth to these three vessels. The consequence was, that the *Lingi* was not discharged till the 24th of August, the *Pellegro* till the 25th, and the *Benedetto* till the 1st of September. Upon each of these vessels the plaintiff had to pay demurrage amounting in the whole to 197l. 4s. 6d.; but no question arises as to these vessels, this amount having been paid into Court by the defendants.

The *Nero*—the vessel in question—was despatched from Carthage on the 9th of July, two days after the *Benedetto* sailed, having on board 767 tons.

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She made a still shorter passage, arriving at Cardiff on the 28th or 29th of July. On the 30th notice was given by the master of his readiness to discharge. The same reasons which caused the defendants to retain the three other vessels led to the detention of the *Nero*. Although the charter by which she was engaged allowed fourteen days for unloading, the vessel was not discharged till the 3rd of September; the process of unloading occupying only three days. For the detention beyond the lay days the plaintiff had to pay demurrage amounting to 150*l*. This formed the other item of claim in the action, and is the sum now in question.

Bills of lading had been sent to the defendants as soon as the several vessels sailed. The bill of lading of the *Nero*, dated the 7th, arrived on the 15th of July.

It was admitted that steamers and other vessels which came in after the *Nero* arrived were discharged before her; but the preference the defendant thus gave to other vessels does not of itself create any liability to the plaintiff. The question is not whether they could have discharged her at an earlier date, but whether they were bound either by their contract or by their acceptance without objection of the bill of lading, to take delivery of the cargo, and discharge the vessel within the lay days, so as not to subject the plaintiff to demurrage. As I before observed, notice was given by the master of the *Nero* to the defendants of his readiness to discharge on the 30th of July. On the 1st of August the agent of the defendants wrote to the plaintiff, who carried on business at Cardiff, a letter in these terms: "I find that you have sent us about 1,400 tons of ore more than we are under contract to receive from you until the month of September. There are so many steamers and vessels in with ore to us, that we have some already under demurrage. I am therefore compelled to give you notice that we cannot receive all the cargoes in the month of August, which you have sent us, and I shall be glad to hear from you which ships you will remove from us.

"I must further give you notice that we cannot be responsible for any of the days which the vessels now in port with ore from you have expended in the month of July."

To which the plaintiff replied on the same day: "I am sorry I cannot agree with you about the views you take with regard to the contract. No special stipulation is made in it regarding quantities to be delivered any month. It says simply: 'Delivery June, July, August and September;' and thus I am making deliveries. I gave special notice of every shipment to you, and each was accepted by you in accordance with our contract. I am entirely within the limits of my contract with my deliveries, and am sorry I have to decline all responsibility with regard to demurrage which you may have incurred or which may be incurred yet."

On the 18th of August the correspondence was resumed by defendants' agent:—

"Referring to your contract made with the Dowlais Iron Company at Dowlais in May last, for the delivery by you of 5,000 to 6,000 tons of manganiferous ore in the months of June, July, August and September, and also to my notice to you dated 1st of August instant, I now beg to give you notice that after I have received a sufficient quantity of the manganiferous ore to complete the August delivery, I shall not receive any further quantity until the month of September. If you will keep the vessels waiting on demurrage, it will of course be at your own cost."

To this the plaintiff answered:—

"I can only repeat what I told you in mine of 1st instant. As I have no special monthly quantities to deliver, and only 5,000 or 6,000 during June, July, August and September, you have no right to refuse any quantity coming in during these four months, so long as the total is not above the contract quantity. I have made my deliveries entirely within the limits of our contract; and if you are unable to discharge these vessels within the times stipulated in our contract, all demurrages are for your account, and you are responsible for same."

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These letters disclose the different views of the contract taken by the parties, and which were substantially insisted on in the argument. The defendants contend that the quantity is to be distributed rateably over the four months as if the contract had contained the words "by equal monthly quantities." This however cannot be the true meaning of the contract. For the contract gives the option to the one party or the other (it matters not for this purpose to which) to deliver or to demand either 5,000 or 6,000 tons, and no provision is made for exercising the option at any given time, whether in the first month or the last, or either of the intermediate months. So that until the option is exercised, the plaintiff could not tell how many tons should be delivered in any month, whether a fourth of 5,000 or a fourth of 6,000 tons. But apart from this consideration, and supposing the contract had specified 5,000 tons only, the circumstances shew that the parties could not have contemplated equal monthly deliveries. It is not unreasonable to suppose that the ore had to be procured by the plaintiff's correspondents at Carthage. At all events, they had to provide shipping for it. It was known to both parties that it would take many cargoes to make up the contract quantity; but it could not be known beforehand to either of them what freights would be within the reach of the shippers at any given time, or what tonnage the vessels would be which they should be able to take up. Moreover, the contract shews that the cargoes might be sent either in steamers or sailing vessels, and the length of a voyage for a sailing vessel varies from three weeks to more than twice that length.

The elements of uncertainty must have been within the contemplation of both parties when the contract was made, and neither of them could have supposed that the plaintiff intended to bind himself to tender in any one month an aliquot portion of the 5,000 tons.

I cannot therefore read this contract as one requiring equal deliveries in each of the four months. Considering that

the vendor's capacity to deliver any specified quantity within any specified time was known to be dependent on so many contingencies, it must have been understood between the parties that a considerable margin on each side of an aliquot portion of the 5,000 tons was to be allowed to him. What he stipulates for is that he will deliver the whole quantity within four months, but not that he will deliver any given portion in either month; and the utmost, I think, that could be required of him was to deliver a reasonable proportion of the 5,000 tons in each of the four months.

I desire not to be understood as laying it down that if through the accidents of navigation or other such cause no portion of the ore should arrive in a particular month the contract would thereby be broken. It is not necessary in this case to say more than that the delivery of a substantial portion in each month would satisfy the contract.

I cannot therefore accede to the argument urged on the part of the defendants, that the jury should have been directed as a matter of law that the quantity contracted for ought to have been equally distributed over the four months. It is a question for the jury whether in the then state of things, considering the quantity which had already been delivered, it was or was not reasonable to tender a further cargo of 767 tons on the 30th of July. The defendants were not bound to discharge more than from fifty to sixty tons per day, and at this rate they might have completed the unloading by the time the lay days expired; but they could, as the event shewed, have completed it in three days. The jury, having had the facts before them, after some deliberation came to the conclusion that the tender was not unreasonable.

This appears to me to decide the case in favour of the plaintiff. For it follows from this finding that the defendants were guilty of unreasonable delay in discharging the *Nero*, and that they thereby caused a loss to the plaintiff of 150*l.* for demurrage. It is unnecessary to express any opinion upon the effect of their having accepted without objection the

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bill of lading, or of the finding of the jury, that they ought to have returned it.

Upon the former finding, my judgment is for the plaintiff for 150*l.* and costs.

Solicitors—Gregory & Co., agents for Downing, Cardiff, for plaintiff; Ingledew, Ince & Greening, agents for Ingledew, Ince & Vachell, Cardiff, for defendants.

[IN THE EXCHEQUER DIVISION.]

1878. }
Feb. 16. } YOUNG v. KITCHIN.
March 4. }

Set-off—Assignment of Chose in Action—Debt on a Contract—Set-off of Damages for Breach by the Assignor—Judicature Act, 1873, sec. 25, sub-sec. 6—Rules of the Supreme Court, Order XIX. rule 3, Order XXII. rule 10.

A plaintiff sued as assignee of a debt for work done under a contract. The defendant delivered a "statement of defence and counter-claim," claiming "by way of set-off and counter-claim" damages for breach of the contract by the assignor in not completing the work within the time agreed on:—Held (on demurrer), that the defendant was entitled to set off or deduct these damages, but that the form of the statement of defence must be amended, inasmuch as it did not shew that the defendant claimed only to set them off and not to recover them.

This was a demurrer to part of a statement of defence and counter-claim.

The statement of claim was in substance as follows:—

The defendant employed Downs & Co., builders, to execute certain works in the erection of four warehouses, and to complete another warehouse and a public-house then in course of erection, subject to a certain schedule of prices and other stipulations; Downs & Co. finished the said works on or about the 1st day of October, 1876, and the defendant took possession of the same.

The cost of the works, according to the terms of the employment, amounted to 29,484*l.* 11*s.* 10*d.*, whereof at the time of the assignment hereinafter mentioned there was due from the defendant to Downs & Co., a balance of 6,084*l.* 11*s.* 10*d.*

Downs & Co. on the 5th day of November, 1877, by deed, for the considerations in the said deed mentioned, assigned to the plaintiff the said debt of 6,084*l.* 11*s.* 10*d.*, and the plaintiff on the 6th of November, 1877, gave the defendant notice in writing of the assignment. The defendant has not paid to the plaintiff the said sum of 6,084*l.* 11*s.* 10*d.*, or any part thereof, and refuses so to do. The plaintiff claims 6,084*l.* 11*s.* 10*d.* and interest.

The statement of defence and counter-claim alleged (*inter alia*) that it was a term of the contract between the defendant and Downs & Co. that defects in the works should be remedied or allowed for, and that by reason of unremedied defects nothing was due from the defendant upon the contract, and "by way of set-off and counter-claim" proceeded in substance thus:—

6. By the agreement between the defendant and Downs & Co., Downs & Co., in consideration that the defendant would employ them to erect the four warehouses mentioned in the statement of claim, and would pay them for the erection of the same and of another warehouse already built, and of a public-house then being built, promised that the works should be commenced immediately upon the signing of the agreement, and that three of the said four warehouses should be finished and delivered up to the defendant by the 1st of August, 1876, and the remaining one of the said four warehouses by the 1st of September, 1876.

7. Downs & Co. contrary to the agreement did not deliver up to the defendant the said three of the said four warehouses until November, 1876, and the remaining one until August, 1877, in consequence whereof the defendant was unable to let the said warehouses for the reception of hops, for which purpose the same were erected, as Downs & Co. at the time of their making the said agreement well knew, and the defendant has, through his

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being unable to let the said warehouses as aforesaid, lost great sums of money.

The defendant claims 2,400*l.* damages for breach of the said contract in not delivering possession to him of the said four warehouses at the respective times agreed upon.

The plaintiff demurred to the 7th paragraph of the statement of defence, on the grounds (*inter alia*) that it did not state any cause of set-off or other answer to the plaintiff's claim, and that it was in the nature of a cross action, and stated no maintainable cause of action against the plaintiff.

Bush Cooper (on Feb. 16), for the plaintiff.—The plaintiff is entitled under the Judicature Act, 1873, sec. 25. sub-sec. 6 (1) to sue for the debt assigned to him, without being met, even by way of set-off or other defence, by a claim, like this, to damages for a breach of contract by his assignors. Even if the defendant is by way of defence entitled to these damages, the defence is wrong in form, inasmuch as it claims these damages, not merely by way of defence, but in such a form that, under Order XIX. rule 3 and Order XXII. rule 10, the defendant would be entitled, if the balance upon the claim and counter-claim should be in his favour, to judgment for the balance, which clearly cannot be right.

Bompas (*Olare* with him), for the defendant.—It is not contended that the defendant can claim these damages from the plaintiff otherwise than by way of defence. But he is clearly entitled to

claim them by way of defence. He would, even before the Judicature Acts, have been entitled in an action by the plaintiff's assignors to deduct these damages from the amount sued for—*Allen v. Cameron* (2). Therefore the plaintiff's assignors had not even a legal right to the sum which they affected to assign, save as subject to this claim of damages for breach of contract. And the plaintiff as assignee from them cannot take that to which they had not even a legal right. Moreover, in equity before the Judicature Acts, the plaintiff as assignee would have taken subject to this cross-claim to damages, as at least an equity against his claim; and the Judicature Act, 1873, sec. 25. sub-sec. 6 (1) did not intend to enlarge the rights of an assignee of a chose in action beyond the rights which he already possessed in the view of a Court of equity.

Bush Cooper, in reply.—The plaintiff's claim and the defendant's cross-claim, though arising upon the same contract, arise upon independent undertakings in the contract. Clearly, therefore, the plaintiff cannot be met by this defence, objection to the form of the defence apart.

CLEASBY, B.—There are two questions in this case—one of substance and the other of form. The question of substance is, whether the defendant is entitled in this action, which the plaintiff brings as assignee of a debt for work done under a building contract, to set up by way of defence a claim of damages for breach of contract by the assignor in not completing the works within the time agreed on. Now, by the terms of the Judicature Act, 1873, sec. 25, sub-sec. 6 (1) the assignment of a chose in action is effectual only "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." I think that this cross-claim would have been allowed in equity to stand as a defence against the assignee; and my opinion, therefore, upon the question of substance is in favour of the defendant. As to the question of form, I will take time to consider.

(2) 1 Cr. & M. 832; s. c. 2 Law J. Rep. Exch. 263.

(1) The Judicature Act, 1873, sec. 25, sub-sec. 6, enacts: Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor, &c.

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CLEASBY, B., (on March 4).—In this case the principal question was disposed of upon the argument, by holding that the defendant was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract on the part of the plaintiff's assignor.

Another question remained, upon the form of the defence and counter-claim; and it rather appeared to me that the counter-claim was in such a form (claiming, as I thought it purported to do, damages against the plaintiff) that the 7th paragraph shewed no title to such a claim, and was therefore demurrable.

The form has been followed of a counter-claim in an ordinary case where the plaintiff does not sue as the assignee of a chose in action, and where the defendant is entitled to judgment for the balance of his counter-claim if it overtops that of the plaintiff. But this is not the case here; the defendant has no claim to recover anything against the plaintiff; he only meets the plaintiff's claim by a counter-claim of damages arising out of the same contract, and this ought to appear upon his defence and counter-claim.

The above objection would apply equally to the allegation of the 8th paragraph, which is not demurred to (3). And this rather shews that the plaintiff did not intend by his demurrer to rely upon this formal objection, but to raise the substantial question which has been decided. And the defendant has been misled or he might have amended the formal defect.

The proper course is, I think, to overrule the demurrer, the costs to be costs in the cause, the defendant to be at liberty to amend his claim by shewing that he does not claim to recover damages against the plaintiff, but only to set them off against the plaintiff's claim.

Judgment accordingly.

Solicitors—A. H. Miller, for plaintiff; Pettengill, for defendant.

(3) The 8th paragraph contained an allegation that there was defective work which had not been remedied or allowed for; and the defendant claimed 800*l.* damages for this defective work.

[IN THE QUEEN'S BENCH DIVISION.]

1878.

Feb. 19.

May 13.

LEATHAM v. AMOR AND
OTHERS.

Bill of Sale—Assignment of present and future Property—Judgment Creditor.

*M. assigned to the plaintiff all the machinery, plant, &c., upon certain leasehold premises, comprising a sugar refinery, warehouse and other offices, as well as the machinery, plant, &c., "which shall hereafter be upon the said premises," for securing a sum of money and interest. The assignment was duly registered under the Bills of Sale Act. The interest due under the above-mentioned security being in arrear plaintiff obtained judgment of recovery of the premises; prior, however, to the writ of possession being delivered to the Sheriff, the latter had seized a considerable amount of machinery and fixtures, used in connection with the sugar refinery, but acquired subsequently to the deed, under a writ of *fi. fa.* issued by the defendants upon a judgment obtained against *M.*, who was then in possession of the premises and of the property seized:—*

Held (on the authority of Holroyd v. Marshall, 10 H.L. Cas. 191; s. c. 23 Law J. Rep. Chanc. 193), that as the assignment to the plaintiff, though of after acquired property, was absolute, and not a mere agreement to assign, and as the goods were sufficiently specific to make the assignment operative in equity, the plaintiff was entitled to retain the property seized as against the defendants.

This was a Special Case stated for the opinion of this Division, pursuant to two orders of Mr. Justice Lopes, upon certain interpleader proceedings taken before him by the Sheriff of Middlesex, who had seized the machinery, plant and fixtures of a sugar refinery under a writ of execution at the suit of the defendants, and which machinery, plant and fixtures were claimed by the plaintiff as against the execution creditor.

The facts were as follows:—

The plaintiff (being possessed of the unexpired residue of a term of twenty and one and a half years from the 25th of

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December, 1864, in certain leasehold premises, comprising a sugar refinery, warehouse and other offices, together with the machinery, engines, boilers, plant, fixtures, &c., standing and being on and used in connection with the said refinery and premises), by an indenture dated the 6th of December, 1876, between the plaintiff and one Alexander Manbré, assigned all his interest in the said refinery and premises, together with all the said machinery, engines, boilers, plant, fixtures, &c., to Manbré, his executors, administrators and assigns, in consideration of the price or sum of 5,000, to be paid by Manbré to the plaintiff by five equal annual instalments of 1,000*l.* each, with interest at the rate of five per cent. on the said sum of 5,000*l.*, or on so much thereof as should for the time being remain unpaid, the indenture reciting that it was the intention of the parties thereto that the due payment of the said sum of 5,000*l.* and interest should be secured to the plaintiff by a deed of mortgage of all the said assigned premises, which was intended to bear date the day next after the date of the indenture.

Accordingly, by another indenture, dated the 7th of December, 1876, between the plaintiff and Manbré, which recited the foregoing indenture and the agreement for the security therein mentioned, Manbré covenanted to pay the plaintiff the said sum of 5,000*l.* in manner aforesaid, together with the agreed interest thereon, such interest to be paid half yearly on the 17th days of January and July in each year. By this indenture Manbré, in pursuance of the said agreement for security, further assigned or purported to assign the premises and effects in the following terms—namely, "The said Alexander Manbré doth hereby assign unto the said William Henry Leatham (the plaintiff), his executors, administrators and assigns, all and singular the building and erections, machinery, engines, boilers, cranes, pipes, tanks, pans, plant, implements, apparatus, utensils, trade fixtures and fixed and moveable chattels and effects, now standing and being in and upon or belonging to or used in connection with the

said refinery, and the buildings connected therewith, and being at No. 26, Cable Street, St. George's-in-the-East aforesaid, and which are particularly specified and described in a certain inventory, dated the 15th day of September, 1874, signed by the said William Henry Leatham, James Bryant, junior, and Octavius Leatham, and also by the said parties hereto, subject to the additions to and alterations and renewals of parts of the said machinery, chattels and effects, which have taken place since the said last mentioned date, as now shewn in red ink by the alterations in the said inventory, or which shall hereafter be in or upon the said premises." This indenture was duly registered under the Bills of Sale Act.

The half-yearly payment of interest which became due upon the security of the indenture of the 7th of December in the month of January, 1877, not having been paid, the plaintiff on the 25th of July commenced an action in the Exchequer Division against Manbré to recover possession of all the sugar refinery premises, and for mesne profits and arrears of rent; and the defendant's appearance to the writ having been struck out by a Master's order, the plaintiff, on the 30th of August, obtained judgment of recovery of the premises, and on the 28th of September following a writ of possession of the premises was directed to the Sheriff of Middlesex; but, just prior to this, namely, on the 23rd of September, the Sheriff took possession of a considerable amount of machinery, plant, fixtures, &c., on and used in connection with the said refinery and premises, under a writ of *fi. fa.* issued by the defendants, upon a judgment against Manbré, who was then still in possession of the premises and of the property seized.

Among the said property so seized by the Sheriff and claimed by the plaintiff are articles which are not comprised in the inventory hereinbefore mentioned, but which had been placed upon the premises by Manbré subsequently to the date of the indenture of the 7th of December. With these exceptions the machinery, plant, fixtures, &c., seized by

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the Sheriff, are all comprised in the inventory.

The goods, which were the subject of the present interpleader, were the articles which were not comprised in the inventory.

[The above facts are taken from the judgment of the Lord Chief Justice.]

Lane, for the plaintiff.—The case is on all fours with *Holroyd v. Marshall* (1), where it was held under similar circumstances that the title of a claimant was preferable to that of the execution creditor, as to the added as well as the original machinery. He also referred to the judgment of Lord Westbury in *Reeve v. Whitmore* (2).

Barnes, for the execution creditors (the defendants).—The facts in *Holroyd v. Marshall* (1) are distinguishable on several grounds. In that case there was an express covenant that all machinery, &c., "fixed or placed in or about the said mill, buildings and appurtenances, in addition to or substitution for the said premises, or part thereof, should be subject to the trusts, &c., hereinbefore declared and expressed concerning the said premises," during the continuance of the security; here no such declaration of trust is contained. *Belding v. Read* (3), decided subsequently to *Holroyd's Case* (1), is an authority to shew that the claimant has no legal title to this property, and that the deed of assignment conferred a mere equitable right, not being sufficiently specific to admit of a bill for specific performance being maintained in a Court of Equity. He likewise cited *Congreve v. Evetts* (4); *Ohidell v. Galsworthy* (5); *Carr v. Acraman* (6); *Hope v. Hayley* (7).

(1) 10 H.L. Cas. 191; s. c. 33 Law J. Rep. Chanc. H.L. 193.

(2) 33 Law J. Rep. Chanc. 63.

(3) 8 Hurl. & C. 955; s. c. 34 Law J. Rep. Exch. 212.

(4) 10 Exch. Rep. 298; s. c. 23 Law J. Rep. Exch. 273.

(5) 6 Com. B. Rep. N.S. 471.

(6) 11 Exch. Rep. 566; s. c. 25 Law J. Rep. Exch. 90.

(7) 5 E. & B. 830; s. c. 25 Law J. Rep. Q.B., 155.

Lane, in reply.—*Belding v. Read* (3) strongly supports the contention of the claimant. There the property in question purported to be assigned was merely stock-in-trade, and Martin, B., Bramwell, B., and Channell, B., expressly distinguish such property from property which is of the character of fixed machinery, or was ear-marked as belonging to the premises. Again, no distinction can be shewn between the present and *Holroyd's Case* (1) on the ground of there being no declaration of trust; for in the latter case the property was assigned by the grantor through a trustee, whereas here the assignment from grantor to grantee was direct. He cited *Brown v. Bateman* (8).

Our. adv. vult.

The judgment of the Court (9) was (on May 13th) delivered as follows:—

COCKBURN, L.C.J.—We took time to look into the authorities and to see whether the case was distinguishable from *Holroyd v. Marshall* (1), so as to be within the operation of *Belding v. Read* (3), and we are of opinion that the case comes within the former decision, the assignment, though of after acquired property, being absolute and not a mere agreement to assign, and the goods being sufficiently specified to make the assignment operative in equity. In *Belding v. Read* (3), Bramwell, B., observing upon *Holroyd v. Marshall* (1), says, "There, machinery, which in a sense was not specified when the deed was executed, having become specific by being brought into a particular mill, and made a part of its machinery, it was held that, although the added machinery was not in existence when the deed was executed, a covenant or grant of this nature would confer an equitable interest in it," and Channell, B., uses language to the like effect. It was owing to the want of this specific character in *Belding v. Read* (3) that an assignment of "all other the personal estate and effects whatsoever" of the bankrupt "now being or hereafter to be

(8) 36 Law J. Rep. C.P. 134; s. c. Law Rep. 2 C.P. 272.

(9) Cockburn, L.C.J.; and Manisty, J.

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on the premises or elsewhere in the United Kingdom" was held to be inoperative as against the bankrupt's assignees.

We think that the assignment in the case before us is sufficiently specific, the machinery and chattels in question having become specific, to use the language of Baron Bramwell, by having been brought into the refinery and made part of its machinery. Our judgment is, therefore, in favour of the plaintiff.

MANISTY, J.—The point is whether the assignment or bill of sale of the 7th of December, 1876, from Manbré to the plaintiff operated so as in equity to pass the property in certain after-acquired goods to the plaintiff Leatham, and to give him priority over the defendants, the execution creditors, notwithstanding he had not taken actual possession before the seizure of the Sheriff.

I think the intention of the parties, as it is to be collected from the deed, was that after-acquired goods brought on to and used in connection with the refinery and premises mentioned in the deed, should become and be the property of the present plaintiff, whether formal possession of them was taken by the plaintiff or not; and that, consequently, the case is governed by the decision of the House of Lords in *Holroyd v. Marshall* (1), in which it was held that, although non-existing property to be acquired at a future time is not assignable at law, it is assignable in equity. In the case of *Reeve v. Whitmore* (2), it was held that the deed was intended to operate only as a license to take possession, and, consequently, no property in the after-acquired goods passed until possession was taken by the assignee. That case, therefore, is clearly distinguishable from the present.

It is found, as a fact, that the goods in question were upon and used in connection with the refinery when the Sheriff seized them. I think, therefore, they were sufficiently described and capable of being identified to have entitled the plaintiff to maintain an action for specific performance of the contract contained in the bill of sale of the 7th of December, 1876, and that, consequently, the plaintiff was

in equity the proprietor of them, and entitled to priority over the defendants as execution creditors. In *Belding v. Read* (3), it was held that the goods were not sufficiently specified or earmarked to be the subject of a decree for specific performance, and that, consequently, the property in them did not pass even in equity.

I think the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Solicitors—Emmett & Son, agents for Sotheby, Wilkinson & Co., Wakefield, for plaintiff; J. Pedley, for defendants.

[IN THE DIVISIONAL COURT FOR THE Q.B., O.P. AND EXCH. DIVISIONS.]

1878. { EADE (judgment creditor),
April 1. { v. WINSER & SON (judgment
debtors), THE LONDON TRAM-
WAYS COMPANY (garnishees),
CHAPMAN (claimant).

Debtor and Creditor—Garnishee Order—Claimant—Order XLV. rule 7—Judge by Consent trying Issue summarily—Appeal—Judicature Act, 1873, s. 49.

Where upon an attachment under a garnishee order by a judgment creditor of moneys due to the judgment debtor, a third party claims such moneys for a debt due to him from the judgment debtor, and consents to a Judge at chambers deciding the issue summarily between him and the judgment creditor, instead of asking under Order XLV. rule 7, for an issue to be tried in the usual way, such decision of the Judge is final, and cannot be appealed against by such third party.

In July, 1877, Alfred Eade obtained a judgment against Winsor & Son for 49l. 3s. 4d. The only person constituting the firm of Winsor & Son was Henry J. Winsor, and on the 22nd of February last the said Henry J. Winsor obtained a verdict for 200l. against the London Tramway's Company for an injury which he had sustained through their negligence.

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Thereupon the said Henry J. Winsor assigned such 200*l.* and the benefit of the judgment to be obtained pursuant to the said verdict to James Chapman for securing the payment to him by Winsor of 191*l.* 12*s.* 2*d.*, and on the 23rd of February last Eade, the judgment creditor of Winsor, attached under a garnishee order the moneys owing from the London Tramway's Company to the said judgment debtor. The garnishees took out an interpleader summons, which was heard before Field, J., at chambers on the 1st of March last, who then made an order ordering the garnishees to pay into Court the sum of 49*l.* 3*s.* 4*d.*, the amount due to the said A. Eade on his judgment, to abide the event of an issue between the claimant, James Chapman, and the said judgment creditor, A. Eade, as to whether the said claimant as against the said judgment creditor was entitled to the said sum of 49*l.* 3*s.* 4*d.*, and he adjourned the further hearing to another day for his trying the said issue upon affidavits.

On the 6th of March Field, J., heard the parties at chambers on the trial of the said issue, and he then found the said issue in favour of the said judgment creditor, and barred the said claimant with costs. The claimant gave notice of appeal from this decision of the learned Judge.

Finlay now appeared for the claimant in support of such appeal.

Anderson, for the judgment creditor, took the preliminary objection that no appeal would lie, as it appeared from the affidavits that the trial of the issue between the claimant and the judgment creditor, as directed by the order of the 1st of March last, was to be before Mr. Justice Field himself by the consent of the parties, and he referred to sec. 49 of the Judicature Act, 1873.

Finlay.—If in the proceedings to attach debts there is a claim by a third person, as was the case here, the Judge under Order XLV. rule 7, has power to order “any issue or question to be tried or determined, and may bar the claim of such third person or make such other order as such Judge shall think fit.” This rule is taken from sec. 30 of the Common

Law Procedure Act, 1860, and in a note on that section in *Day's Common Law Procedure Acts* (4th ed.), p. 371, it is said that that section “provides for a summary adjudication by the Judge upon the claims of a third party to liens or charges upon debts sought to be attached by an execution creditor, and gives a power of barring such claims, i.e., claims to such liens or charges as between such third person and the garnishee, but not of barring a debt claimed by such third person against the execution debtor. The learned Judge, therefore, had jurisdiction to direct an issue or to try summarily, but the fact that the parties consented to his trying summarily would not oust the right of appeal given from every order by a Judge by sec. 50 of the Judicature Act, 1873.

[HUDDLESTON, B.—How do you get over sec. 49, which expressly states that no order of a Judge made by the consent of parties shall be subject to appeal except by leave of such Judge.]

That means the order to the making of which the consent was given. The claimant by consenting to the order of the 1st of March only consented to the learned Judge trying the issue summarily, and did not consent to the order he made on the 6th of March, which is the order appealed from. The Interpleader Act, 1 & 2 Vict. c. 58. s. 2, and the Common Law Procedure Act, 1860, s. 17, make the decision of the Court or Judge in an interpleader proceeding final and conclusive, and, therefore, in *Shorridge v. Young* (1) it was held that the disposal summarily by a Judge at Chambers of an interpleader order by consent of the parties could not be reviewed by the Court. There is no such provision in the enactments as to garnishee orders for making the decision final.

[HUDDLESTON, B.—You did not ask my brother Field at Chambers to order an issue to be tried, as you might have done under Order XLV. rule 7, but you asked him to decide the matter summarily, which in effect was to make him an arbitrator between the parties.]

(1) 12 Mees. & W. 5; s. c. 13 Law J. Rep. Exch. 30.

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If giving the consent was to have that effect, of course it must be admitted that there would be no power to review his decision.

LORD COLERIDGE, C.J.—I am of opinion that this preliminary objection must prevail. I think that my brother Field was asked to proceed summarily as an arbitrator in determining the rights of the parties, and the claimant must be taken to have consented to this with all the consequences attending such a disposal of the case. If so, as Mr. Finlay admits, no appeal will lie from the decision of my brother Field.

HUDDESTON, B.—I am of the same opinion. By Order XLV. rule 7, the Judge has power to direct an issue or question to be tried or determined, which, according to rule 5, may be "in any manner in which any issue or question in an action may be tried or determined," or he may make such other order as he shall think fit. There were, therefore, two courses open. The Judge might direct an issue or determine the matter himself summarily. The parties by consenting to the latter course took the decision of the Judge as that of an arbitrator, and therefore his decision was final.

Appeal disallowed.

Solicitors—C. Gregory, for judgment creditor;
Chapman & Co., for judgment debtor and
claimant.

[IN THE EXCHEQUER DIVISION.]

1878. } BAKER, *Inspector of Mines* (ap-
Feb. 5. } pellant) v. CARTER (respondent).

*Mines Regulation—35 & 36 Vict. c. 76
(The Coal Mines Regulation Act, 1872),
s. 51—Owner's Responsibility for Breach
of General Rules by another Person.*

[For the report of the above case, see
47 Law J. Rep. M.C. 87.]

[IN THE COMMON PLEAS DIVISION.]

1878. { BUDGE (*petitioner*) v. AN-
May 15, 16. { DREWS AND OTHERS (*re-*
 { *spondents*).

Municipal Elections Act (38 & 39 Vict. c. 40) — Nomination — Burgess Roll on which the Name of Person nominated must appear — Jurisdiction to review Decision of Mayor.

It is sufficient to entitle a person to be nominated for the office of councilor for a municipal borough that, if otherwise duly qualified, he be enrolled on the burgess roll in force at the time of the election, although his name may not be on the burgess roll which was in force at the time of the nomination.

Therefore, where one of several candidates for the office of councillor was nominated on the 23rd of October, 1877, who was not enrolled on the burgess roll for the year beginning the 1st of November, 1876, but was enrolled on the burgess roll for the year beginning the 1st of November, 1877, when the election was held, and was in all other respects qualified to be elected councillor,—Held, that he was rightly nominated.

Held also, that this Court had jurisdiction, on a petition questioning the election, to review the decision of the mayor, who had allowed an objection to such nomination on the ground that the name of such candidate was not on such previous burgess roll.

The petitioner petitioned against the election of James Andrews, Titus Buckley and Henry Thomas Trevanion, three of the respondents (the other respondent, Francis T. Rogers, being the returning officer) for the office of councillors for the south-east ward of the borough of Poole, at an election for such office holden on the 1st of November, 1877.

The following are the facts necessary for this report, as they were set out in a Special Case stated for the opinion of the Court by the order of Field, J. :—

1. The petitioner is a person who was a candidate at the said election of councillors.

24. On the 22nd day of October, 1877, the burgess-roll and ward lists of the said borough and ward were duly published.

25. On the 23rd day of October, 1877,

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six candidates were nominated in writing for the south-east ward. The names of the six candidates were and are as follows:—James Andrews, Titus Buckley, Henry Thomas Trevanion, Henry Farmer, Philip Edward Lionel Budge (the petitioner) and George Frederick Wanhill. All the candidates were nominated in writing and by separate nomination papers.

28. The said Henry Farmer and Philip Edward Lionel Budge were persons enrolled on the burgess-roll and south-east ward list of the said borough and ward, and were in all other respects qualified to be elected councillors. The said George Frederick Wanhill was not enrolled on the burgess-roll and ward list published on the 22nd day of October, 1876, but he was enrolled as "George F. Wanhill" in the burgess-roll for the said borough published on the 22nd of October, 1877, and was in all other respects qualified to be elected a councillor.

29. The said George Frederick Wanhill, though in all respects so entitled, was by an omission of the overseer of the poor of the tything of Longfleet, in the said borough of Poole, not enrolled on the burgess-roll published on the 22nd day of October, 1876.

30. No application has been made by the said George Frederick Wanhill, under the provisions of section 24 of the 7th Will. 4. and 1st Vict. c. 78, to have his name inserted on such burgess-roll.

31. On the 24th day of October, 1877, the mayor attended alone, without any alderman or assessor, at the town hall, to decide on the validity of certain objections made to the nomination papers of all the candidates.

33. An objection was made by the said Henry Thomas Trevanion, under the Municipal Elections Act, 1875, section 1, sub-section 3, to the nomination paper of the said George Frederick Wanhill on the ground that the name of the said George Frederick Wanhill was not on the burgess-roll published on the 22nd day of October, 1876.

34. The mayor by a decision in writing allowed such objection.

35. A poll was held in the said ward on the 1st day of November, 1877, the result of which was as follows:—James

Andrews, 476 votes; Titus Buckley, 458 votes; Henry Thomas Trevanion, 452 votes; Henry Farmer, 452 votes; and Philip Edward Lionel Budge, 447 votes. There being only three vacancies in the body of councillors, the said Francis Time-wall Rogers, who presided at the said election, gave a casting vote in favour of the said Henry Thomas Trevanion.

36. On the 1st day of November, 1877, the said Francis T. Rogers declared the same James Andrews, Titus Buckley and Henry Thomas Trevanion duly elected, and published a list of their names as and for a list of the names of the persons so elected.

The questions for the opinion of the Court who are to pronounce judgment in such form as they shall see fit, with or without costs as they shall see fit, subject, however, to the respondents' objections in respect of questions 3 and 4, as hereinafter appears, are—

1. Whether the said James Andrews, Titus Buckley and Henry Thomas Trevanion were or any of them was duly elected to the office of councillor.

2. Whether if they or one of them were not duly elected, their or his election is void.

3. Whether the nomination of the said James Andrews, Titus Buckley and Henry Thomas Trevanion were illegal and void or not.

4. Whether the decision of the mayor allowing the objection to the nomination paper of the said George Frederick Wanhill was wrong or not.

5. Whether the petitioner is entitled to any and what relief.

The respondents object to questions 3 and 4 being determined by the Court, on the ground that the Court has no jurisdiction to entertain or determine the same.

The Solicitor-General (Sir H. Giffard) (with him *Grantham* and *O. Bowen*), for the petitioner.—[The arguments of the Solicitor-General were chiefly on the points raised by the petitioner, on which the Court gave no opinion, and which, therefore, it is unnecessary to refer to for the purpose of this report. He, however, contended that the decision of the mayor

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was wrong in disallowing Wanhill's nomination, as the burgess-roll upon which the election was to take place was the one published on the 22nd of October, 1877, which must therefore be the roll by which the qualification to be nominated must be determined, and he further contended that if the mayor was wrong the election was necessarily invalidated and his decision subject to reversal on this petition against the election.]

Pollard (Benjamin with him), for the respondents.

[GROVE, J.—I wish to direct your attention to the 4th question. The objection to the nomination paper of Mr. Wanhill which the mayor allowed was that, though Mr. Wanhill's name was on the burgess-roll made on the 22nd of October, 1877, it was not in the previous roll. But by section 22 of 5 & 6 Will. 4. c. 76, the burgess-roll is to be the roll of burgesses entitled to vote "at any election which may take place in such borough between the 1st day of November inclusive in the year wherein such burgess-roll shall have been made, and the 1st day of November in the succeeding year." That would, therefore, include the 1st of November, 1877, on which this election took place, so that Mr. Wanhill's name was on the roll which was in force when the election took place. How, therefore, do you get over this 22nd section?]

The respondents object to questions 3 and 4 being determined by the Court on the ground that the Court has no jurisdiction to do so. It is clear that the Court has no jurisdiction to entertain the 3rd question.

[GROVE, J.—But how about the 4th question? That is the one which we wish you to argue first.]

The 12th section of 35 & 36 Vict. c. 60 defines the matters in respect of which a municipal election shall be questioned. It enacts as follows:—"The election of any person at an election for a borough or ward may be questioned by petition before an election Court constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the 'Court,' on the ground that the election was, as to the borough or ward, wholly avoided by general bribery, treating, undue influ-

ence or personation, or on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes." The present case does not come within any of the things there enumerated, and therefore the Court has no jurisdiction to review the mayor's decision and to question the election. The Legislature intended to leave untouched the jurisdiction of the Queen's Bench to enquire by *quo warranto* as to the validity of the election of persons to these municipal offices except in the cases specially mentioned in such 12th section. Then the 38 & 39 Vict. c. 40. s. 1, sub-sec. 3, which makes the decision of the mayor "if disallowing any objection to a nomination paper final, but, if allowing the same subject to reversal," makes it so subject only "on petition questioning the election or return," and this brings it back to section 12 of 35 & 36 Vict. c. 60, and there are no grounds here within the terms of that 12th section on which it can be so questioned.

[GROVE, J.—By striking off Mr. Wanhill as a candidate another candidate might have been elected than would otherwise have been. It would affect, therefore, the majority of votes given to those elected.]

The "majority of lawful votes" means as between the candidates at the election for whom the votes were given, and does not apply to the case of a person who tried to be a candidate, but was not considered qualified to be such. Then, next, whether the decision of the mayor allowing the objection to the nomination was or was not right. Under the Municipal Corporation Act of 1835 (5 & 6 Will. 4. c. 76), there were no nominations, and therefore necessarily only one burgess-roll, and the municipal elections, whether to fill up a casual vacancy during the year, or for the election of councillors on the 1st of November in every year, were by the burgesses on the roll according to section 22 of that Act. The 29th section, which enacts who

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are entitled to vote in the election for councillors, says, "every burgess of any borough who shall be enrolled on the burgess-roll for the time being," which means the time of the election. The nomination of candidates is first introduced at municipal elections by 22 Vict. c. 35. s. 6, which states that "at any election of councillors to be held for any borough or ward, any person entitled to vote may nominate for the office of councillor himself (if duly qualified) or any other person or persons so qualified." "Any person entitled to vote" means then, at the time of nomination, entitled to vote. The being so entitled was the being on the burgess-roll which was then in force, which in the present case was the burgess-roll beginning the 1st of November, 1876, and ending the 31st of October, 1877, and the register is "conclusive as to the right of persons included therein to vote at an election for the purposes whereof such register is in force."—35 & 36 Vict. c. 60. s. 10. A man must be a burgess at the time when he is nominated, and he must be nominated by one who is a burgess. Furthermore, he must be qualified to be on the roll as a burgess which shall be in force when he is elected. As to being qualified though not actually on the roll—*The Queen v. Dixon* (1) and *Whalley v. Bramwell* (2). By 38 & 39 Vict. c. 40. s. 5, "a person shall not be entitled to sign or subscribe any nomination paper or to vote unless his name is on the burgess-roll for the time being." The case of *The Queen v. Harvey* (3) is a distinct authority in favour of the respondents. It shews that the roll for the time being is in the present case the roll in operation on the 23rd of October, 1877, when the nomination took place, and that a person whose right to vote only commenced on the 1st of November, could not vote or nominate before that time. If the Court is against the respondents on the 4th question, and is also of opinion that it has jurisdiction to deal with it, it is unnecessary to argue the other points.

(1) 15 Q.B. Rep. 33; s. c. 19 Law J. Rep. Q.B. 362.

(2) 15 Q.B. Rep. 775; s. c. 20 Law J. Rep. Q.B. 53.

(3) 3 Q.B. Rep. 475; s. c. 11 Law J. Rep. Q.B. 282.

GROVE, J.—This is a petition in respect of an election of town councillors for one of the wards of the borough of Poole, which took place on the 1st of November, 1877, in that borough, and the three candidates who were elected on that occasion were James Andrews, Titus Buckley and Henry Thomas Trevanion, who are three of the respondents in this petition. Several objections were taken to the validity of the election, and as one of these objections went to the whole question of whether the election was valid or void we requested the counsel for the respondents to address himself, in the first instance, to that objection. Notwithstanding the able argument of Mr. Pollard, who being very well acquainted with the legislation on this subject, was able with perfect readiness to call our attention to a large number of sections applying more or less directly to this case, we are of opinion that this objection is fatal to the election. The objection is the one contained in the fourth question put for our decision:—"Whether the decision of the mayor allowing the objection to the nomination paper of the said George Frederick Wanhill was wrong or not?" No doubt the case states that, "The respondents object to questions 3 and 4 being determined by the Court, on the ground that the Court has no jurisdiction to entertain or determine the same," and it might, *prima facie*, appear to be more in order that we should take the question of jurisdiction first, but as many of the facts which would have to be referred to for that purpose relate to the other point we deem it more convenient to take the objection itself first, and the question of jurisdiction afterwards. The facts with regard to George Frederick Wanhill are as follows:—[The learned Judge here read paragraphs 25, 28 and 29 of the special case.] The question turned on this fact, Wanhill being nominated as a candidate for the election to take place on the 1st of November, 1877, was it necessary, in order to make his nomination a valid one, that he should be upon the burgess roll made on the 22nd of October, 1876, or upon the burgess roll made on the 22nd of October, 1877, or

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on both; or to put it as Mr. Pollard put it, should he be on the burgess roll of the 22nd of October, 1876, and be entitled to be on the burgess roll of the 22nd of October, 1877, and which would be the roll upon which the election of the 1st of November would proceed? It was argued for the respondents that it was necessary that he should be upon the roll published on the 22nd of October, 1876, and should also be entitled to be upon the subsequent burgess roll, which would be made out upon the 22nd of October, 1877, although it was said to be immaterial whether he was actually on that roll, provided he was entitled to be upon it. On the other hand it was contended for the petitioner that Wanhill was rightly nominated, being not only entitled to be but being upon the burgess roll published on the 22nd of October, 1877, and therefore that the mayor who allowed the objection to the nomination paper was wrong in allowing it, or, to use a converse expression, in disallowing his candidature. We are of opinion that the mayor was wrong, and that Wanhill was entitled to be nominated and elected, if the electors thought fit to vote for him so as to give him a majority entitling him to be elected, he being on the burgess roll published on the 22nd of October, 1877. The principal section of the statute on which the question hangs is the 22nd section of 5 & 6 Will. 4. c. 76, which enacts as follows:—"That the burgess lists so revised and signed as last aforesaid shall be delivered by the mayor to the town clerk of such borough, who shall keep the same and shall cause the said burgess lists to be fairly and truly copied into one general alphabetical list in a book to be by him provided for that purpose, with every name therein numbered, beginning the numbers from the first name and continuing them in a regular series until the last name, and shall cause such books to be completed on or before the 22nd of October in every year, and shall deliver such books, together with the lists, at the expiration of his office to the person succeeding him in such office; and every such book in which the said burgess lists shall have been copied shall be the burgess roll of the burgesses

of such borough entitled to vote, after the passing of this Act, in the choice of councillors, assessors and auditors in such borough, as hereinafter mentioned, at any election which may take place in such borough between the 1st day of November, inclusive, in the year wherein such burgess roll shall have been made, and the 1st day of November in the succeeding year." The election took place on the 1st of November, 1877, and it is admitted that the burgess roll which was completed by the 22nd of October preceding is the burgess roll of voters who were to vote at the election in November, but it is said that, with regard to the nomination of candidates, both the person nominating and the person nominated must be on the previous roll, that is to say, the roll of persons entitled to vote not at the election in November, 1877, but at the election in November, 1876. If this be so, there is no doubt that many inconvenient consequences will follow. In the first place, if the nominator must necessarily be upon the old roll and need not be upon the new, the person nominating might be a person who would not be a voter at the election for which he had nominated. This was an inconvenience, but it would not be fatal if the words of this and other Acts made it clear that it was so intended, but it could hardly be a thing contemplated by the Legislature that a man whose time for being a voter should expire before the election for which he had nominated a candidate should be the one selected by the Act to nominate candidates. I am, however, inclined to think it is unnecessary for us to give judgment upon this point, because the point here is not upon which roll the nominator should be but upon which should be the person nominated, because the disallowance of Wanhill's candidature was upon the ground that he, although upon the burgess roll which would be the proper one for election on the 1st of November, 1877, was not on the previous roll, which was the one for the election on the 1st of November, 1876, and for casual elections between that date and the 1st of November, 1877. The next section which applies to this case is 7 Will. 4. and 1 Vict. c. 78.

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s. 6, which says:—"Be it enacted that in every borough, in which, by reason of any neglect or informality, a new burgess roll of the said borough shall not have been duly made in any year within the time directed by the said Act, the burgess roll which was in force before the time appointed for the revision shall continue in force until such new burgess roll shall have been duly made." Then comes section 6 of the Act 22 Vict. c. 35, which enacts as follows:—"At any election of councillors to be held for any borough or ward any person entitled to vote may nominate for the office of councillor himself (if duly qualified) or any other person or persons so qualified (not exceeding the number of persons to be elected for the borough or ward as the case may be), and every such nomination shall be in writing, and shall state the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions, and shall be signed by the party nominating and sent to the town clerk at least two whole days (Sunday excluded) before the day of election, and the town clerk shall, at least one whole day (Sunday excluded), before the said day of election, cause the Christian names and surnames of the persons so nominated, with such statement of their respective places of abode, and descriptions, and with the names of the person nominating them respectively, to be printed and placed on the door of the town hall, and in some such conspicuous parts of the borough or ward for which such election is to be held." According to the argument of the respondents they must read this thus, "At any election of councillors to be held, say on the 1st of November, 1877, any person entitled to vote, not on the 1st of November, 1877, but on the 1st of November, 1876, and up to the 1st of November, 1877, may nominate a person to be elected on the 1st of November, 1877." Without some such words as these the *prima facie* reasonable meaning of the statute is that the words, "any person entitled to vote," must mean at some election the period for which has not gone by. In order to give it the construction contended for by the respondents it must

mean that he must be entitled to vote, not at the general and usual election, because that has passed—the 1st of November, 1876—but it must mean that he is entitled to vote at any bye or casual election of councillors which may accidentally become necessary before the 1st of November, 1877.

I think that this would be a very strained construction, and one which would not occur to any one in reading the section. I see no reason why the burgess roll which was completed on the 22nd of October—although it did not for the purposes of election come into effect till the 1st of November—should not be in existence for enabling persons to know who would be qualified candidates, who would be qualified voters, and who would be qualified nominators for the election to take place on the 1st of November, when the roll was to come into force. But here we are not bound to decide whether the nominator should be on the old roll, but whether the name of a person nominated must appear on the roll published on October 22nd, 1876, or on the one published on October 22nd, 1877. Now, assuming the language of the Act to be *prima facie* opposed to what we are now deciding, which I do not think it is, the person nominated would have to be upon two rolls, or on the roll for two years; virtually a two years' qualification in order to be qualified, because, by the argument of the respondents, he must for the purposes of being nominated be on the roll from the 1st of November, 1876, and for the purpose of being elected he must be qualified to be on the roll for the 1st of November, 1877. There must, therefore, be virtually a two years' qualification, and no portion of the Act has been called to our attention to shew that this was contemplated by the statute. Then, again, according to the argument for the respondents, the person nominating might be one whose qualification might cease before the time of the election, whilst the qualification of the person nominated must continue. The words of the Act do not require this, but the contrary, particularly the words of the 38th & 39th Vict. cap. 40, sec. 5. But before going to section 5, perhaps I

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ought to call attention to section 1, subsection 2 of the same Act, which says—"Every person nominated shall be enrolled on the burgess roll of the borough or a person whose name is inserted in the separate list at the end of the burgess roll, as provided by section 3 of the Act 32 & 33 Vict. c. 55, and shall be otherwise qualified to be elected." This is read by the respondents as meaning that every person nominated shall be enrolled not on the burgess roll upon which the election shall take place on the 1st of November, 1877, but on the burgess roll upon which the election of the 1st of November, 1876, took place. This, I think, is a somewhat forced construction of the section, but when one comes to section 5, the language seems much more strong in favour of the construction we are adopting. That section says—"that at any municipal election a person shall not be entitled to sign or subscribe any nomination paper or to vote unless his name is on the burgess roll for the time being in force in the borough." It is admitted that the roll for the purpose of voting was the one which was to be used for the election of the 1st of November, 1877. But it was said we are to read the word "or" as disjunctive, thus—"and he shall not be entitled to sign any nomination paper or to vote;" that is to say that he was not to sign any nomination paper unless he was on the previous roll, or to vote unless he was on the subsequent one. In my opinion it would be a strange thing for the legislature to couple these two things together and treat as different these two qualifications and incidents—the subscribing to a nomination paper and voting at an election. The grammatical construction of the section would be that no person was entitled to do either of these things, namely, either to subscribe the nomination paper or to vote unless his name was on one roll, and if only one roll was contemplated on which his name was to be, it must surely be the roll which was to be used for election purposes on the 1st of November. But the section goes on to make this clear; it says, "And every person whose name is on such burgess roll or ward list, as the case may be, shall be entitled to

sign or subscribe any nomination paper and to demand and receive a ballot paper and to vote." If the burgess roll was different for the person nominated or nominating and the person voting, how could such person be entitled "to sign a nomination paper, to demand and receive a ballot paper, and to vote"? Does not this demonstrate that the nomination and voting were both to be done by a person who was on one and the same roll? And if there was only one roll the enactment must mean the one in respect of which alone the person can vote at the election, which in this case was the roll coming into effect on the 1st of November, 1877. Then it was contended that by this construction we are differing from the decision given in the case of the *Queen v. Harvey* (3). But I do not think that we are at all departing from that decision. In giving judgment in that case Lord Denman used words which were not inconsistent with this case, but which would probably have been more explicit than they were if the case now under consideration had been in the mind of the Court, which could not have been so, as nomination papers had not at that time come into existence. So far from our judgment differing from that in the *Queen v. Harvey* (3) if the same point were to arise again as arose then, we should give the same decision as was given there. By sec. 22 of 5 & 6 Will. 4. cap. 76, the book there mentioned is to be the burgess roll of persons entitled to vote "at any election which may take place in such borough between the 1st day of November inclusive, in the year wherein such burgess roll shall have been made, and the 1st day of November in the succeeding year," but the election in the case of *The Queen v. Harvey* (3) was a bye-election taking place between the 22nd of October and the 1st of November, and was, therefore, one to which the 22nd section could not apply, as up to the 1st of November the old roll only would be the proper one. The language of Lord Denman, which had been relied on by the respondents, after the addition of very few words, would be quite consistent with the decision in the present case. "We are of opinion," said Lord Denman, "that in order to be

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qualified the name of Mr. Harvey ought to have appeared upon the list or roll which was in force during the current municipal year ending on the 1st of November, 1841, and that it was not enough that his name should appear on a list or roll which was not to be in force *until* the 1st of November, 1841. Had Mr. Harvey's name been upon the list or roll which was in force during the current year between the 1st of November, 1840, and the 1st of November, 1841, he would clearly have been qualified though his name had not been on the list upon which it is now; and it seems equally clear that the Legislature did not intend that there should be two burgess lists containing different names in operation at the same time at any period during the current year. The proceedings which take place with respect to the burgess list between the 5th of September and the 1st of November in any year are only for the preparation of a list which is to be the burgess list or roll for the year beginning on the 1st of November; and until that day arrives the placing of a name upon it will give no qualification to the party whose name is so placed, the list or roll of the former year being the burgess list or roll until that day." If after that the words "for the purpose of an election during the current year" had been inserted the judgment would have been quite consistent not only with that case but with our judgment in the present case.

I now come to the other point, namely, whether the Court has jurisdiction to entertain this matter, and whether it comes within the powers vested in it by the Act of Parliament to decide whether this election be valid or void, as the case may be. The first section which has been cited as applying to this point is section 12 of 35 & 36 Vict. cap. 60,—
"The election of any person at the election for the borough or ward may be questioned by a petition before an election court, constituted as hereinafter in this Act provided, and hereinafter in this Act referred to as the Court, on the ground that the election was, as to the borough or ward, wholly void, by general bribery, treating, undue influence, or per-

sonation, or on the ground that the election of such person was avoided by corrupt practices or offences against this act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not elected by a majority of lawful votes." It was contended upon that section that the Court has no powers to decide this case, because it was said that neither of the contingencies enumerated in that section had occurred. I think the section does apply, for if we decide against the respondents Andrews, Buckley, and Trevanion, we do so on the ground that they were not duly elected by a majority of lawful votes, because had Wanhill's nomination not been disallowed the lawful votes which were given might have had a different effect. If we were not to read the section in this way our jurisdiction would be very limited indeed, because none of those enquiries that shake elections by shewing that some wrong has been done, which diverts, or might divert, the course of voting, would be within our jurisdiction. The power fairly comes within that section, but if it does not, there is another statute, the words of which are so clear that we should be deciding in the face of the statute if we did not hold that we had jurisdiction in this case. Section 1, sub-section 3, of 38 & 39 Vict. chap. 40, state that "the decision of the Mayor, which shall be given in writing, shall, if disallowing any objection to a nomination paper, be final; but if allowing the same shall be subject to reversal on petition questioning the election or return." Words could not express anything more clear than this. Here there was a petition questioning the election or return, and this, I consider, is the proper Court to entertain the matter. The mayor allowed the objection to a nomination paper, which was one of the very things said by this statute to be subject to reversal on petition questioning the election or return. But it was argued that in the previous Act 35 & 36 Vict. c. 33. sec. 20, sub-sec. 2, there was an interpretation clause, giving to these words a different effect from

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what would otherwise be their obvious, clear, and direct meaning. It said:—"The term petition questioning the election or return shall mean any proceeding under which a municipal election can be questioned." It meant that the term petition applied not only to what were ordinary petitions against an election, but to other proceedings, such as a *quo warranto*, and therefore that it had a larger meaning than an ordinary petition. But if this be so, it seems that it does not negative the words in the subsequent section, or limit them, but rather enlarges them. It may be that the interpretation of the Act 35 & 36 Vict. c. 33, is to be construed as an interpretation of the words in that Act, and not of the words used in a subsequent Act, and I certainly am not aware of any case in which an interpretation clause in a previous Act was held to apply to a subsequent Act, but without looking at it in that way it seems to me that there is nothing in the interpretation which is inconsistent with the subsequent Act applying to this case. I think the Legislature contemplated this Court having jurisdiction in such a case as this, and that the objection which has been raised by the petitioner is fatal to the election, and that the election must be declared void. With regard to the question of costs, it has been contended that certain objections having been made to Mr. Rogers, the returning officer, if the Court decided on a point that did not apply individually or peculiarly to him he should be allowed his costs, and so should stand on a different ground from the other respondents. But the respondents had all acted together, and I see no reason why Mr. Rogers should stand in a different position from the other respondents. The election, therefore, in my opinion, will be declared void, and the respondents will have to pay the costs.

LINDLEY, J.—I agree in the judgment delivered by my brother Grove, and I only wish to say a few words. Upon the question of jurisdiction I will add nothing, as the Act of Parliament is abundantly plain. With respect to the main question, as to whether this election is void or not, I think the key of the whole

statutes is to be found in the examination of the statute of 1835. From that it will be seen that there had always been two burgess rolls existing between the 22nd of October and the 1st of November, one of which regulated elections taking place before the 1st of November, and the other regulated those taking place on and after that day. When one comes to the Act 22 Vict. c. 35. s. 6, it appears plain that the words "entitled to vote" refer to the election for which candidates were to be nominated, this being a necessary sequence of the language used. I also think that the words "burgess roll for the time being in force" in 38 & 39 Vict. c. 40. s. 5, there mean the roll upon which the election is to take place.

LOPES, J., concurred.

Election declared void.

Solicitors—Ellis, Munday & Co., for petitioner;
Peacock & Goddard, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } HARRINGTON v. THE VICTORIA
June 4. } GRAVING DOCK COMPANY.

*Contract—Action for Commission—
Master and Servant—Agreement in Fraud
of a Third Party—Absence of Damage.*

An agreement made with the purpose of doing something which is calculated to defraud or injure a third party is illegal and void as between the parties to it; and it makes no difference that no damage has in fact been sustained by such third party.

This was a motion for judgment on the part of the plaintiff.

The action was brought by the plaintiff against the defendants for commission on amounts received by the latter for the repairing of two steamships be-

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longing to the Great Eastern Railway Company.

The plaintiff had been employed by the Great Eastern Railway Company to examine the vessels in question, for the purpose of ascertaining what repairs were necessary to be done to them, and the cost of such repairs.

The defendants, whose business it was to dock and repair ships, offered to give him five per cent. commission provided he would disclose to them the amount of his estimate to the Great Eastern Railway Company, and would endeavour to obtain for them the employment to do the repairs. The defendants accordingly tendered for the contract, and it was agreed between them and the plaintiff that the latter should superintend the doing of the repairs on behalf of the defendants.

The defendants obtained the contract, and paid part of the percentage to the plaintiff, but declined to pay the remainder, on the ground that the agreement was invalid, whereupon the present action was brought.

The case came on for trial before Field, J., and a special jury, when the jury found, in answer to questions left to them by the learned Judge, as follows:—

1. That the agreement to pay the five per cent. was in consideration of the plaintiff's undertaking to superintend the execution of the repairs on behalf of the defendants, of his disclosing to them the estimate he had given to the Great Eastern Railway Company, and of his using his influence to induce the company to accept the defendants' tender.

2. That at the time the agreement was made the plaintiff was in a position of trust and confidence in relation to the Great Eastern Railway Company in reference to the estimate and tenders, and that he was so in respect of both vessels, up to the day of the acceptance for the tenders.

3. That the agreement was calculated to bias the plaintiff, but that it did not so bias his mind as to prevent him giving his free and unfettered advice to the Great Eastern Railway Company, or lead him to give advice to them less beneficial than he otherwise would in reference to either of the tenders.

4. That the arrangement for disclosing the estimate and using his influence was not disclosed to the Great Eastern Railway Company.

On the above findings—

A. L. Smith (*Butt* with him) now moved for judgment on behalf of the plaintiff, and contended that inasmuch as it was found the Great Eastern Railway Company had in no way been damnified by the conduct of the plaintiff, the agreement between him and the defendants was capable of being enforced.

Parry and *Jeune*, for the defendants, were not called upon to argue.

COCKBURN, L.C.J.—I think that in this case our judgment ought to be for the defendants. I assume, for the purpose of the argument, that the effect of the contract entered into was not to influence the plaintiff to do anything dishonest with reference to his employers; still I think that upon the findings the defendants are entitled to judgment. I am of opinion that where a bribe or a promise of a bribe is given or made to a person employed by another by a person who has contracted with that other with a view of inducing the agent to do something in derogation of good faith towards his employer, such a transaction amounts to a corrupt bargain. The agent's mind is naturally biased under such circumstances, and it is quite immaterial what the ultimate effect was. The jury have found that its tendency was to make the plaintiff disloyal to his employers; and the man who takes it, obviously does so with the full knowledge that it is intended to induce him to act unfaithfully towards his master. It would therefore be fraught with the most evil consequences were we to hold that the plaintiff who comes here to enforce such a *turpis causa* were entitled to recover.

It matters not in my judgment that the master has not in fact been damnified; it is sufficient that it is intended between the contracting parties that the agreement should be injurious to him.

MELLORE, J.—I am of the same opinion. It is not because the agreement for the

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payment of the per centage fails to have the consequences intended that therefore a contract which would otherwise be void is rendered valid. It may be that in the particular instance the jury were satisfied that the agreement entered into by the plaintiff with the defendants had no corrupting effects; still it was intended to influence the conduct of the plaintiff towards his employer. I think, therefore, it would be most fatal to uphold such a bargain, the object of which was undoubtedly to damnify the employer, on the ground that such employer had not as a matter of fact been damnified.

FIELD, J.—I am of the same opinion. I should have ordered judgment to be entered at the trial had it not been that I felt that the effect would be to carry the law one step further than it has hitherto been carried. I am therefore glad that a question of such deep interest to society should receive such a determination. I quite concur with the observations that have fallen from the Lord Chief Justice and my brother Mellor, which are in accordance with common sense and the principles of the common law.

Judgment for the plaintiff.

Solicitors—Cattarns, Jehu & Hughes, for plaintiff; Gedge, Kerby & Millett, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]
1878. } FRANCIS (*appellant*) v. MAAS
Feb. 21. } AND OTHERS (*respondents*).

The Adulteration of Seeds Act 1869 (32 & 33 Vict. c. 112), ss. 2, 3—"Seeds of Another Kind"—Improving Quality of Clover Seed by Sulphur Smoking.

[For the report of the above case, see 47 Law J. Rep. M.C. 83.]

1878. }
June 6, 22. }

BLOUNT v. HARRIS.

Bill of Sale—Description of Residence of Attesting Witness—Variance between Bill of Sale and Affidavit—17 & 18 Vict. c. 36.

The attestation to a bill of sale correctly described the witness as "Solicitor, Bloomfield Street, in the City of London." In the affidavit the witness, describing himself as "Solicitor, of 16, Bloomfield Street, in the City of London," proceeded to state that he "resided" at "Grove House, Acton, in the City of London." His residence was in fact at Grove House, Acton, Middlesex. There were three places called Acton in England, none of them being in the City of London:—

Held, a sufficient description of the residence of the attesting witness, it being one which, though inaccurate, would, coupled with the description in the bill of sale, enable a person of ordinary intelligence to conclude that the suburban Acton must be the place of residence of a solicitor carrying on business in the City of London.

The question in this case, which was argued before Field, J., on the 6th of June, having been reserved by him for further consideration at the trial, was, whether the description of the residence of the attesting witness to a bill of sale, given in the affidavit filed with the copy of the bill, was sufficient within the Bills of Sale Act.

The attestation of the bill of sale was as follows:—"Edward Clarke, solicitor, Bloomfield Street, in the City of London."

The affidavit was in this form:—"I, Edward Clark, solicitor, of 16, Bloomfield Street, in the City of London, make oath and say as follows: I reside at Grove House, Acton, in the City of London," &c.

There is no such place as Acton in the City of London, but there are three Actons in England—one in Middlesex, one in Suffolk and one in Cheshire.

Crispe, for the plaintiff, who claimed under the bill of sale, argued that the description was reasonably sufficient, and

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that it was permissible to refer to the bill of sale itself to correct any ambiguity in the affidavit. He cited *Jones v. Harris* (1), *Bouth v. Roublot* (2), *Hewer v. Cox* (3), *Attenborough v. Thompson* (4).

Wildy Wright, contra, cited *Murray v. Mackenzie* (5), *Larchin v. The North London Deposit Bank* (6).

Oriepe, in reply.

Our. adv. vult.

The following judgment was delivered (on June 22) by

FIELD, J.—The question in this case is not free from difficulty, but after careful consideration I have come to the conclusion that my judgment must be for the plaintiff.

The cause was tried before me (as to the point now raised) without a jury, and I have to decide whether the description of the residence of the attesting witness to the bill of sale under which the plaintiff claims as given in the affidavit required to be filed, together with a copy of the bill, is sufficient within the meaning of the Bills of Sale Act. The attesting witness is Edward Clarke, and his residence is thus described in the affidavit—"Grove House, Acton, in the City of London."

In the description in the same affidavit of his abode as a deponent, and in the attestation clause of the bill of sale, a copy of which is also filed, he is described as of 16, Bloomfield Street, in the City of London, solicitor, and there is no reasonable doubt that the words, "the City of London," used in describing his residence, were originally intended to be applied to the description of his residence at his office, and were by accident left standing when it was determined to insert his residence at Acton, the fact being

that his private residence is at Grove House, and his business residence in Bloomfield Street, London.

It appeared upon the trial that, whilst admittedly there was no such place as Acton in the City of London, there were other places in England known as Acton—one in Suffolk and the other in Cheshire, and that there were three Actons with other names affixed, such as Acton-Burnell, &c., and under these circumstances the description in its entirety being admittedly inaccurate, it is necessary to decide whether the affidavit still contains a sufficient description, so as to be in compliance with the requisitions of the Act.

Now the object of the Legislature in requiring a description of the residence and occupation of the attesting witness was, that any person having an interest in making inquiries as to the goods of another with whom he is about to deal, or to issue or act upon process of execution against them, should be able to apply to the attesting witness for information for the purpose of making any necessary inquiries to guide his conduct, and that information, it is intended, should be furnished to him by the affidavit, coupled, in case of any ambiguity, with the copy bill of sale, to which the enquirer also has access. And whilst, on the one hand, the inquirer ought not to be called upon to exercise any unusual degree of skill and trouble in tracing the attesting witness out, and is entitled to have all necessary information supplied by the documents themselves, yet, on the other hand, a description ought to be, I think, held sufficient, if an ordinary person, by ordinary inquiry and the exercise of ordinary intelligence, can ascertain where he will find the object of his search. To give an erroneous number of a house in a long street, is an illustration of the first class of cases, and in such a case the description has been held insufficient—*Murray v. Mackenzie* (5); but the case now under consideration seems to me to fall within the second class.

The debtor and the grantee of the bill of sale resided in London, and the solicitor had clearly an office there; and applying a fair construction to the affidavit, coupled with the information supplied by

(1) 41 Law J. Rep. Q.B. 6; s. c. Law Rep. 7 Q.B. 157.

(2) 1 E. & E. 850; s. c. 28 Law J. Rep. Q.B. 240.

(3) 3 E. & E. 429; s. c. 30 Law J. Rep. Q.B. 73.

(4) 2 Hurl. & N. 559; s. c. 27 Law J. Rep. Exch. 23.

(5) 44 Law J. Rep. C.P. 313; s. c. Law Rep. 10 C.P. 625.

(6) 44 Law J. Rep. Exch. 71; s. c. Law Rep. 10 Exch. 64.

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the bill of sale, an ordinary inquiry would bring out the fact that there was no Acton in the City of London, so that there would be small difficulty in concluding that the general words referring to the City, as compared with the specific "Grove House, Acton," were erroneous, and the inquirer would then be remitted to the only remaining difficulty—which Acton it is that is referred to.

But upon this head, the description of the deponent in the same affidavit comes strongly in aid, for as he is there described as of "Bloomfield Street, in the City of London, solicitor," and all the parties to the transaction reside in London, surely the most ordinary intelligence would come to the conclusion that the man who carries on his daily professional avocation in London would so much more probably have his nightly residence in the well-known metropolitan suburb rather than in the two other remote and obscure Actons, that I cannot think he would hesitate as to the spot where he would find the "Grove House" of which he is in search.

Evidence was given before me that letters posted with the address given in the affidavit duly reached their destination in course of post, shewing that an applicant by letter would have met with no difficulty in communicating with the attesting witness; but although the test was suggested by myself, I do not rely upon it. The post-office authorities, by their training, can bring more than ordinary skill and knowledge to bear upon such a subject. *Ut res magis valeat quam pereat* is a wholesome maxim, and applicable, I think, to this case. My verdict is, therefore, for the plaintiff.

Solicitors—Noon & Clarke, for plaintiff; G. R. Harrison, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. }
April 6. } SANDYS v. FLORENCE.

Negligence — Innkeeper — Liability for Injury to Guests.

It is the duty of an hotel-keeper to take reasonable care of the persons of his guests, so that they are not injured by reason of a want of such care on his part whilst they are in the hotel as his guests.

A statement of claim alleged that, while the plaintiff was using an hotel, of which the defendant was proprietor, as a guest for reward to the defendant, by the negligence of the defendant the ceiling of the room in which the plaintiff then was, fell upon and injured him:—Held, on demurrer, that such statement sufficiently shewed a cause of action.

The plaintiff's statement of claim was as follows:—

1. The plaintiff is a wholesale trimming merchant, and the defendant is the proprietor of the Castle Hotel, Coventry, and it became, and was, his duty to have and keep the said hotel in a secure and proper condition, so as to be safe for persons lawfully using the same as guests (1).

2. The defendant neglected to do so, and while the plaintiff was using the said hotel as a guest for reward to the defendant, by the negligence of the defendant the ceiling of the room in which the plaintiff then was, fell upon and seriously injured him, so that he became sick and wounded, and suffered great pain, and incurred divers great costs and expenses in and about medical and surgical attendance and otherwise, and was prevented from carrying on his business for a long time, and lost the profit he would otherwise have made.

The defendant demurred to this statement of claim which, as originally drawn, had not the words in italics in it, on the ground that it disclosed no duty on the part of the defendant towards

(1) The words "as guests" and "as a guest for reward to the defendant" were inserted during the argument.

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the plaintiff to prevent the said ceiling from falling as alleged.

Patchett (*FitzAdams* with him) in support of the demurrer.

[LINDLEY, J.—The objection to the statement of claim is that it does not shew in what capacity the plaintiff was in the defendant's house. If the plaintiff was in the hotel as a guest, why is it not so alleged?]

Cock, for the plaintiff, then amended the statement of claim accordingly, by inserting therein the words in italics:

Patchett demurred to the amended statement.—The statement, even as amended, discloses no cause of action. The mere allegation of duty will not create a duty unless it can be legally created from the facts which are stated. There are no such facts stated in this case. The mere statement of the ceiling falling by reason of the defendant's negligence is not sufficient. In *Southcote v. Stanley* (2) the declaration alleged that the plaintiff was lawfully in the defendant's house as a visitor by his invitation, and that for the purpose of leaving the house the plaintiff, with the defendant's permission and knowledge, opened a glass door of the defendant's which it was necessary to open, and that by the carelessness, negligence and default of defendant the door was in an insecure and dangerous condition and unfit to be opened, by reason whereof, and of the carelessness, negligence, and default and improper conduct of the defendant, a piece of glass fell from the door upon the plaintiff and injured him. Yet it was held on demurrer that the declaration disclosed no cause of action. The fact that the defendant in this case is an hotel or inn keeper is immaterial, and makes no difference between that case and the present one. There is no obligation at common law on an innkeeper to take care of his guests. *Calye's Case* (3) shews a responsibility for the goods of the guest, the "*bona et catalla*," but it is limited to this, and does not extend to a responsibility for the person of the guest. Plead-

ings are to contain a statement of the material facts, but not evidence—Order XIX. rule 4.

[LINDLEY, J., referred to rule 25 of that order.]

That still shews the necessity to set out the facts required to constitute the defendant's liability unless it be sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind. If it had stated that the ceiling was in a dangerous state to the knowledge of the defendant, the plaintiff's case might have been different, but what is alleged is the result of some antecedent fact which is not stated.

[LINDLEY, J.—I would agree with you had the statement been only that the plaintiff was hurt by the negligence of the defendant. The statement, however, is that the ceiling fell by the defendant's negligence.]

There is no precedent to be found of an action for an injury from negligence in which the act is not stated in respect of which the negligence is complained of, as, for example, in so negligently navigating a vessel, or in so negligently managing an engine, &c. Besides, it is not sufficient to shew negligence; the plaintiff must shew a breach of duty—*Collis v. Selden* (4). In that case the declaration alleged that the defendant negligently hung a chandelier in a public house, knowing that the plaintiff and others would be under it, and that unless carefully hung it would fall and injure them, and without warning the plaintiff of the dangerous way in which it was hung, whereby the chandelier fell on and injured the plaintiff whilst lawfully in the public-house, and it was held that the declaration disclosed no cause of action. There is here no contract, nor is there anything like a trap, as in *Indermaur v. Dames* (5) and *Gautret v. Egerton* (6).

Cock, for the plaintiff, was not called on.

(4) 37 Law J. Rep. C.P. 233; s. c. Law Rep. 3 C.P. 435.

(5) 35 Law J. Rep. C.P. 184; and on appeal, 36 Law J. Rep. C.P. 181; s. c. Law Rep. 1 C.P. 274.

(6) 36 Law J. Rep. C.P. 191; s. c. Law Rep. 2 C.P. 371.

(2) 1 Hurl. & N. 247; s. c. 25 Law J. Rep. Exch. 339.

(3) 8 Rep. 63.

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LINDLEY, J.—I shall overrule the demurrer to the statement of claim as now amended, since, in my opinion, the statement as amended shews a cause of action. The facts alleged, which I rely on as sufficient for this, are, that “whilst the plaintiff was using the defendant’s hotel as a guest for reward to the defendant, by the negligence of the defendant the ceiling of the room in which the plaintiff then was fell.” I pass over the previous allegation that it was the defendant’s duty “to keep the said hotel in a secure and proper condition, so as to be safe for persons using the same as guests,” because I think that that duty is too widely alleged, and that the defendant’s duty is not to insure his guests, but to see only that they do not suffer from want of reasonable and proper care on his part. The plaintiff was using the defendant’s hotel as a guest for reward, so that the case is distinguishable from that of *Gautret v. Egerton* (6), and is more like the case of a keeper of a shop, the duty of whom, with reference to customers, is pointed out by Willes, J., in delivering the judgment of the Court of Common Pleas in *Indermaur v. Dames* (5). “We are to consider,” he says, “what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business upon his invitation, express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class, for whether the customer is actually chaffering at the time or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows, or ought to know, such as a trap-door left open, unfenced and unlighted—*The Lancaster Canal Company v. Purnaby* (7), and *Chapman v. Rothwell* (8), where *Southcote v. Stanley* (2) was cited, and the Lord Chief Justice, then Mr. Justice Erle, said, ‘the distinction is between

the case of a visitor—as the plaintiff was in *Southcote v. Stanley* (2)—who must take care of himself and a customer who as one of the public is invited for the purposes of the business carried on by the defendant.’ This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper’s business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself.” It appears to me that the distinction there pointed out between a visitor in a private house and a customer in a shop is to be remembered in deciding this case, and that therefore it was the duty of the defendant, who was an hotel-keeper, to take reasonable care of the persons of his guests, so that they should not be injured by anything happening to them through his negligence while they are his guests. That being so, all the rest is merely a matter of verbal criticism on the pleading. It is said on the part of the defendant that what is stated in the statement of claim is not enough to shew a cause of action, and that the statement ought to specify the nature of the defendant’s negligence, but whether the ceiling fell by reason of a want of proper care on the part of the defendant, or, as it is alleged, by the defendant’s negligence, is really the same thing. So it is also immaterial to allege knowledge on the part of the defendant of the state of the ceiling; the single word “negligence” includes this. In my opinion enough is stated to shew a cause of action, and the demurrer must be overruled; but inasmuch as the statement of claim as originally delivered and demurred to was defective, I think there ought to be no costs.

Demurrer overruled without costs.

Solicitors—James Neal, for plaintiff; Pattison, Wigg & Co., agents for Oliver Minster, Coventry, for defendant.

(7) 11 Ad. & E. 223; s. c. 7 Law J. Rep. Q.B. 258.

(8) E., B. & E. 168; s. c. 27 Law J. Rep. Q.B. 316.

[IN THE COMMON PLEAS DIVISION.]

1878. }
 May 8. } THE MABELLA IRON ORE COM-
 June 18. } PANY v. ALLEN.

Action on Judgment for Costs by House of Lords.

An action lies on the judgment of the House of Lords ordering the appellant in an unsuccessful appeal to that House to pay the costs of such appeal to the respondent.

The plaintiffs' statement of claim after stating that the plaintiffs were a joint stock company stated that in June, 1875, judgment was given by the late Court of Exchequer Chamber in favour of the plaintiffs in an action in the late Court of Exchequer of Pleas, wherein the plaintiff was one George Ace Bevan, and the defendants were the present plaintiffs [in which action the said George Ace Bevan recovered judgment for 300*l.* and costs] (1); and the said George Ace Bevan gave notice of appeal against such judgment to the House of Lords, and before such appeal was further proceeded with, the said George Ace Bevan was adjudicated bankrupt, and the defendant herein was appointed trustee under such bankruptcy.

There was no estate of the said bankrupt, nor were there any assets in the said bankruptcy. The defendant being such trustee, was added as a co-plaintiff with the said George Ace Bevan in the said action by an order made in the said action on the 8th of May, 1876, and the defendant without the authority of the Court of Bankruptcy having jurisdiction in that behalf and without any authority from any committee of inspection, or the creditors under the said bankruptcy, prosecuted as appellant the said appeal to the House of Lords against the said judgment of the Court of Exchequer Chamber, and upon the 23rd of March, 1877, judgment dismissing the said appeal and affirming the said judgment of the Court of Exchequer Chamber, and order-

ing the said defendant to pay to the plaintiffs the costs incurred in respect of the said appeal was pronounced by the House of Lords.

In accordance with the practice in that behalf a draft of the judgment proposed to be entered up on the said appeal was sent by the proper officer to the defendant as such appellant, and the said defendant proposed an alteration in the said judgment to the effect that the said costs of appeal should be paid by him "out of the estate of the said George Ace Bevan," which alteration having been in due course objected to by the plaintiffs, was disallowed, and judgment was duly entered upon the said appeal, which judgment, so far as it is material for this report, was in the words and figures following:—

"It is ordered and adjudged by the Lords, spiritual and temporal, in the Court of Parliament of Her Majesty the Queen assembled, that the said judgment of the Court of Exchequer Chamber of the 25th of June, 1875, complained of in the said appeal be, and the same is hereby affirmed, and that the said appeal be, and the same is hereby dismissed this House; and it is also further ordered that the said appellant, George Allen, trustee in bankruptcy of the said appellant George Ace Bevan, do pay, or cause to be paid, to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk of the Parliaments."

The said costs of the plaintiffs as respondents in the said appeal, were duly taxed and certified by the clerk of the Parliaments at the sum of 24*l.* 13*s.* 6*d.*, which the plaintiffs claim from the defendant in this action, and all things happened, all conditions were fulfilled and all times elapsed necessary to entitle the plaintiffs to have the said sum paid to them by the defendant, yet the said defendant hath not paid the same or any part thereof. The plaintiffs claim the said sum of 24*l.* 13*s.* 6*d.* and interest thereon from the 25th of June, 1877, until payment or judgment.

Demurrer to this statement of claim on the ground *inter alia* that the plaintiffs have not shewn such a contract as entitles

(1) These words between the brackets were inserted during the argument of the demurrer.

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them to any relief against the defendant personally.

Levitt, for the defendant, in support of the demurrer.—No such action as this lies. It is a novel action, and no precedent can be found for it. In *Macqueen's Practice of the House of Lords*, pp. 270 to 274, several modes of recovery of costs from an appellant are given, and an action is not one of such modes. It is there said that the recovery of such costs may be effected by estreating the appellant's recognizance into the exchequer. It is also stated that "independently of the remedy under the recognizance the House may compel payment of costs by ordering the party into custody," and that "a more effectual course is to remit the matter to the Court below with the necessary directions." It also appears from *Macqueen's Practice of the House of Lords*, p. 420, that up to 1678 the House had no means of taxing costs, and in the cases there mentioned, viz., *Moore v. Salcross* (February, 1677) and *Dean v. Symonds* (July, 1678) the Court of King's Bench having refused to tax the costs of the respondent the House ordered the appellant to pay the respondent a round sum. This, as Mr. Macqueen points out, was because the House formerly had no taxing officer of its own; but, says Mr. Macqueen, "by the standing order No. 215, the Clerk of the Parliaments or clerk assistant is now authorised on the application of either party to tax costs awarded by the House upon appeals and writs of error." This shews that an action for such costs is not necessary. Then is it maintainable? It was not even before the Judicature Act, 1873, and certainly it is not since that Act. A judgment for costs is not a debt of record as described in 2 *Stephens's Commentaries*, 7th edition, p. 140. In fact, in this case there is no judgment, but only an order to pay costs. That order to pay costs forms no part of the judgment. As appears from 7 *Viner's Abridgement*, title "debt" (N) "for what thing the judgment being debt lies upon it," there are some judgments on which an action will lie and others on which it will not lie. No doubt it was

decided in *Hutchinson v. Gillespie* (2) that debt will lie on a final order of the Judicial Committee of the Privy Council for payment of costs, but that was on the ground that by the Act regulating the jurisdiction of the Privy Council, power is given to make orders for the payment of costs, and that upon the well-known rule as laid down in *Com. Dig. Debt* (A 1) and "Action upon Statute" E., where a statute directs a sum of money to be paid, debt may be maintained for its recovery. But there is no such statute referring to the House of Lords, and the payment of costs ordered by the House cannot be a statutable debt. There is nothing for an implied promise to pay, as where there is a judgment or a statutable debt. *Carpenter v. Thornton* (3) is an express decision that an action is not maintainable upon a decree of a Court of Equity for interest and costs on non-completion of a purchase by the defendant, according to his agreement. That was decided on the ground of there being no implied contract to pay what had been so decreed, Abbott, C.J., stating, "I cannot say that a man compelled by a Court of Equity against his will to pay a sum of money impliedly agrees to pay the money." At all events no action for these costs can be brought since the Judicature Act, 1873, inasmuch as by section 25 subsection 11 of that Act in all matters in which there be any conflict between the rules of equity and the rules of common law, the rules of equity are to prevail, and, therefore, as now an order by the House of Lords on appeal from the old Common Law Courts is on the same footing as an order by such House on appeal from the Equity Courts, and no action would have formerly lain on a decree in equity, so no action can be maintained now on an order by the House on any appeal to it from any of the divisional courts. There is this further objection, that the order of the House in the present case does not order the defendant personally to pay the costs. He is described in the order as "trustee

(2) 11 Exch. Rep. 798; s. c. 25 Law J. Rep. Exch. 103.

(3) 3 B. & Ald. 52.

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in bankruptcy," and if this case had been remitted to the Court below, the sheriff would only have been able to have taken goods in the possession of the defendant as such trustee. The 43 Geo. 3. c. 46. s. 4, by which in actions on judgments the plaintiff is not to be entitled to costs unless the Court or Judge shall otherwise order, shews that such an action is not to be favoured.

R. E. Webster (Pollard with him), for the plaintiffs.—The order of the House of Lords was against the defendant personally, the words "trustee in bankruptcy" are merely added as descriptive of the defendant. It is not against the defendant as trustee, and the proposition of the defendant to alter the order so as to make the costs payable out of the bankrupt's estate was expressly refused. The case of *Ex parte Angerstein, re Angerstein* (4) shews that a trustee in bankruptcy making an unsuccessful application may be ordered to pay costs personally unless he obtains an indemnity from the creditors. The reason why this action is brought is because the case in the Court below was decided on a special case, and there being therefore no record there was a difficulty in seeking to recover the costs by the ordinary process of the Court. At all events, this action lies, though it is admitted it would not lie, if the order had been interlocutory and not a final one. It was conceded in *Hutchinson v. Gillespie* (2) that if the order there had been a final and not an interlocutory order, it would have been the subject of an action. As regards the 43 Geo. 3. c. 46. s. 4, *Bennett v. Neale* (5) decides that that statute only applies to the original plaintiff, and does not extend to an action brought to recover the costs of a judgment of nonsuit.

Levitt in reply.

Our. adv. vult.

On the 18th of June the following judgment was delivered:—

DENMAN, J.—This was a demurrer to a statement of claim which alleged in

substance as follows. In June, 1875, the Court of Exchequer Chamber gave judgment in favour of the present plaintiffs in an action in which one Bevan was plaintiff and the present plaintiffs were defendants, and in which Bevan had recovered judgment for 300*l.* and costs in the Court below. Bevan gave notice of appeal, and before any further proceeding was adjudicated bankrupt, and the defendant was appointed trustee in bankruptcy. There was no estate or assets of the bankrupt.

In May, 1876, the defendant was added as a co-plaintiff with Bevan by an order in the action, and without any order of the Court of Bankruptcy, or authority of any committee of inspection prosecuted the appeal to the House of Lords. On the 23rd of March, 1877, the House of Lords gave judgment, dismissing the appeal and affirming the judgment of the Exchequer Chamber, and ordering the defendant to pay to the plaintiffs the costs incurred in respect of the said appeal.

During the preparation of the judgment the defendant proposed that it should be drawn up so as to state that the costs of the appeal should be paid by him "out of the estate of the said Bevan," which proposition was disallowed, and the part of the judgment relating to those costs was as follows: "and it is further ordered that the said appellant, George Allen, trustee in bankruptcy of the said appellant Bevan, do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk of the Parliaments."

The costs were duly taxed and certified at 24*l.* 13*s.* 6*d.*, which the plaintiffs claimed with interest from the 25th of June, 1877. One point made for the defendant upon the argument of the demurrer was, that the action was misconceived in being brought against the defendant personally. But I think it quite clear that the House of Lords had jurisdiction to order the defendant who had prosecuted the appeal without assets to pay the costs of the unsuccessful appeal, and (what is more important) I

(4) 43 Law J. Rep. Bankr. 131; s.c. Law Rep. 8 Chanc. App. 479.

(5) 14 East 343.

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think it is also clear beyond any doubt upon the facts set out in the statement of claim and admitted by the demurrer, that the order of the House of Lords as to costs, does and was intended to make him personally liable for these costs, being an order made upon the same principle upon which the Lords Justices acted in the case cited by Mr. Webster of *In re Angerstein* (4).

The real question, therefore, upon this demurrer, seems to me to be whether an action lies upon an order of the House of Lords such as that set out in the statement of claim. The reasons relied upon in support of the demurrer were the following:—First, that the action was novel. Secondly, that there are three well known modes of obtaining costs ordered to be paid by a judgment of the House of Lords, which are enumerated in *Macqueen's Practice*, pp. 270–274, of which an action is not one. Thirdly, that the order in the present case is not part of the judgment, but a mere order of the Court upon which an action will not lie. Fourthly, that even if an action would have lain before the Judicature Act, 1873, none will now lie, because there is no such doctrine in equity as that upon which the action upon a judgment, as it was contended, was held to lie, namely, that of an implied promise to pay, and because by section 25 of the Judicature Act, 1873, sub-section 11, it must be taken that that doctrine is abolished as applicable to all actions. Fifthly, that 43 Geo. 3. c. 46. s. 4, shews that the Legislature did not intend that the remedy by action upon a judgment should be used unless no other fair remedy existed.

As to the first objection, that the action was novel, this only appears to me to be a ground for examining carefully whether it is maintainable or not according to true principles of law. The only difficulty in the present case seems to me to arise from the fact that, in the cases which bear most closely upon the present, the action has been held to lie or not to lie upon grounds applicable to the particular case, and that there is nowhere to be found any authority one way or the other, as to the right to sue in any

case where the House of Lords has given a judgment. This may perhaps be accounted for by the fact mentioned by Mr. Levitt in his argument, that it was not until the year 1835 that the House of Lords passed any resolution enabling its officer to tax costs in the usual way (see order 215 in *Macqueen's Practice*, appendix 1).

But whatever be the cause of the absence of express authority for any such action, there can be no doubt that the mere absence of a precedent for it would go no further than an argument against its maintenance by no means conclusive, but more or less cogent according to the nature of the case.

The second argument in support of the demurrer is a more formidable one, namely, that there is no necessity for such an action, because there is a sufficient remedy by other modes of proceeding. This argument has undoubtedly played an important part in all the decisions upon the subject; but upon a careful perusal of those decisions I can find nothing which amounts to a holding that an action will not lie upon a final judgment of a superior Court, merely because that Court might enforce its judgment by other methods. The true principle upon which such actions lie is stated by Alderson, B., in the case of *Hutchinson v. Gillespie* (2):—"Wherever there is the judgment of a Court of competent jurisdiction for payment of a sum of money an action will lie thereon; for the law gives so much credit to the judgment as to consider that the sum is due." This no doubt only applies to final judgments and not to orders on interlocutory proceedings (see *Fry v. Malcolm* (6), *Patrick v. Shedden* (7), and this brings me to the third objection which is, that the order for costs in the present case was not part of the judgment, but a mere order relating to costs upon which an action will not lie.

I am, however, clearly of opinion that the order in question was a part of the final judgment of the House of Lords. The mere use of the word "order"

(6) 4 Taunt. 706.

(7) 2 E. & B. 14; s. c. 22 Law J. Rep. Q.B. 282.

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instead of the word "adjudge" or "decree," can, I think, make no difference in the nature of the thing done. In the case of *Hutchinson v. Gillespie* (2), where the words of the judgment of the Privy Council were "direct that there should be paid for the costs," &c., though the case was decided upon a statutory duty, it is clear that if the proceeding had not been one of an interlocutory character but a final judgment, the Court would have, equally or *à fortiori*, held that the action lay. Baron Bramwell commences his judgment by the words, "If this order had been a portion of the proceedings in the cause that is a part of the final judgment in the Canadian Court or of the Privy Council, I should have thought that there would have been no difficulty in maintaining an action upon it."

In *Emerson v. Lashley* (8) where it was held that an action would not lie on an order for costs in an interlocutory proceeding, Eyre, C.J., in giving judgment, says, "In actions brought in the superior Courts the costs become a duty only by being united with the debt in the judgment. There is that sort of credit given to the judgments of a Court of competent jurisdiction, that they create debts and duties upon which actions of debt are founded." *Carpenter v. Thornton* (3) was decided on special grounds which in no way apply to the case of an ordinary common law action. It may also be questioned whether that case can be supported after the case of *Henderson v. Henderson* (9) unless it be on the ground that it does not appear in *Carpenter v. Thornton* (3) that the proceeding may not have been one of an interlocutory character in the course of a suit in equity, and not in the nature of a final decree.

It was fourthly argued that, inasmuch as the basis of an action upon a judgment is an implied promise to pay, and no such doctrine exists in equity, and by section 25 of the Judicature Act, 1873, subsection 11, equitable doctrines are now to prevail, this action must therefore fail. I

think, however, that this argument fails, on the ground that the doctrine of implied promise is not at all necessary to support the action. The duty to pay is created by the final judgment of a Court of competent jurisdiction to which this Court will give credit, and even if the ground of the action were "an implied promise to pay in accordance with such duty," I can find nothing in the Judicature Act to the effect that, because a doctrine was not adopted by Courts of Equity, it is therefore no longer to be used by the High Court of Justice. Such a construction of the Judicature Act would abolish many very wholesome doctrines of law merely because they had not been applicable to proceedings in Courts of Equity. Lastly, it was urged that actions on judgments were not favoured by the Legislature, which was shewn it was said by 43 Geo. 3. c. 46, s. 4, providing that no costs should be recovered by a plaintiff bringing an action on a judgment without leave of the Court. This argument Mr. Webster effectually disposed of by citing *Bennet v. Neale* (5), where the Court refused to stay proceedings in an action brought for 3*l.* 3*s.* for the costs of a nonsuit on payment of that sum only without costs, holding that the statute only extended to judgments recovered by plaintiffs, and not to those for defendants. On the whole, therefore, I am of opinion that the plaintiffs are entitled to judgment, and that the demurrer must be struck out with costs.

Judgment for plaintiffs.

Solicitors—C. C. Ellis Munday & Co., for plaintiffs; Hacon & Turner, for defendant.

(8) 2 H. Black. 248.

(9) 6 Q.B. Rep. 288; s. c. 13 Law J. Rep. Q.B. 274.

[IN THE COMMON PLEAS DIVISION.]

1878. { ESCOTT v. GRAY;
June 5, 7. { THE WEST MARIA AND FORTESCUE
CONSOLS AND JOHN WATSON,
third parties.

Action—Mining Company—Cost-Book System—Action by Creditor in Collusion with Company against a Shareholder—Staying Action.

A creditor of a cost-book mining company will not be allowed to bring an action against a shareholder of the company for the purpose of enforcing a call, and therefore if the action be not really an action by the creditor, but a collusive action by the company, it will be stayed.

The plaintiff sued the defendant in the County Court of Devon, holden at Tavistock, for the amount due for goods supplied to the West Maria and Fortescue Consols, a mining company, on the cost-book system, of which the defendant is a shareholder, and which goods were so supplied on the order of Mr. Watson, the purser of the said mining company.

The defendant caused the said mining company and the said Watson to be made third parties in the County Court action, which action came on for trial before the Judge of the said County Court in January and February last, when, after hearing the evidence, the learned County Court Judge stated that he could not shut his eyes to the fact that the plaintiff's action was the company's action, but he considered that the company had not properly been brought in as third parties, as they were not incorporated, and that the question was solely between the plaintiff and the defendant, who, being a partner, was liable to the plaintiff, and he gave judgment for the plaintiff for the amount claimed.

A rule was afterwards obtained in this division of the High Court, calling upon the plaintiff and the third parties to shew cause why the verdict for plaintiff should not be set aside and judgment entered for the defendant, and against the third parties, or why a new trial should not be had.

Anstie, for the plaintiff, shewed cause. *Bodham* appeared for the third parties. *Archibald* and *Stephen Lynch*, in support of the rule.

GROVE, J.—There must be a new trial. My brother Lindley informs me that it has been the practice in equity to stay actions of this kind when the Court is satisfied that the action is by a creditor of a company for the purpose of the company getting money from a shareholder. My brother Lindley will, therefore, in order to instruct the County Court Judge, state what has been the principle on which the equity Courts have acted.

LINDLEY, J.—Apparently there has been in this case a miscarriage of justice. I wish to make a few observations as to the principle applicable to a matter of this kind. The first point to be considered is whether the action is really and honestly an action by a creditor of the company, or whether the action is an action by the company in the name of the plaintiff, a creditor. The County Court Judge seems to have come to the conclusion that it is not an action by the creditor to assert his own claim, but that it is an action by the company in the name of the creditor, and then he appears to have given judgment on the assumption that it is really a creditor's action. That is not satisfactory. Assuming the action is not really a creditor's action, he should have treated it as a collusive action, instituted by the company to put pressure on a shareholder with whom the company has a dispute. The proper mode of dealing with such an action is to stay it, for a creditor has no right to lend himself as a mere instrument for settling such disputes.

Before the *Stannaries Act*, 1869 (32 & 33 Vict. c. 19), there was perhaps some reason for bringing such an action in the name of a creditor to enforce a call, because a cost-book mining company, not being incorporated, could not bring an action for calls, but now to put a creditor on a shareholder for such a purpose is wholly unjustifiable, and nothing can be said in its favour,

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because by the Stannaries Act, 1869, an action may be brought by the pursuer for a call made by the company. In support of the view that actions by the company in the name of a creditor should be restrained there are a number of cases, to some of which I will refer, as shewing how Courts of equity have dealt with them. They have not allowed a creditor to abuse his legal right, and have stayed the action brought by him against a shareholder in a cost-book mine; but if the shareholder has owed a call, they have required him to pay it as the price for the action being stayed. The leading authority for this is the case of *Taylor v. Hughes* (1), decided by Lord St. Leonards when Lord Chancellor in Ireland. The next case, in point of date, is *Outts v. Riddell* (2), before Knight Bruce, V.C., where the creditor was also told that the Court would not allow him to abuse his legal rights, but at the same time the Court said it would not restrain the action except on terms which appeared to be just. Then followed the case of *Horn v. The Kilkeny, &c., Railway Company* (3), in which Wood, V.C., applied the same principle, and afterwards Lord Romilly, in the well-known case of *Shortridge v. Bosanquet* (4), and Kindersley, V.C., in *Sibley v. Minton* (5), did the same thing. These cases shew the principle on which the present case should have been dealt with, assuming the County Court Judge to have come to the conclusion that the action was a collusive one. The right way to redress the miscarriage which has occurred is to send the case down for a new trial. I may add, with respect to a cost-book company being able to sue and be sued, that since the Judicature Acts there is no reason why such a company, though not a corporation, may not sue and be sued like any other partnership in the partnership name. The real matter to be enquired into before the County Court Judge will

be whether this is or not a *bona fide* creditor's action. If it is, the judgment which has been given is right; if it is not, but, on the contrary, a collusive action, the judgment is obviously wrong.

Rule absolute for a new trial.

Solicitors—Crowder, Anstie & Vizard, agents for John Shelley, of Plymouth, for plaintiff and third parties; Walter Stocken, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. { JAMES SMITH AND COMPANY v.
June 7. { THE WEST DERBY LOCAL
BOARD.

Notice of Action—Form of Notice—Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 139—Action for a Misfeasance.

In an action against a local board acting under the Public Health Act, 1848 (11 & 12 Vict. c. 63), for not having properly filled up a trench which the board had caused to be made in a road for laying down a sewer, by reason of which that part of the road gave way, and the plaintiff's horse was injured, the notice of action given in compliance with section 139 of that Act stated that the board did by their "labourers' servants and others on or about the 13th of May last negligently, carelessly and improperly leave a certain portion of the said road or highway in an insufficient and improper state of repair, whereby a horse" of the plaintiff "sank into the said road or highway, and was thrown therein," and injured:—

Held, that the notice was not limited to a complaint of an injury from non-repair of the road, but was applicable to a cause of action arising from an act of misfeasance, and was therefore a sufficient notice of the cause of action.

Appeal from the decision of the Judge of the County Court of Lancashire, holden at Liverpool. The action was for damages for an injury to the plaintiff's horse, caused by part of the road

(1) 2 Jon. & Lat. at 24.

(2) 1 De Gex & S. 226.

(3) 1 Kay & J. 399; s. c. 24 Law J. Rep. Chanc. 241.

(4) 16 Beav. 84; s. c. 22 Law J. Rep. Chanc. 48.

(5) 27 Law J. Rep. Chanc. 53.

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over which it was being driven suddenly giving way. The defendants were the sewer and highway authorities under the Public Health Act, 1848 (11 & 12 Vict. c. 63), for the district in which the road was situate; and they had caused a trench of about ten feet deep, to be dug in it for the purpose of laying down a pipe sewer. After the pipe had been laid down, and before the accident occurred, the trench was filled in. The subsidence which caused the horse's fall was situated in that part of the road where the trench had been filled in, and in the opinion of the County Court Judge the accident arose from the trench not having been properly filled in; and he held that the defendants were liable, and assessed the damages at 10*l*. From this decision the defendants appealed; and one of the grounds of such appeal was that the notice of action, which by sec. 139 of 11 & 12 Vict. c. 63 the plaintiffs were required to give, was insufficient, as it limited the plaintiffs' claim to damages arising through non-repair of the highway. The notice of action was as follows:—

"To the Local Board of Health in the parish or district of West Derby, in the county of Lancaster. Take notice that we, James Smith and John Innes, trading as James Smith & Company, of 9, Lord Street, Liverpool, wine merchants, and Thomas Goffey, attorney for the said James Smith & Company, and on their behalf, will on the expiration of one month from this date enter a plaint against you the said Local Board of Health of West Derby, in the County Court of Lancashire, holden at Liverpool, for the injury and damage caused to us by the undermentioned matters and things done or omitted by you and your labourers, servants and others acting under your orders and directions at and upon a certain road or highway called Moss Road, in the parish of West Derby, to wit, for that you the said Local Board did by yourselves, your labourers, servants and others, on or about the 13th day of May last, negligently, carelessly and improperly leave a certain portion of the said road or highway in an insufficient and improper state of repair,

whereby a horse belonging to us the said James Smith & Company while being lawfully driven upon and along the said road or highway sank into the said road or highway, and was thrown therein, and by reason of the said negligent, careless or improper conduct was thrown down and severely injured and permanently diminished in value to the great injury and damage of us the said James Smith & Company. Further take notice that Thomas Goffey, of 15, Lord Street, Liverpool, in the county of Lancaster, is the name of our attorney in the cause of action aforesaid.—Dated this 11th of October, 1875.

Signed James Smith & Co."

[As the question as to the sufficiency of this notice is the only one which need be mentioned in this report, so much of the argument of counsel and judgment of the Court as referred to other matters is omitted.]

Baylis, for the appellants.—The notice of action is insufficient. It is merely a notice of an injury arising from non-repair of the highway, and for that the defendants would not be liable. The parish and not the defendants would be liable for the neglect to repair the highway—*Parsons v. The Vestry of St. Mathew, Bethnal Green* (1) and *Gibson v. The Mayor, &c., of Preston* (2). A notice of action ought to be construed strictly; for it is to be acted upon, and it must give notice of a cause of action. The Public Health Act, 1848 (11 & 12 Vict. c. 63), under which the defendants were acting, requires by section 139 that notice should be given, "explicitly stating the cause of action," and that section enacts that "the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the last-mentioned notice." The cause of action must therefore be clearly stated in the notice under this Act. It is true that in *Jones v. Nicholls* (3), where there was a notice

(1) 37 Law J. Rep. C.P. 62; *s. c.* Law Rep. 3 C.P. 56.

(2) 39 Law J. Rep. Q.B. 131; *s. c.* Law Rep. 5 Q.B. 218.

(3) 13 Mea. & W. 361.

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of action to a constable which contained the date of the arrest, the notice was held sufficient, though it did not give the date of the subsequent detention in custody of the plaintiffs at another place, but that was because without such date it sufficiently shewed what was the cause of action.

Cave, for the respondents, was requested to limit his arguments to the form of the notice of action.—The case of *Jones v. Bird* (4) is directly in point. There the action was for an injury to the plaintiff's house, arising from the defendants not properly shoring up another house adjoining whilst they were at work on a sewer under such house; and a notice of action was held sufficiently to describe the cause of action in stating that the defendants altered certain sewers near to the plaintiff's house so negligently, that the plaintiff's house fell.

[He was then stopped by the Court.]

GROVE, J.—[After stating that in his opinion the Judge of the County Court was right, and that the defendants were liable as the sewer authority, and at all events in their joint capacity as a highway and sewer authority, the learned Judge proceeded to the objections to the notice of action as follows]:—That objection is the most formidable one for the respondents; but in my opinion the notice is sufficient. Such notice, as stated by Abbott, C.J., in *Jones v. Bird* (4), is not to be construed with great strictness. It is not to be construed with the same strictness as a pleading. Pleading is to state some specific complaint or answer, whereas the object of a notice of action is mainly to enable the party to whom it is given to tender amends; and therefore what is required is that it should be sufficiently clear so as to shew what are really the grounds of complaint; and if this be done the notice is, I think, sufficient. In *Jones v. Nicholls* (3), Pollock, C.B., said he was disposed to think the notice there "would be sufficient if construed with the strictness of a plea," implying that it was not necessary that it should be construed with the same strictness. And

Bayley, J., in *Jones v. Bird* (4), said, "A notice of this sort does not require the same precision as a declaration. It is quite sufficient if it calls the attention of the defendants to the general nature of the injury, so that they may go to the premises, and see what the ground of complaint is." Now does the notice in this case give such sufficient information of what the complaint is? It is said it does not, inasmuch as it merely complains of an injury from non-repair of a road in the sense of leaving it out of repair in the ordinary way, so as to make it a case of non-feasance, instead of misfeasance, by the defendants. It seems however to me that the notice is sufficient if it be reasonably read by a person wishing to understand it. It states that the defendants did by their "labourers, servants and others," carelessly "leave a portion of the said road in an insufficient and improper state of repair." Therefore it is not merely for non-repair, but that having labourers there the defendants left such part of the road in an insufficient and improper state; and then the notice goes on to state the nature of the injury, namely, "whereby a horse," whilst being driven on the road, "sank into the said road," tending to shew, I think, the existence of some local matter, like a hole, being left there in an insufficient state. It is sufficient if the notice informs the defendants substantially of the ground of complaint, and in my opinion this notice is sufficient.

LINDLEY, J.—I am of the same opinion. I need not say anything in addition to what my brother Grove has said with respect to there being evidence of negligence and to the liability of the defendants. The real ground for this appeal was that the defendants expected to uphold a special demurrer to the notice of action. The object of a notice of action is, as has been observed by my brother Grove, to enable a party to tender amends; and therefore it is sufficient if it states substantially the nature of the complaint. The appellants have insisted on the stringent wording of section 139 of the Public Health Act, 1848, and have contended that the notice does not state

(4) 5 B. & Ald. 837.

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a cause of action, because it complains only of an injury arising from an act of omission, namely, in not repairing the road; but I think, when it is properly looked at, it is capable of being construed as applicable to an injury arising from an act of misfeasance and certainty if after this notice the defendants had enquired into the matter, it is obvious that they would have learnt what it was which the respondents complained of. I think that the County Court Judge was right.

Appeal dismissed with costs.

Solicitors—Torr & Co., agents for W. Radcliffe & Co., Liverpool, for appellants; Brook & Chapman, for respondents.

[IN THE COURT OF APPEAL.]

1878. }
May 11. } HOLME v. BRUNSKILL.*
June 7. }

Principal and Surety—Bond—Alteration of Agreement between Principals—Discharge of Surety—Landlord and Tenant—Surrender by Operation of Law—New Tenancy.

In an action against a surety on his bond, whereby he guaranteed the performance of a covenant by his principal, the lessee of a farm and flock of sheep, to deliver up to the plaintiff at the end of the tenancy with the farm, a like number and quality of sheep regularly heathed and pastured on the farm, it was proved that an alteration had been made in the terms of the letting by the surrender of a small part of the farm and a proportionate reduction of the rent. The jury found that the alteration had not made any material difference in the relation between the parties, so as to affect the capacity of the tenant to perform his covenant:—

Held, by COTTON, L.J., and THESIGER, L.J. (BRETT, L.J., dissenting) that the surety was discharged.

* *Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.*

By COTTON, L.J., and THESIGER, L.J.—Any alteration in the form of the agreement between principals discharges the surety, unless it is self-evident that the alteration cannot prejudice the surety; the surety himself being the judge as to materiality.

By BRETT, L.J.—The surety is discharged where there has been a material alteration, or an alteration of some specific provision of the agreement, but not otherwise.

By the whole COURT.—The mere surrender of a small part of demised premises and proportionate reduction of the rent does not in itself amount to a surrender by operation of law of the old tenancy, and the creation of a new one.

The plaintiff at the date of the bond hereinafter mentioned was, and still is, the owner of a farm called "Riggindale," in Westmoreland.

The action was brought against the defendant as surety on a bond dated the 18th of March, 1873, whereby George Brunskill, of Riggindale farm, Robert Brunskill (the defendant), and Christopher Hodgson Norman jointly and severally became bound in 1,000*l.* to Hugh Parker Holme. The bond recited that H. P. Holme had agreed to let to George Brunskill, from year to year, a farm and lands called Riggindale, situate at Mardale, and a stock of 700 heath-going sheep, and a dwelling-house and buildings, and that the sheep had been delivered to the said George Brunskill, and that it had been agreed that George Brunskill, R. Brunskill, and C. H. Norman should enter into the bond for the redelivery of the sheep or their offspring; and the condition was declared to be as follows:—

"That if the above bounden George Brunskill, his heirs, executors or administrators, do and shall at the determination of the said tenancy deliver up unto the said Hugh Parker Holme, his heirs, executors, administrators or assigns, along with the said farm and premises the like number, species and quality of good and sound sheep as were delivered to the said George Brunskill as aforesaid, and of the same stock or of the offspring breed or produce thereof, all of

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demised premises. This makes a surrender by operation of law—*Tayleur v. Wildin* (2). Moreover, the alteration in the terms is material. Riggindale farm is a specific thing. That has been taken away and something else substituted without the defendant's consent. The question of materiality is not for the jury. The surety himself is the sole judge of it—*Polak v. Everett* (8). See also the judgment of Bailey, J., in *Whitcher v. Hall* (6). In *The Great Western Railway Company v. Whinray* (9) the alteration was for the benefit of the surety. In such a case he would not be discharged. But here the alteration was clearly to the disadvantage of the surety, though, perhaps, not greatly so.

Russell in reply.—There are two classes of cases where it is not material whether the surety has been injured by the alteration or not. First, where time has been given to the principal—*Petty v. Cooke* (10) (Blackburn, J., there says that the rule ought not to be extended); and, secondly, where the guarantee depends on certain specified conditions, and one of the specified conditions has been broken. In all other cases the question is whether the surety has been prejudiced. *Storey's Equity Jurisprudence* (12th edition), §§ 325, 326. In the present case no specified condition has been broken.

The judgment of the majority of the Court (11) was (on June 7) delivered by—

COTTON, L.J.—This was an appeal of the plaintiff against a judgment of Mr. Justice Denman in favour of the defendant, Robert Brunskill. The action was on a bond for 1,000*l.*, dated the 18th day of March, 1873, executed by George Brunskill and Robert Brunskill, and others in favour of the plaintiff.

[His Lordship then stated the facts of the case as above set out and proceeded.]

(8) 45 Law J. Rep. Q.B. 369; s. c. Law Rep. 1 Q.B. Div. 669.

(9) 10 Exch. Rep. 77; s. c. 23 Law J. Rep. Exch. 261.

(10) 40 Law J. Rep. Q.B. 281; s. c. Law Rep. 6 Q.B. 790.

(11) Cotton, L.J., and Thesiger, L.J.

Mr. Justice Denman, before whom the action was tried, gave judgment for the defendant, and against this judgment the plaintiff has appealed.

One ground on which the defendant relied in support of the judgment was, that his obligation under the suretyship bond had expired before the deficiency arose, that is to say, that by the notice to quit and agreement made as to the surrender of the bog-field and the withdrawal of the notice, a new tenancy was created to which the bond did not apply, and for this he relied on the case of *Tayleur v. Wildin* (2) as an authority that under the circumstances a new tenancy was created, and it was on the authority of *Tayleur v. Wildin* (2) that Mr. Justice Denman, as we understand, principally relied; but we are unable to agree with this view.

In *Tayleur v. Wildin* (2) the tenant continued in the occupation of the farm after the day for which the notice to quit, which was withdrawn, had been effectually given, and the rent for which the surety was sued accrued in respect of the occupation after that day, and the Court considered the continuance of the tenant's possession after that time as a new tenancy, and that the guarantee which applied only to the old tenancy, was therefore gone. But, in the present case, the tenancy of George Brunskill was in fact determined on or before the day, when, if the notice to quit had not been withdrawn, it would have ended. The deficiency and deterioration of the flock therefore occurred at the determination of the very tenancy to which the bond referred. It was, however, argued that the effect of giving up the bog-field must be a surrender of the old tenancy. But we are of opinion that this cannot be maintained, and that notwithstanding the surrender to a landlord of part of the land demised, the former tenancy of the remainder of the farm still continues.

It was contended by the defendant that even if there was a continuance of the old tenancy, the effect of the surrender of the bog-field was to discharge him as surety from all liability.

The bog-field contained about seven acres, and the jury, in answer to a

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question left to them at the trial, found that the new agreement with the tenant had not made any substantial or material difference in the relation between the parties as regards the tenant's capacity to do the things mentioned in the condition of the bond, and for the breaches of which the action was brought. The plaintiff's contention was that this must be treated as a finding that the alteration was immaterial, and that, except in the case of an agreement to give time to the principal debtor, a surety was not discharged by an agreement between the principals made without his assent, unless it materially varied his liability or altered what was in express terms a condition of the contract.

In my opinion this contention on behalf of the plaintiff cannot be sustained.

No doubt there is a distinction between the cases which have turned on the creditor agreeing to give time to the principal debtor and the other cases. Where a creditor does bind himself to give time to the principal debtor he, with an exception hereafter referred to, does deprive the surety of a right which he has—that is to say, of the right to pay off the debt which he has guaranteed, and to sue the principal debtor; and without enquiry whether the surety has, by being deprived of this right, in fact suffered any loss, the Courts have held that he is discharged. The exception to which I have referred is where the creditor, on making the agreement with the principal debtor, expressly reserves his right against the surety, but this reservation is held to preserve to the surety the right above referred to, of which he would be otherwise deprived. The cases as to discharge of a surety by an agreement made by the creditor to give time to the principal debtor are only an exemplification of the rule stated by Lord Loughborough in the case of *Rees v. Berrington* (12). "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his

affairs (for they are as much his as your own) without consulting him."

The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without enquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

This is in accordance with what is stated to be the law by Lord Justice Amplett in *The Croydon Gas Company v. Dickinson* (13).

The plaintiff, in support of his contention, that, having regard to the finding of the jury, the surety was not discharged, relied on various dicta to the effect that any material change in the contract between the principals will discharge the surety. Even if by these expressions the Judges intended to state that to have the effect of releasing the surety the alteration must be material, it does not follow that they intend to lay down that no alteration would discharge the surety, unless the jury in an action to enforce his liability held it to be material, or to express any opinion at variance with the rule I have laid down. The case of *Sanderson v. Aston* (1) was specially relied on by the plaintiff. But Martin, B., though he did not formally dissent from

(12) 2 Ves. jun. 540, at p. 543.

(13) 46 Law J. Rep. C.P. 167; s. c. Law Rep. 2 C.P. Div. 51.

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the decision of the majority of the Court, was not satisfied with the judgment, and if the decision is to be considered as based on the reasons given by Pollock, B., that the Court was entitled to consider whether the alteration was material or not, it cannot, in my opinion, be maintained.

In the present case, although the bog-field contained seven acres only, yet it cannot be said to be evident that the surrender of it could not prejudicially affect the surety. Some of the witnesses for the plaintiff admitted that it was occasionally used for pasturing, that its loss would be appreciable in the spring, and that it might make a difference of fifteen in the number of the sheep which the farm would carry. The case may also be considered in another point of view.

The bond given by the defendant, the surety, was to guarantee the delivery up of the flock of sheep therein referred to at the determination of the tenancy of the Riggindale farm, which, in my opinion, must mean Riggindale farm as then demised to George Brunskill, and the bond certainly implied that he should continue to hold the farm as then demised till the flock was given up. The contention of the plaintiff, if it could be supported, would make a variation in the terms of the contract, as to the nature of which there is at least a doubt, and would make the defendant liable for a deterioration of the flock during the time when the tenant held a smaller farm than that contemplated by the contract of the surety.

The plaintiff's counsel relied on some observations made by Lord Cottenham in the case of *Hollier v. Eyre* (7). But, in fact, those observations are in favour of the defendant, and not of the plaintiff. What Lord Cottenham says is: "The surety will be left to judge for himself between his original undertaking and another substituted for it; but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation." In this case, as already pointed out, the original contract of the surety was that the flock should be delivered up in good condition, together

with the farm as then demised to the tenant.

No part of that which was guaranteed was ever withdrawn from the operation of the bond. But the plaintiff attempts to substitute for the contract that the flock should be given up in good condition with the farm as then demised, a contract that it should be delivered up in like condition with a farm of different extent. In our opinion the surety ought to have been asked to decide whether he would assent to this variation. He never did assent, and, in our opinion, was discharged from liability, notwithstanding the finding of the jury, inasmuch as, in our opinion, the question was not one which ought to have been submitted to them.

BRETT, L.J.—I speak with great deference when I say I cannot bring my mind altogether to agree with this judgment, and I feel bound to observe that I arrive at another view than that which has been expressed. As to the first part of the judgment, I entirely agree. I do not think there was any new tenancy, and I only ground that view on the findings of the jury, amongst other things, that the alteration was immaterial. It is the latter part of this view with which I cannot agree. In the first place, this case comes before us fettered by certain rules. We are bound to observe that it is a direct appeal from the decision of my brother Denman after a trial by a jury. We are therefore not at liberty to ask whether the question he left was left in proper form. There cannot be a motion on the ground of misdirection, and we are not at liberty to say that the finding of the jury was contrary to the evidence. It is a general rule that we have no right to look at a verdict, but accept it according to its ordinary construction. I find the question left to the jury was whether the new agreement with the tenant, which, we are told, did not alter the tenancy—whether that new agreement made a sufficient and material difference in the relation between the parties as to the tenant's capacity to do the things mentioned in the bond, and for breach of which the action was brought.

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They not only found that, but my brother Denman says that the matter is far more fit for the consideration of a jury of the county of Cumberland than for a lawyer, and he cannot say that he is dissatisfied with their view. Therefore, there is the finding of the jury with the assent of the Judge. If it were necessary to give an opinion, considering I have not an intimate knowledge of these things, but from what I know of Cumberland farmers, so far from dissenting from the opinion of the jury, I think it is a substantial finding. When one remembers how many views are taken as to farms in Cumberland, I should be inclined to agree with the jury, and say it did not make any material difference. We are bound by that finding, and can act in conformity with it. Where there is a suretyship bond, and there are some alterations in the contract or relation of the parties under the bond as to guaranteeing or performance, the question is whether the alteration is not material or substantial, and whether the surety is released. I cannot bring my mind to think he is. The law takes no notice of alterations that are neither material nor specific. The proposition of law as to suretyship to which I assent is this:—If a material alteration is made of the relation in a contract, the observance of which is necessary, and if a man make himself surety by an instrument reciting the principal relation or contract in such specific terms as to make the observance of the specific terms the condition of his liability, then any alteration which happens is material. But where the surety makes himself responsible in general terms for the observance of certain relations between the parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract. My opinion is in accordance with the finding of the jury, and it will be most dangerous in this particular case to put ourselves in the place of a jury, and because we think seven acres may make a difference, or 10*l.* a year may make a difference, to set aside the finding of the jury, which is that neither one nor the other is material or substantial. I think this case comes within the third

proposition, and the surety is not released. The doctrine of the release of suretyship is carried far enough, and to the verge of sense, and I shall not be one to carry it any further.

Judgment for the defendant.

Solicitors—Johnston & Harrison, agents for Harrison & Little, Penrith, for plaintiff; J. L. Morris, agent for Arniston & Co., Penrith, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1878. }

June 18. }

APPLEFORD v. JUDEKINS.*

Practice—Appeal from Inferior Courts—Lord Mayor's Court—Appeal to Court of Appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45.

The Lord Mayor's Court is an inferior Court within section 45 of the Judicature Act, 1873, and where there has been an appeal from that Court to a Divisional Court under that section no further appeal lies to the Court of Appeal except by special leave of the Divisional Court.

This was an action of ejectment brought in the Lord Mayor's Court of London.

It was tried on February 21, 1878, and the learned Judge directed a verdict for the plaintiff. Execution was stayed, and leave given to the defendant to move the High Court of Justice on certain points reserved.

On March 1st a rule *nisi* was obtained in the Common Pleas Division to enter a non-suit or a verdict for the defendant. The plaintiff shewed cause on May 17, when the above rule was discharged with costs.

On May 27th the defendant moved the Divisional Court for leave to appeal from the order discharging the rule *nisi* to the

* *Coram* Baggallay, L.J.; Bramwell, L.J.; and Theigier, L.J.

Appleford v. Judkins (App.), C.P.

Court of Appeal. The Divisional Court refused to grant such leave, but a stay of the proceedings in the Mayor's Court was granted until the matter should have been brought before the Court of Appeal, supposing an appeal to that Court to lie without leave.

The defendant now appealed accordingly.

Attenborough, for the plaintiff, took the preliminary objection that under sec. 45 of the Judicature Act, 1873, no appeal could be brought to the Court of Appeal, from a Divisional Court, in a case on appeal from the Lord Mayor's Court without special leave, which in this case had not been given.

Lamaison, for the defendant, contended that the Mayor's Court was not an inferior Court within the meaning of sec. 45 of the Judicature Act, 1873. Under 20 & 21 Vict. c. clvii. (the Mayor's Court Act, 1857,) sec. 4, the Court of Exchequer Chamber was the Court of Error to review proceedings in the Mayor's Court. By section 46 of the same Act her Majesty in Council may direct any Act passed to amend the law to apply to the Mayor's Court. An order in Council dated 20th November, 1863, applies the provisions of the Common Law Procedure Act, 1854. Under section 34 of that Act the present appeal will lie.

BRAMWELL, L.J.—I am of opinion that the objection must prevail. Section 45 of the Judicature Act, 1873 (1) is as follows.

(1) By 36 & 37 Vict. c. 66. s. 45, all appeals from Petty or Quarter Sessions, from a County Court, or from any other inferior Court, which might, before the passing of this Act, have been brought to any Court or Judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the Judges thereof as may from time to time be assigned for that purpose, pursuant to rules of Court, or subject to rules of Court, as may be so assigned according to arrangements made for the purpose by the Judges of the said High Court. The determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court, by

[His Lordship read the section.] Perhaps the application to the Divisional Court is not, properly speaking, an appeal; it is an application for an order to set aside the verdict and enter a nonsuit or verdict for the defendant. But in substance it is an appeal, and such an appeal is to be heard and determined by the Divisional Court, and there is to be no appeal without special leave. No special leave was given in the present case, and I do not see to what Courts the Act can apply unless it be to Courts such as the Lord Mayor's Court of London.

BAGALLAY, L.J.—I am of the same opinion. I had some doubts at first whether this was an appeal which could be heard and determined by the High Court of Justice. But it is admitted that the appeal to the Divisional Court was right, and that being so, I do not see how we can get over the express words of the section. The requisite leave has not been obtained, and this appeal cannot be heard.

THESIGER, L.J.—I am of the same opinion. The case of *Ooz v. The Lord Mayor of London* (2) decided that the Lord Mayor's Court is an inferior Court. The position that Court held with regard to appeals before the passing of the Judicature Acts was as follows:—In the case of error on the record there was an appeal direct to the Exchequer Chamber, but on points reserved to any of the three Courts of Queen's Bench, Common Pleas or Exchequer. That being so, by the 16th section of the Judicature Act of 1873, the jurisdiction of those Courts was transferred to the High Court of Justice. Taking that section alone the appeal would have been to any of the Divisional Courts. But we must look to the Act and see what further provision has been made for carrying out the jurisdiction of the High Court in these appeals. The whole question turns on section 45. The words of that section are wide enough to

which any such appeal from an inferior Court shall have been heard.

(2) 1 Hurl. & C. 338; s. c. 2 Hurl. & C. 401; s. c. 32 Law J. Rep. Exch. 64, 232; s. c. 36 Law J. Rep. Exch. 225; s. c. Law Rep. 2 H.L. 239.

Appelford v. Jenkins (App.), C.P.

include appeals from the Mayor's Court. A special Divisional Court was formed for the hearing of appeals from inferior Courts. There is a subsequent rule (Order LVIII. rule 19, Dec. 1876) abolishing the special Divisional Court of Appeal from inferior Courts, and now section 45 applies to the ordinary Divisional Courts. The present case comes within section 45, and the objection to our jurisdiction must prevail.

Appeal refused.

Solicitors—Attenborough, for plaintiff; Chorley, Crawford & Chester, for defendant.

[IN THE COURT OF APPEAL.]

1878. } KIPPLING v. TODD.
June 20, 26. } SAME v. ALLAN.*

Railway Company—Scire facias—Director's Qualification—"Shareholders"—Estoppel—Companies Clauses Consolidation Act, 1845 (8 Vict. c. 8), ss. 3, 8, 36.

The defendants T. and A. were named as directors in the special Act of a railway company. The Act provided that the qualification of directors should be fifty shares of 10l. each, and that the directors named in the Act should continue in office till the first ordinary meeting of the company. T. never acted as a director, and another director was appointed in his place. A. acted as director for a time and then resigned, and his place on the board was informally filled up. No shares were allotted to either of the directors, and the whole of the share capital of the company was placed in other hands.

A register of shareholders of the company was drawn up, in which the names of the defendants did not appear. No ordinary meeting of the company was held, and the resignations of the defendants, and the

sealing of the register were therefore informal.

In an action of *scire facias*, brought several years after the defendants' resignations of their directorships, by the public officer of another company which had obtained a judgment against the first-named company,—Held, that as no shares had been allotted to the defendants, and they were not *de facto* directors, and all the share capital of the company was in other hands, the defendants could not be made liable as directors on their share qualifications except by way of estoppel; and that no estoppel had been raised.

Portal v. Emmens (45 Law J. Rep. C.P. 305; 46 Law J. Rep. C.P. 179; s. c. Law Rep. 1 C.P. Div. 201, 664) explained and distinguished.

These two cases were appeals from the judgments of Lopes, J., in actions brought by the plaintiff as public officer of the Darlington Joint Stock Banking Company upon writs of *scire facias* to recover from each of the defendants the sum of 500l. or 10l. per share on fifty shares in the Merrybent and Darlington Railway Company.

The Darlington Banking Company on the 1st of February, 1876, obtained a judgment against the railway company for 18,322l. 8s.

In default of sufficient assets of the company to satisfy the judgments, writs of *scire facias* were issued against the defendants, whose connection with the company is shewn in the above headnote.

The facts of the cases are fully set out in the judgment of the Court.

The material sections of the Merrybent and Darlington Railway Company's special Act (passed 11th of July, 1866) are as follows:—

Section 2 incorporates the Companies Clauses Act, 1845 (1) and several other Acts.

(1) By the Companies Clauses Act, 1845 (8 Vict. c. 16), section 3, the word "shareholder" shall mean shareholder, proprietor or member of the company.

By section 8, "Every person who shall have subscribed the prescribed sum or upwards to the

* *Coram Baggallay, L.J., Bramwell, L.J., and Thesiger, L.J.*

Kipling v. Todd (App.).

By section 4, certain named individuals, including the defendants, "and all other persons and corporations who have already subscribed, or shall hereafter subscribe to the undertaking, and their executors, administrators, successors and assigns respectively, shall be united into a company for the purpose of making and maintaining the railway, and for other the purposes of this Act," &c.

By section 13, "The first ordinary meeting shall be held within three months of the passing of this Act."

By section 14, "The number of directors shall be seven, but it shall be lawful for the company from time to time to reduce the number, provided that the number be not less than five."

By section 15, "The qualification of a director shall be the possession in his own right of not less than fifty shares."

By section 17, certain named individuals, including the defendants, "shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of this Act; at that meeting the shareholders present in person or by proxy, may either continue in office the directors appointed by this Act, or any of them, or may elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by this Act being if qualified eligible for re-election; and at the first ordinary meeting to be held in every year after the first ordinary meeting, the shareholders present in person

capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company."

By section 36, "If any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up," &c.

or by proxy shall (subject to the power hereinbefore contained for reducing the number of directors) elect persons to supply the places of the directors then retiring from office agreeably to the provisions in the Companies Clauses Consolidation Act, 1845, contained, and the several persons elected at any such meeting being neither removed nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead in manner provided by the said Act."

At the trial, before Lopes, J., without a jury, the learned Judge reserved his judgment, and afterwards gave judgment for the plaintiff, on the ground that the defendants were liable to the extent of their share qualification as directors, on the authority of *Portal v. Emmens* (2).

Against this decision the defendants respectively appealed.

Benjamin and Oandy, for Todd.—The only fact in the case upon which the plaintiff relies, to make Todd liable, is the fact that his name appears in the special Act as a director. But he cannot be a shareholder without holding shares. All the share capital has been allotted to others, and therefore Todd cannot hold shares. *Portal v. Emmens* (2), on which Mr. Justice Lopes based his decision, is distinguishable. There the defendant had taken an active part in the promotion of the company and in obtaining the Act, and was therefore estopped from denying that he was a shareholder. It is true that the Act vested certain shares, in one sense, in the defendant, but not in such a way as to be capable of transfer. Therefore there was no need of a formal transfer of shares from Todd; and as Todd never acted as a director, or held himself out as such, except by allowing his name to appear in the Act, *Austin's Case* (3) is in point, and shews that he is not liable.

(2) 45 Law J. Rep. C.P. 305; 46 Law J. Rep. C.P. 179; s.c. Law Rep. 1 C.P. Div. 201, 624.

(3) Law Rep. 2 Eq. 435.

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But *Harward's Case* (4), *Forbes's Case* (5) and *Kincaid's Case* (6) all are distinguishable, for in all those cases the parties sought to be made liable as directors had acted in a way inconsistent with any other view of the matter.

Herschell and *Little*, for Allan.—Allan's case differs slightly from Todd's. He resigned in December, 1867, and though no one was formally elected in his room, the number of directors was made up to the maximum. The persons *prima facie* liable under the writ of *scire facias* are the registered shareholders. They could not be heard to say that the register was informally sealed. Therefore the creditor must look to them, and it is not enough for him to shew that the register was not properly sealed unless it is further shewn that the persons on the register had not agreed to become shareholders. *Portal v. Emmens* (2) is an authority to this extent, that a person named in the special Act as a director, must be taken *prima facie* to be a member of the company holding shares. But the question is not what was the position of affairs in 1866 or 1867, but at the date of the writ of *scire facias*. If a person, who is a director and has shares allotted to him, ceases to be a director, he must transfer his shares, or he remains a shareholder. But in the present case no shares have been allotted to the defendants, and therefore no transfer is necessary. A man who is a shareholder simply because he was named a director, ceases to be a shareholder when all the shares are allotted to other people. Here the shares were properly allotted, though the register was informal, and it cannot be said that the persons to whom they were allotted are not shareholders because of that irregularity. *Portal v. Emmens* (2) really decides that till some one else has

the shares, the persons originally named as directors and consequently as shareholders, shall be liable.

W. G. Harrison and *English Harrison*, for the plaintiff.—*Portal v. Emmens* (2) was not decided merely upon the ground of estoppel. It did not turn on the special agreement entered into by Emmens, nor on the special circumstances of the case. It is an authority to shew that the defendants' names having been put into the Act of Parliament they became directors, and consequently shareholders to the extent of their qualification. The Act has the effect of a statutory allotment. Resignation of the first directors does not divest their shares; therefore after the defendants had ceased to be directors, they were still shareholders. The question is, have they got rid of the shares?

[BAGGALLAY, L.J.—Assuming the defendants to be shareholders, how could they get rid of their shares before the sealing of the register?]

By a stamped transfer. Here the defendants have taken no steps to get rid of their shares, and are therefore liable. This principle has been acted on in winding-up cases; e. g. *Kincaid's Case* (6) and *Forbes's Case* (5). It lies on the defendants to prove that they have parted with their shares. Of this there is no evidence, for the evidence of the register is not admissible. Even if it were a good one, it would only be evidence as between the company and its shareholders, and not in an action of *scire facias*. As to what is requisite for a valid transfer of shares before the sealing of the register, see *The Cheltenham, &c. Railway Company v. Daniel* (7), and *The Sheffield and Manchester Railway Company v. Woodcock* (8). In neither case was there a properly executed transfer. But in the former there was an actual sale of scrip, and subsequently a valid registration of the purchaser as a shareholder. In the latter case, the purchaser was actually registered, and the

(4) 41 Law J. Rep. Chanc. 283; s. c. Law Rep. 13 Eq. 30.

(5) 44 Law J. Rep. Chanc. 356; s. c. Law Rep. 19 Eq. 353.

(6) 40 Law J. Rep. Chanc. 19; s. c. Law Rep. 11 Eq. 192.

(7) 2 Q.B. Rep. 281.

(8) 7 Mee. & W. 574; s. c. 11 Law J. Rep. Exch. 26.

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company were held to be estopped from denying the validity of the transfer, though it was informal.

Candy and Little replied.

Cur. adv. vult.

The judgment of the Court was (on June 26) delivered by—

THE SINGER, L.J.—The plaintiff in these actions is a judgment creditor of the Merrybent and Darlington Railway Company for a sum exceeding 18,000*l.*, and seeks by means of the process of *scire facias* to obtain execution against each of the defendants to the amount of 500*l.* as holders of fifty shares in the company. The actions were tried before Mr. Justice Lopes without a jury; judgments were given by him for the plaintiff in each action; and against those judgments the present appeals were brought.

The evidence upon which the learned Judge acted, consisted of statements made by counsel which were taken as admitted; the oral examination of the secretary of the company; a register of shareholders which was put in, subject to objection as to its admissibility and as to its validity; and a minute book, which was referred to in a general way, was handed to the learned Judge for his perusal, and must, we think, be taken to have been made evidence, although it has been contended before us that only one or two minutes were actually referred to. In addition to the materials before the learned Judge we have had read to us, without objection on the part of the plaintiff, an affidavit sworn by the defendant Todd. It would have been more satisfactory to the Court if the two cases had been taken in a somewhat more formal and precise manner; for considerable time has been occupied in the argument in this Court in discussing what was proved at the trial; there being a difference of opinion upon this point between the learned counsel engaged. The following facts, however, may be treated as established:—The royal assent was given to the Merrybent and Darlington Railway on the 11th of June, 1866. Prior to its passing, the defendant Todd, an owner of land in the neighbourhood of

the line of the proposed railway, was asked by a person of the name of Boyer to join him and other persons in the prosecution of the railway scheme, and to become a shareholder in and director of the company to be incorporated. At that time it was intended that the qualification of a director should be the possession of two shares of 10*l.* each. Todd at first assented to Boyer's request, and paid a deposit of five shillings a share, or 25*l.*, in respect of the qualification shares which it was then contemplated he would receive when the Act incorporating the company should pass. Subsequently, however, Todd appears to have come to the conclusion that, as he was not himself a resident in the county in which the proposed railway was to be made, it would be better for him to have nothing to do with it; and he accordingly wrote to that effect to Boyer. In answer to his letter Boyer wrote informing him that his name was already in the bill which had been lodged in Parliament, and that it would be inconvenient at the stage of the proceedings in Parliament which had then been reached to strike it out, and suggesting that he should allow his name to remain, and should after the passing of the Act resign his position in the company. Todd acquiesced in this suggestion, and the bill passed into law.

By the 4th section nine persons, including the defendants Todd and Allan, and a person of the name of Spark, were specifically named as constituting with all other persons who had already subscribed, or should thereafter subscribe to the undertaking, the company incorporated by the Act; and by the 17th section seven of the persons named, including Todd and Allan, but excluding Spark, were constituted the first directors of the company. The terms of that section are as follows. [His Lordship here read the section.]

The Act having passed, Todd carried out the arrangement which he had made with Boyer, sent in his resignation as director, and on the 27th of August, 1866, a meeting of directors was held, at which the board purported to accept the resignation, and to appoint Mr. Spark

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director in the stead of Todd; and on the same day an attempt was made to hold an ordinary meeting of the company, at which Spark would have been presumably elected by the company a director in accordance with the terms of section 17 of the Special Act, but which, as appears from the minute book, was adjourned in consequence of a quorum of shareholders not being present. Spark, however, thenceforward acted as a director; Todd took no part whatever in the affairs of the company—never applied for any shares in it to be allotted to him; no shares were allotted to him; and although it appears from the minute book that upon four occasions resolutions for calls were made by the directors, there is no evidence that notice of such calls or any of them was given to Todd; and as far as relates to any act done either by him or the directors of the company, or the company itself, Todd entirely ceased to have any connection with the company; and for anything that appears on the evidence, never heard anything more of it until eleven years afterwards, when the plaintiff issued his writ of *scire facias* against him. The case of Allan differs in this respect, that he at the time when the special Act passed seems to have intended to take part in the affairs of the company, and did act as a director down to the month of December, 1867, when he also resigned his directorship. There is no entry in the minute books of any appointment of a director in his stead; but shortly after his ceasing to act, the name of A. Briggs, who had not previously acted as a director, and whose name is not in the special Act, appears in the minute book as one of the directors attending the board. As regards the subsequent history of the company, the evidence before us is of the most meagre character. Prior to 1869 no register of shareholders existed, and no allotment of shares had been made; but in August, 1869, a register of shareholders was in fact sealed, and such register was put in at the trial, subject to the objection already referred to as to its admissibility in evidence, and also to the objection, that even if admitted in evidence, it could have no legal effect, being

sealed at a meeting of the company at which there was no proper quorum. Upon this latter point Richardson, the secretary of the company, who was examined as a witness, proved that the only two persons present at the meeting in August, 1869, were Spark and a person of the name of Johnston, who was one of the directors of the company. Apart, however, from the evidence of the register, it was stated at the trial on the part of Todd and Allan, and not disputed, that a mining and smelting company, called the Merrybent and Middleton Tyas Mining and Smelting Company, Limited, became the holders of 5,650 shares out of the 6,000 shares which constituted the capital of the company; and Richardson proved that 54,000*l.* had been paid by the mining company, although in what way this amount was paid did not appear, and that with this exception, no payment in respect of shares was made by anybody.

In this state of facts it was contended on the part of the plaintiff that both Allan and Todd, by virtue of their nomination as directors in the special Act of the company, became shareholders of the company for the number of shares mentioned in the Act as the qualification of directors; that their liability as shareholders could only be got rid of by transfer of those shares in the manner provided by the Companies Clauses Consolidation Act, 1845, and that a transfer had not in fact in any manner been validly made, and that the writs of *scire facias* were properly issued against both defendants. The defendants, while admitting that owing to their nomination as directors in the special Act, they became shareholders of the company upon the passing of that Act, urged that the liability thereby incurred was one different in kind to that which would have attached to them if shares had been duly allotted to them, and contended that the resignation of their offices as directors took effect in law as well as in fact, and was acted on by the company, that the proper inference from the evidence was that the whole of the 6,000 shares which constituted the capital of the company were held by persons other than

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themselves, and that under all the circumstances of the case the liability of the shareholders had ceased. In support of the plaintiff's contention, great reliance was placed on the case of *Portal v. Emmens* (2), which, being a decision of this Court, is binding upon us, and which was alleged by the plaintiff's counsel to be decisive upon the question before us. It becomes necessary to ascertain, in the first instance, what that case really decided. We cannot agree with the argument of Mr. Benjamin, that the *ratio decidendi* was limited to the narrow ground of an estoppel founded upon the special circumstances of the case, although the judgment of the Lord Chief Justice and the concluding passages of the judgment of the Master of the Rolls lent some colour to the argument; but we read the judgments as deciding that where by Act of Parliament persons named are incorporated into a company having a share capital, and the same persons are also named as directors, while the holding of a certain number of shares is prescribed as a qualification for the office of director, these legal consequences follow:—First. Each corporation, *ex necessitate rei*, becomes a member of the company, and as such, and apart from the definition of shareholders given in the third section of the Companies Clauses Consolidation Act, 1845, must be considered as holding at least one share in the company; and each person named as a director must be considered as holding at least the number of shares constituting the prescribed qualification. Second. Section 36 of the last-mentioned Act under which the *scire facias* in this and similar cases is issued, authorises its issue against any shareholder. Section 3 of the same Act defines "shareholder" as meaning "shareholder, proprietor or member of the company," and, consequently, execution may issue against a person who by the Special Act is constituted a director, a member of the company, and therefore a shareholder.

The decision in *Portal v. Emmens* (2), though going to the length we have mentioned, appears to us to go no further; and the facts there proved shewed that the defendant on the one hand

had done nothing for the purpose of getting rid of his position as director, with its consequent obligations; and, on the other hand, he had done nothing towards satisfying the liability to the plaintiff, under which the company by its Special Act itself had come. It is a long step from such a case to the present, where years after directors have resigned their offices, and other persons have *de facto* acted in their stead without any claim being made by the company to treat the original directors as shareholders, a creditor of the company whose claim against it only first arose long after their resignations, attempts to treat those original directors as still shareholders; and we are of opinion that such a claim cannot, under the circumstances of the case, be supported.

In forming this opinion, we propose to assume in favour of the plaintiff, First. That no valid election of directors in the place of Todd and Allan ever took place, for the reason that such elections were by the provisions of the special Act to be made by the company, and not by the board of directors, and no valid ordinary meeting of the company at which such election could be made ever in fact took place. Second. That the register is not evidence against the plaintiff, although it might be evidence against the defendants, and would be evidence as between them and the company in actions for calls; see sections 26, 27 and 28 of the Companies Clauses Consolidation Act, 1845. Third. That no register was ever duly authenticated by the company, there having been no meeting at which the company's seal was properly authorised to be affixed to it. But, having assumed thus much in favour of the plaintiff, how stands the matter? No shares were in fact allotted to the defendant, therefore no shares could be transferred by him in the manner prescribed by sections 14 and 15 of the general Act. This was admitted on the part of the plaintiff, and it was argued on his part that until an allotment of shares, and possibly until the formation of a register, it would be impossible for the defendants to get rid of their positions as shareholders. But we cannot concur in that view. The deci-

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sion in *Portal v. Emmens* (2) requires us to imply that Todd and Allan were at one time shareholders, from the fact that they were named as corporators and directors in the special Act; but the reason of the thing would seem to require that it should be competent to persons in such a position, by *bona fide* arrangement between them and the company, to relinquish their position as corporators and directors, and to get rid of its consequent liabilities, provided no circumstances existed which might constitute an estoppel in favour of a particular creditor; and if this be so, it would also seem to follow that the fact of such an arrangement may be established as against a creditor, who cannot set up an estoppel in the same manner as it might be established between the same persons and the company itself. How could we reasonably hold under the circumstances of this case, and after such a lapse of years, that the company on the one hand could have claimed to treat either Todd or Allan as shareholders, or that Todd or Allan, if the company had been successful, could have enforced a claim to an allotment of the shares which constituted the qualification for the position which they once held? As a matter of fact, from the figures proved, it has been not unreasonably argued that no shares could have been allotted to the defendants; for from the minutes of the meetings of the board of directors, held after the resignations of Todd and Allan, it appears that seven persons—that is to say, the maximum number allowed by section 14 of the special Act—acted in the capacity of directors; and if each held the prescribed number of fifty shares, which upon the maxim, "*omnia presumuntur rite esse acta*," it might be presumed they did, and no transfers of shares being proved to have taken place, 350 shares would thereby be absorbed; and inasmuch as the mining company is proved to have held 5,650 shares, the whole capital of the company would thus be allocated to persons other than the defendants. But be this as it may, we think it at all events a proper inference from the facts proved that the company accepted from Todd and Allan a sur-

render of their shares, or inchoate right to shares, which the defendants possessed under the Special Act. Such a surrender must, under section 9 of the Companies Clauses Act, 1863, be accepted by a company, on such terms as they think fit, of any shares which have not been fully paid up. If a company may accept a surrender in the case of specific shares actually issued, it seems to follow that they may do so in the case of a mere right to have specific shares allotted, and that the evidence of an acceptance in the latter case need not be as express as would be required in the former case; for where shares have been issued and certificates given, it would be reasonable to expect that a surrender should be evidenced either by writing or by a delivery of the certificates to the company. But where there is nothing to deliver, and only a right or liability to be enforced, the mere non-enforcement of that right or liability for many years is in itself strong evidence of the right or liability having been abandoned. It has been suggested that if, under such circumstances as exist in the present case, a director of a company, named as such in the special Act, were held to have become freed from the liability attaching to his position, then the whole body of directors could by mere arrangement among themselves equally free themselves from liability, and creditors of the company might be left without any shareholders against whom they might enforce execution. But we think that the Courts are strong enough to stop any unjust and collusive arrangements of the kind suggested, and that they have no analogy in kind or degree with the *bona fide* surrender which we infer from the facts of the case before us. The authorities which have been cited in argument do not directly support the conclusion at which we have arrived; but they are in no way adverse to it. The cases of *The Cheltenham and Great Western Railway Company v. Daniel* (7), and *Scott v. Berkeley* (8), at least indicate that the Courts in cases like the present will look

(8) 3 Com. B. Rep. 925; s. c. 16 Law J. Rep. C.P. 107.

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to the substance of the transactions which are in question, and where persons whose position as shareholders is a legal consequence of some other position held by them, relinquish that other position under circumstances which evidence an intention to cease to be a shareholder acted upon by the company, will hold that such intention has been effectually carried out, even though forms prescribed by Act of Parliament, or adopted as the general mode of carrying out such transactions, have not been in the particular instance adhered to.

The appeals must be allowed, and judgment entered for the defendants.

Judgment for the defendants.

Solicitors—Clarkes, Rawlins & Clarke, agents for Allison, Son & Willan, Darlington, for plaintiff; A. Burn, for defendant Todd; R. T. Jarvis, agent for Hutchinson-Lucas, Darlington, for defendant Allan.

[IN THE COURT OF APPEAL.]

1878. }
May 4. } BAXENDALE v. BENNETT.*
July 2. }

Stolen Bill of Exchange—Liability of Acceptor—Negligence—Estoppel.

A bill of exchange, with a blank for the drawer's name, and the defendant's name written across it as acceptor, was placed by the defendant in a drawer in his chambers, from which it was stolen. A drawer's name was forged, and subsequently the bill came into the hands of the plaintiff as bona fide holder for value. In an action on the bill,—Held, that the defendant was not liable.

By BRAMWELL, L.J., because the negligence of the defendant, if any, was not the proximate or effective cause of the loss, and therefore did not estop the defendant from denying the validity of the bill.

By BRETT, L.J., because the bill was drawn without the authority of the de-

fendant, and the defendant had been guilty of no negligence.

Young v. Grote (4 Bing. 253), Ingham v. Primrose (28 Law J. Rep. C.P. 294), and Coles v. The Bank of England (10 Ad. & E. 437), questioned.

This was an appeal from a judgment of Lopes, J., in an action tried by him without a jury on the 12th of June, 1878. The plaintiff sued as indorsee of a bill of exchange of which the defendant was the acceptor.

The facts of the case were as follows:—In the year 1872 the defendant, in the course of transactions between himself and a Mr. Holmes, received from him a draft in blank as to the drawer's name, written in Holmes's handwriting. The defendant wrote his name across the draft as acceptor, and returned it to Holmes, who, finding that he did not need it, returned it to the defendant.

The defendant placed it in an unlocked drawer in his chambers at the Temple, from which it was taken, having probably been stolen by some one who was not a servant of the defendant. When it came into the hands of the plaintiff, who was admitted to be a bona fide holder for value, the document had been completed by the insertion of the name of W. Cartwright as the drawer. No such man as Cartwright was known to the defendant, and the name was inserted without his knowledge or consent.

His Lordship took time to consider, and on the 14th of June delivered judgment as follows:—

This is an action on a bill of exchange, the plaintiff is indorsee and the defendant the acceptor. The acceptance of the bill is admitted, as also is the fact that the plaintiff is an innocent holder for value. The defence is that the drawer committed forgery, and that the plaintiff making his title through a forgery cannot recover; on the other hand, it is contended that the defendant was guilty of such negligence as facilitated the forgery so as to cause the loss to fall on him. [After recapitulating the facts, as above stated, his Lordship proceeded.]

I am of opinion that the bill was stolen and was a forgery; but I am also of

* Coram Baggallay, L.J.; Bramwell, L.J.; and Brett, L.J.

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opinion that by abstaining from destroying it, and by leaving it in an unlocked drawer the defendant led to the bill being put into circulation, and it came into the possession of the plaintiff without any just reason to suspect the circumstances. I cannot therefore distinguish it from the cases which have been cited, namely, *Young v. Grote* (1), and *Ingham v. Primrose* (2), and my judgment is therefore for the plaintiff with costs.

Bittleston, for the defendant, on the 23rd of January, obtained in the Court of Appeal (3) an order *nisi* for a new trial, on the ground that the decision of the learned Judge was against the weight of evidence. On the 4th of May, the defendant moved for judgment on the facts found by the learned Judge, and the arguments on the above order *nisi* were heard at the same time.

Bittleston (*Bolland* with him), for the defendant.—First, even supposing the defendant to have been guilty of negligence, the judgment is wrong; for the negligence was not the cause of the loss but the forgery, which was not the natural consequence of the negligence.

Secondly, there was no evidence of such negligence as would estop the defendant, though he may have been negligent as regards himself, for he has committed no breach of duty.—See per *Blackburn, J.*, in *Swan v. The North British Australasian Company* (4).

[*BRAMWELL, L.J.*, referred to *The Bank of Ireland v. Evans's Trustees* (5).]

In that case the seal of the company was forged, and the negligence of the company, which led to it, was held too remote to estop their denial of its validity. In that case the Lord Chancellor lays it down that to make the defendant liable in such circumstances there must be

either estoppel or ratification. *Young v. Grote* (1) was decided on the ground of estoppel. But the facts were stronger in that case than here. There a negotiable instrument was carelessly uttered by the defendant. Here nothing of the kind was done. The document was not an acceptance, for it had never been delivered to anyone as such—*Stoessiger v. The South Eastern Railway Company* (6), *McCall v. Taylor* (7).

Jeune, for the plaintiff.—The defendant owed a duty to the public to keep the inchoate bill safe, or to destroy it. The case is within the principle of *Young v. Grote* (1), which was followed in *Ingham v. Primrose* (2). The abstention of the plaintiff from destroying the bill, or taking effectual means to keep it from circulation, is the *causa proxima* of the loss. See the judgment of *Williams, J.*, in the last-mentioned case. In *Swan v. The North British Australasian Company* (4) it was assumed that if the instrument had been negotiable the defendant would have been liable. Here the defendant is estopped from denying that the instrument is negotiable—*Schultz v. Astley* (8), *Montague v. Perkins* (9), *Byles on Bills*, p. 188 and note.

Bittleston, in reply, cited *Aude v. Dixon* (10).

Our. adv. vult.

On the 2nd of July the following judgments were delivered:—

BRAMWELL, L.J.—I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by one Cartwright on and accepted by him. In very truth he never accepted such a bill, and if he is to be held liable it can only be on the ground that he is estopped from denying that he did so accept such a bill. Estoppels are

(1) 4 Bing. 253; s. c. 5 Law J. Rep. C.P. 165.

(2) 7 Com. B. Rep. N.S. 82; s. c. 28 Law J. Rep. C.P. 294.

(3) *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(4) 2 Hurl. & C. 175; s. c. 32 Law J. Rep. Exch. 273.

(5) 5 H.L. Cas. 389.

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(6) 3 E. & B. 549; s. c. 23 Law J. Rep. Q.B. 293.

(7) 19 Com. B. Rep. N.S. 301; s. c. 34 Law J. Rep. C.P. 365.

(8) 2 Bing. N.C. 544; s. c. 5 Law J. Rep. C.P. 130.

(9) 22 Law J. Rep. C.P. 187.

(10) 6 Exch. Rep. 869; s. c. 20 Law J. Rep. Exch. 295.

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odious, and the doctrine should never be applied without a necessity for it. It never can be applied, except in cases where the person against whom it is used has so conducted himself, either in what he has said or done or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done or failed to say or do. Is that the case here? Let us examine the facts.

The defendant drew a bill, or what would be a bill (had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition it, not being a bill, was stolen from him, filled up with a drawer's name and transferred to the plaintiff a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed, and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill. I am of opinion he could not; but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete and no one could have been defrauded. Why is not the defendant at liberty to shew this? Why is he estopped? What has he said or done contrary to the truth, or which should cause anyone to believe the truth to be other than it is? Is it not a rule that everyone has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee or date or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name and the paper was

stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the case of *Young v. Grote* (1) and the case of *Ingham v. Primrose* (2), the bill torn in two, go a long way to justify this judgment, but in those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument, it has not been got from him by the commission of a crime. This undoubtedly is a distinction and a real distinction.

The defendant here has not voluntarily put into anyone's hands the means or part of the means for committing a crime. But it is said he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he could not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then *The Bank of Ireland v. Evans's Trustees* (5) shews under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument, but those who complained of the negligence were the parties immediately affected by the forged instrument.

BRETT, L.J.—In this case I agree with the conclusion at which my brother Bramwell has arrived, but not with his reasons.

The defendant was a barrister, and he signed a blank acceptance and gave it to a person who wanted money that he might get it discounted: that person sent the blank acceptance back to the defendant, who put it in a drawer in his room, the room not being a place of general resort, and the drawer into which the acceptance was put was left unlocked. Somebody, not the defendant's servant, stole it, and it was filled up by a different person from him to whom the acceptance had been originally given, and who had returned it. On these facts Lopes, J., said that the defendant had been guilty of negligence, and was therefore liable

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up, and they also held that the wife was negligent in filling up the cheque by writing in the middle of the line.

It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care; but that case does not govern the present, it only applies where the persons defrauded are the defendants' own bankers. In *The Bank of Ireland v. Evans's Trustees* (5), Parke, B., in delivering the opinion of the Judges in the House of Lords, remarks, with reference to *Young v. Grote* (1), "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a person would not be liable, which govern the present case:—"If a man should lose his cheque-book, or neglect to lock his desk, and a servant or a stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be considered that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking of *Young v. Grote* (1), says, that that case "went upon the ground (whether correctly arrived at in point of fact is immaterial) that in order to make negligence good there must be something that amounts to estoppel or ratification, and that the plaintiff was estopped from saying that he did not sign the cheque;" and then he says that the doctrine of ratification is well illustrated by *Coles v. The Bank of England* (11). I think the ob-

servations made by the Lords in *The Bank of Ireland v. Evans's Trustees* (5), have shaken *Young v. Grote* (1) and *Coles v. The Bank of England* (11) as authorities. In the present case I think that there was no ratification and no negligence; and that the defendant is entitled to our judgment.

BAGGALLAY, L.J., concurred in holding that judgment ought to be entered for the defendant.

Judgment for the defendant.

Solicitors—Gedge, Kirby & Millett, for plaintiff;
G. Reader, for defendant.

IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1878.

May 8, 9.

July 2.

} **BERDAN v. GREENWOOD AND
OTHERS.***

Pleading—Inconsistent Defences—Embarrassing Defence—Payment into Court, and Denial of the Plaintiff's Right to sue—Rules of the Supreme Court, Order XXVII. rule 1, Order XXX.

There is nothing in the Judicature Acts or Rules to prevent a defendant pleading inconsistent defences.

Therefore in general a defendant may in his statement of defence deny the right of the plaintiff to sue, and at the same time pay a sum of money into Court under Order XXX. in satisfaction of the plaintiff's claim, since such a course, though raising inconsistent defences, does not necessarily tend to prejudice, embarrass or delay the fair trial of the action within the meaning of Order XXVII. rule 1.

Quære, whether in some cases, e.g., actions brought to try a right or to clear the plaintiff's character, or where fraud is charged, such pleading should be allowed.

This action was brought by the plaintiff against various defendants, as members of a firm, upon a contract entered

* *Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.*

(11) 10 Ad. & E. 437; s. c. 9 Law J. Rep. Q.B. 36.

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into by the defendant Greenwood, for commission on orders received through the plaintiff from the Russian Government for machinery for making the Berdan rifle.

One of the defendants named Batley, in his defence, denied that Greenwood had authority to enter into the contract, traversed several material allegations, pleaded the Statute of Limitations, and also paid into Court a sum of 130*l.* in satisfaction of the plaintiff's claim.

The plaintiff obtained an order at chambers to strike out the payment into Court, and this order was affirmed by the Exchequer Division, on the authority of *Spurr v. Hall* (1).

From this decision the defendant appealed.

Herschell and *R. V. Williams*, for the defendant Batley.

Mellor, *Dugdale* and *Shortt*, for the plaintiff.

The facts and pleadings, the arguments and the authorities cited, are all sufficiently stated in the judgment of the Court.

Cur. adv. vult.

The following judgments were delivered on the 2nd of July:—

THESEIGER, L.J.—In this case, which was heard before Lords Justices Brett and Cotton and myself, I have to deliver the judgment of Lord Justice Brett and myself.

The plaintiff, by his statement of claim, alleges that he is the inventor of the Berdan rifle; that in the year 1869 he was in Russia and in communication with the Russian Government respecting the manufacture of his guns and rifles, and that the defendant's firm were endeavouring to obtain from the same government orders for the manufacturing and supplying to it of machines, &c., necessary for the making of the said guns and rifles, that therefore in consideration that the plaintiff would use his influence with the government to prevent an order

being given to any parties for machines to make his guns in Tula (other than as excepted) until a person or commission visited England about the business, the defendant's firm, by a letter signed by one George Greenwood, then a member of the firm, agreed to pay a commission of five per cent. on all orders received through him, or directly from the Russian Government, for such machines, &c., as aforesaid, for three years from the date of the agreement; that the defendant received and executed such orders to a large amount; that all conditions precedent were performed necessary to entitle the plaintiff to recover the agreed commission, and concluded by claiming a sum of over 5,000*l.*

The statement of defence, as originally delivered, denied that George Greenwood was ever a member of, or that he had any authority to bind the firm by the letter constituting the alleged agreement, or that his act in writing it was ever ratified or confirmed, or the offer thereby made ever assented to by the defendant, or that the plaintiff ever accepted such offer; and further alleged that if the agreement was made, the plaintiff never performed his part of it or used his influence with the Russian Government; that at the time of the agreement he knew that the government would not give any orders (other than those excepted) until a person or commission had visited England, and improperly and fraudulently suppressed that fact from George Greenwood. The defendant then put the plaintiff to the proof of the receipt or execution by him of any orders which were the subject of the agreement within three years from its date; alleged that the plaintiff's claim was barred by the Statute of Limitations; and that if the agreement was made, he was induced to make it by the fraud of the plaintiff, and concluded by a payment into Court made in these terms:—"Lest contrary to what the defendant believes and contends, he is under any liability to the plaintiff, he brings into Court the sum of 130*l.*, and says that the said sum is enough to satisfy the plaintiff's claim in respect of the matters herein pleaded to."

(1) 46 Law J. Rep. Q.B. 693; s. c. Law Rep. 2 Q.B. Div. 616.

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The plaintiff objected to the payment into Court concurrently with the other defences, to the same causes of action, combined in the statement of defence. Mr. Justice Field, at chambers, made an order disallowing it, and the Exchequer Division upon appeal affirmed his order. The defendant thereupon appealed to this Court, but intimated at the same time his willingness to strike out of the statement of defence all the allegations of fraud, and when before us by his counsel, expressed the same willingness, and the case must be treated as if in point of fact these allegations were struck out. That being so, two questions have been argued: the first, whether in any case, or in all cases under the Judicature Acts and Orders, a payment into Court at the same time that the cause of action in respect of which it is paid in is denied, should be allowed; the second, whether assuming such a payment to be in some but not in all cases proper, the present is one of those cases.

The first question is one of very great importance. The practices of Judges at chambers since the case of *Spurr v. Hall* (1) was decided, has been to disallow in all cases a payment into Court concurrent with paragraphs denying or traversing the cause of action in respect of which the payment is made, and in the present case, *Spurr v. Hall* (1) was treated in the Court below as an authority, properly supporting that practice, although the learned Judges expressly invited an appeal upon the point.

Payment of money into Court originally existed in the shape of a rule to strike the sum paid in out of the damages, which rule it was necessary to prove at the trial. By the general rules of Trinity Term, 1 Vict., a plea of payment into Court was substituted for the old practice. The question then arose, whether, inasmuch as the statute of 4 Anne, c. 16. s. 4, enabled a defendant with leave of the Court to plead as many several matters as he should think necessary for his defence, the plea of payment into Court ought to be allowed, together with other pleas, to the same cause of action. A uniform practice thereupon

sprang up, under which payment into Court was only allowed to be pleaded where the cause of action to or in respect of which it was made and pleaded was not traversed, and was consequently admitted by the pleading. That practice was continued after the passing of the Common Law Procedure Act, 1852, s. 84, under which certain specified pleas (amongst which the plea of payment into Court was not included), might be pleaded together without leave, while all pleas other than those specified had to be made the subject of leave of a judge or of the Court, if it was desired to join them with any other plea. The ground upon which this practice both before and after the Common Law Procedure Act, 1852, was based was the inconsistency in the record, which it was held would arise if a plea of payment into Court were joined with other defences to the same cause of action; see, as bearing upon this point, the cases, *Key v. Thimbleby* (2); *MacLellan v. Howard* (3); *Jenkins v. Edwards* (4).

In this state of circumstances the Judicature Acts and Orders came into existence, and swept away the old forms and practice of pleading, leaving it open to a defendant, as the general rule, to raise by his statement of defence without leave as many distinct and separate, and therefore inconsistent defences as he may think proper, subject only to the provision contained in Order XXVII., rule 1, which is in these terms: "The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties." As

(2) 6 Exch. Rep. 602, 694; s. c. 20 Law J. Rep. Exch. 251.

(3) 4 Term Rep. 194.

(4) 5 Term Rep. 97.

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regards, however, payment of money into Court, special provision is made by Order XXX., and the Court has to see first whether there is anything in the rules comprised in the last-mentioned order which precludes a defendant from paying money into Court in respect of a cause of action, the existence of which he at the same time denies. This point has not been in terms taken in argument before us, and was not made the ground of the decision in the Court below, but it is involved in the argument, and it is desirable to consider it as introductory to the consideration of the point arising upon rule 1 of Order XXVII. It is suggested that money is not paid into Court by way of satisfaction or amends within the meaning of rule 1 of Order XXX., when it is paid into Court in respect of a claim or cause of action, which the defendant does not admit to exist in fact. Such an argument does not, however, appear to us well founded. The sum paid in is (as has been admitted on the part of the defendant's counsel to be the effect in this action), absolutely appropriated to the purpose of satisfaction or amends. The plaintiff may obtain the payment of it out to himself in manner provided by the third rule of the order under consideration, and may, either under rule 4, accept it in satisfaction of the causes of action in respect of which it is paid in, and if he accept it in satisfaction of the entire cause of action, may tax his costs and sign judgment for the costs so taxed; or, if he think proper, may go on with the action for the purpose of recovering something more, in which event the issue *quoad* the plea of payment into Court will be the same as it was before the coming into operation of the Judicature Acts, although there will be other issues going to the same cause of action which the tribunal by which the action is tried will have to determine. We are of opinion, therefore, that there is nothing in the rules comprised under Order XXX. which precludes a defendant from taking the course under consideration.

The question then arises whether the payment into Court necessarily tends "to prejudice, embarrass or delay the fair

trial of the action" within the meaning of rule 1 of Order XXVII. Now in considering this question we are disposed to give a liberal interpretation to the words "fair trial of the action," and to hold that a pleading, which tends to prejudice, embarrass or delay the plaintiff at any stage of the proceedings in the action, not merely so as to prevent him from fairly trying at the actual trial of the action, but so as to prevent him from ever trying on fair terms the real issue between him and the defendant, the obtaining of a decision upon which is the legitimate object of the action, would affect the "fair trial" of the action within the meaning of the rule; but giving this interpretation to the rule, we are of opinion that in general such a payment into Court as that under consideration has not the effect referred to, and ought to be allowed. That it works no practical inconvenience and leads to no necessarily embarrassing inconsistency in the record will be seen by considering what, if this course be adopted, will be the practical result of the trial of the action.

If the plaintiff fail at the trial to establish his cause of action, the judgment will be properly a general one for the defendant; for if there be no cause of action, it follows that the plaintiff cannot be entitled to recover anything more than that which the defendant has paid into Court, and really ought not to have received any money at all. The record, therefore, only shews that the plaintiff has obtained, through the timidity of the defendant, something which he had no right to obtain. On the other hand, if the plaintiff establishes his cause of action, and proves that the sum paid into Court is not sufficient, or that he is entitled to some relief, such, for instance, as injunction, other than or over and above relief in damages, the judgment will be a general one for him. The only remaining alternative is that of the plaintiff succeeding in establishing his cause of action, but failing to prove any damage beyond the sum paid into Court, or to establish any title to relief other than in damages. In that event the issues upon the record will be duly found in accordance with the event, and will sufficiently explain them-

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selves; the general judgment will be for the defendant, and unless the Judge otherwise orders pursuant to rule 1, Order LV., the defendant will recover the general costs of the cause, while the plaintiff will be entitled to the costs of the particular issues found in his favour. Is there, then, anything inherently unjust in a defendant paying money into Court in respect of a cause of action, which at the same time he by his pleadings denies to exist? As a general proposition, we should answer nothing, while there is much to be said in favour of it. Is it just in principle as regards a defendant, who considers that he has a good defence on the merits, but who is desirous, if possible, of terminating litigation by a payment of money, that he should be forbidden to adopt this prudent course, except under the penalty of a complete admission of a cause of action which he honestly disputes, and with the consequent risk which would attend the trial of the action, if the sole issue were as to the sufficiency of the amount paid in? On the other hand, what is it, if such a course be taken, of which the plaintiff has to complain? In the great majority of actions, whether of contract or *tort*, it can hardly be suggested that he is in any more embarrassing predicament than that in which he would be placed in an ordinary case of a simple plea of payment into Court, or in a case where inconsistent pleas, not including a plea of payment into Court, are pleaded. In the latter case he must be prepared to meet the alternative defences, in the former he must judge whether it is advisable to proceed with the action at all. The combination of the plea of payment into Court with other defences throws no burden greater in kind upon the plaintiff, although in degree it may somewhat enhance the difficulty of his position in regard to the course it is advisable for him to pursue.

It may, however, possibly be that in some actions brought to try a right to or in respect of property which is denied, or to establish character which has been assailed, and in actions where the plaintiff is by the statement of defence charged with fraud, and perhaps in some other cases, it would be, as a matter of practice, improper to allow the defence of payment into

Court concurrently with other defences. It is not necessary for us to decide this point or to say whether, upon the case presented to the Queen's Bench Division in *Spurr v. Hall* (1), the decision arrived at was a proper one; but we wish to guard ourselves against being supposed to decide that even in such actions as those to which we have alluded the payment into Court should not be allowed; and we may add that if in some actions the payment into Court may "tend to prejudice, embarrass or delay the fair trial of the action" within the meaning of Order XXVII. rule 1, the circumstances must at least be of a very special character to justify the Courts in holding that a defendant is precluded from adopting a course which it is, as a general proposition, his legal right to adopt. In the present case, with the allegations of fraud withdrawn, the defence amounts to no more than the defendant's saying this: "I deny the existence of any contract between me and the plaintiff, or that if a contract ever existed, any claim has properly arisen against me in respect of it. I allege that the Statute of Limitations is a bar to the action; but I am content to pay in any event a sum of 130*l.* in respect of any claim which might possibly be established against me; if that sum be accepted as sufficient, the litigation will terminate, but if not, then I will fall back upon my other defences, and the question of the sufficiency of what I have paid will only form one of my defences." What is there in such a course which tends "to prejudice, embarrass or delay the fair trial of the action?" We think, nothing. To the lawyer's mind there is, no doubt, at first sight something anomalous in payment by way of satisfaction or amends in respect of a cause of action, the existence of which the defendant by his pleading denies, but the more we have considered the point the stronger has become our conviction that there is nothing unreasonable or unjust, and nothing contrary to the letter or spirit of the Judicature Acts or Orders in a defendant so acting; and we think that apart from anything in the Judicature Acts or Orders to compel us to do so, no predilection in favour of the old theories of consistent records should induce us to

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preclude defendants in actions from saying and doing that which, as practical men, before the action they might reasonably say and do, namely, say that they entirely deny a person's right to sue them, yet pay, or offer to pay a sum of money as the price of peace and for the prevention of further litigation.

For these reasons we think that the appeal should be allowed, and the order of the Court below reversed.

COTTON, L.J.—The only question which we have to decide on this appeal is, whether the 11th paragraph of the statement of defence ought, under Order XXVII. rule 1, to be struck out as tending "to prejudice, embarrass or delay the fair trial of the action." I agree in the judgment of Lord Justice Thesiger that it ought not, even if this paragraph is to be considered as technically a plea of payment into Court. But for the purposes of this judgment, I think it not necessary to hold that this is a plea of payment into Court within the meaning of the 70th section of the Common Law Procedure Act, 1852. My opinion is, that it is not; and I think it right so to state, because the question may hereafter arise whether if the plaintiff should proceed with this action, and, though he establish the right claimed by him in his action, should fail to prove damages beyond the sum paid into Court, the defendant will be entitled to judgment and the costs of the action. Under the old form of pleading it was necessary that each plea should state only one ground of defence, and the plea of payment into Court contemplated by the Common Law Procedure Act, 1852, necessarily was an admission on the record of the plaintiff's right on which the action was founded. But the 11th paragraph of the statement of defence states that the defendant does not admit any right on the part of the plaintiff. It is in substance this: "I do not admit that you have any claim against me, but for the sake of peace I am willing to pay you the sum which I have paid into Court. If you do not take that in satisfaction, I shall contest, not only the amount of damages, but your right to bring any action." On such a statement being made the plaintiff

must consider what the object of his action is, whether it is to establish a right, or to obtain damages; and if the latter, whether it is probable that the amount offered is as much as he will obtain in the action. On the trial of the action, if the plaintiff establish the right in respect of which he sues, and the Judge is satisfied that the action was brought to try a right, he may make a declaration establishing the plaintiff's right and give him costs, except those of any unsuccessful attempt to prove damages beyond the amount paid into Court.

In this view of the defence, as the allegation of fraud has been withdrawn, I am of opinion that the paragraph in question cannot be considered as in any way tending "to prejudice, embarrass or delay the fair trial of the action;" but there may be special cases in which this would be the effect, as in actions for libel, which the defendant by his statement of defence justifies. All I decide is, that a statement of payment into Court cannot be struck out because the defendant does not admit the plaintiff's right of action.

Appeal allowed.

Solicitors — Whateley, Milward & Whitehead, agents for Whateley, Milward, Balden & Lee, Birmingham, for plaintiff; Van Sandau & Cumming, agents for Brook, Freeman & Batley, Huddersfield, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } THE QUEEN v. SANKEY AND
March 7. } OTHERS.

Elementary Education Acts—33 & 34 Vict. c. 75. ss. 12, 84, 90—Application for Formation of School Board—Voting at Preliminary Meeting—Personation—Rules ultra vires.

[For the report of the above case, see 47 Law J. Rep. M.C. 96.]

[IN THE COMMON PLEAS DIVISION.]

1878.
May 10, 27. { THE LONDON, BRIGHTON AND
June 27. { SOUTH COAST RAILWAY COM-
PANY (appellants) v. WAT-
SON (respondent).

Railway Company — Bye-law under 8 & 9 Vict. c. 20. s. 109—When unreasonable and bad—Passenger travelling without Ticket—Fare from where Train originally started.

The 8 & 9 Vict. c. 20. s. 103 enacts that if any person travel in any carriage of the railway company without having previously paid his fare, and with intent to avoid payment thereof, he shall forfeit to the company a sum not exceeding forty shillings. Section 108 of that Act empowers a railway company to make regulations "for regulating the travelling upon or using and working of the railway," and section 109 enables the company, "for better enforcing the observance of such regulations," to make bye-laws provided such bye-laws be not repugnant to law or to the said Act.

A bye-law made pursuant to that enactment, required "a person travelling without a ticket, or failing or refusing to shew, or deliver up his ticket, to pay the fare from the station whence the train originally started to the end of his journey:"—Held, that the bye-law was void, on the ground that it attempted to inflict a penalty for doing that without fraud which by section 103 could be punished only if done with fraud, and also on the ground of its being manifestly unequal in its operation and so unreasonable.

Appeal from the decision of the Judge of the Southwark County Court.

The respondent went without a ticket as a second class passenger by the railway of the appellants from Norwood Junction to Lower Norwood. On arrival at the latter place, he stated that he had not had time to take a ticket, and he paid sevenpence, the second class fare from Norwood Junction, but refused to pay eightpence, which was the fare from Croydon, where the train had started from, and which the company insisted on his paying according to one of their bye-laws, which was as follows: "Any person travelling without a ticket or failing or refusing to shew or deliver up his ticket as aforesaid, shall be

required to pay the fare from the station whence the train originally started to the end of his journey." As the respondent declined to pay the 1d. in excess of the fare for which he had travelled, the appellants sued him for it in the Southwark County Court.

On the trial before the County Court Judge it was admitted that in travelling without a ticket the respondent had no intention to defraud the railway company, and that the case did not come within section 103 of 8 & 9 Vict. c. 20, which enacts that any passenger travelling without having previously paid his fare, with intent to avoid payment, shall forfeit to the company a sum not exceeding 40s.

The County Court Judge was of opinion that the bye-law was unreasonable, and he accordingly gave judgment for the respondent.

The railway company appealed.

Jeune, for the appellants.—The bye-law is not unreasonable. It has been approved by the Board of Trade, and it does no more than provide for the payment of an increased fare if a person travels on the company's railway without a ticket. It is impossible for the company to know at what station a passenger may get into the railway carriage, and some such regulation as that contained in this bye-law is necessary for the protection of the company against fraud. The passenger may be assumed to know the bye-law before he starts, and therefore there is an implied contract on his part to pay as his fare the fare from where the train originally started, when he becomes a passenger without taking a ticket. So that it is an increased fare, and not a penalty for which the respondent was sued.

[LORD COLERIDGE, C.J.—It is difficult to contend it is not a penalty. A person may only have travelled from Slough to London and yet be compelled to pay the fare from Exeter or Penzance. LOPES, J.—It is an absolute forfeiture, even though the passenger may have paid for and taken a ticket, if by any accident he lose it.]

In *Chilton v. The London and Croydon Railway Company* (1) a bye-law almost

(1) 16 Mees. & W. 212; s. c. 16 Law J. Rep. Exch. 89.

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identical with the present one was considered by the Judges of the Court of Exchequer to be not a penalty.

[LORD COLERIDGE, C.J.—The words of section 163 of the company's private Act in that case provided for the recovery of penalties imposed by that Act or by any bye-law made in pursuance of it, and directed that one moiety of such penalties should be paid to the informer and the remainder to the company. In that case the company claimed the whole fare, which shewed, therefore, it was not a penalty under the only section which made it a penalty, and Parke, B., says "it certainly is not a 'penalty' or 'forfeiture' recoverable under section 163."]

But that learned Judge goes on afterwards to say, "It appears to me that under this plea the sum demanded of the plaintiff was a fare and not a penalty."

[LORD COLERIDGE, C.J.—That is to say, it was not a penalty which would justify the plaintiff being arrested, as he was in that case.]

No doubt it may have been sufficient for the decision in that case, that there had not been there "an offence against the Act," under which alone the 165th section authorised the arrest and detainer of any one by the company, but the learned Judges in that case certainly considered the sum claimed by the bye-law was a fare and not a penalty. What are the company to do in order to protect themselves against persons paying for a less distance than for that which they may have travelled?

[LORD COLERIDGE, C.J.—They can take care that no one goes on the platform without a ticket.]

But a person may take a ticket for a short distance, and when he arrives at the terminus, after having travelled beyond the station for which he took a ticket, state that he had lost his ticket, or that he had forgotten to take one. No doubt it has been held in *Dearden v. Townsend* (2) that a railway passenger who goes beyond the place for which he has a ticket, and is therefore like one who is travelling to that extent without a ticket, cannot be convicted under a bye-

(2) 35 Law J. Rep. M.C. 50; s. c. Law Rep. 1 Q.B. 10.

law similar to the one in the present case in the absence of any intention to defraud. That was because in the case of an intention to avoid payment the 103rd section of the 8 & 9 Vict. c. 20 imposes a penalty for the offence, but that case does not decide that an action cannot be brought for the fare for which he is made liable by the bye-law.

[LORD COLERIDGE, C.J.—I observe that Cockburn, L.C.J., in that case remarked upon the unreasonableness of such a bye-law.]

That was an interlocutory remark during the argument, and the reasonableness of the bye-law was not argued in that case. Moreover, a similar bye-law was deemed by Lord Campbell in *The Queen v. Frere* (3) to be "excessively reasonable." The object of the bye-law is to protect the railway company, whereas that of the statute is to punish fraud. They are distinct from one another, and there is no reason that when the same thing is done without fraud, for which there is a penalty by the statute if done with fraud, that the company should not be entitled to demand in that case the payment of a sum of money by way of fare.

Macmorran, for the respondent.—The sum claimed under this bye-law is not a fare but a penalty. In *Brown v. The Great Eastern Railway Company* (4) both Mellor, J., and Lush, J., thought that a bye-law in the terms of this bye-law was a penalty, notwithstanding the opinion of Parke, B., in *Ohilton v. The London and Croydon Railway Company* (1). Then, if it be a penalty, it is recoverable only on summary proceedings before the justices, as provided by section 145 of 8 & 9 Vict. c. 20.

[LOPES, J.—If it be a penalty, might not then a penalty of more than 40s. be sometimes inflicted for doing that innocently, which if done with fraud would, according to section 103, subject the person to a penalty of not exceeding 40s. ?]

Yes; and that shews how unreasonable

(3) 4 E. & B. 598; s. c. 24 Law J. Rep. M.C. 68.

(4) 46 Law J. Rep. M.C. 231; s. c. Law Rep. 2 Q.B. Div. 446.

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the bye-law is. A man who intends to defraud the company may be better off than one who acts most innocently. In the recent case of *Bentham v. Hoyle* (5) a person was convicted of travelling in a first class railway carriage with a second class ticket. The bye-law under which he was convicted, stated that a passenger travelling without permission "in a carriage of a superior class to that for which his ticket was issued, is subject to a penalty not exceeding 40s., and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started unless he shews that he had no intention to defraud;" and as the justices found as a fact that he had no intention to defraud, it was held by the Queen's Bench Division that the conviction was wrong, and that in order to constitute an offence under the bye-law, an intention to defraud must exist, as otherwise the bye-law itself would be unreasonable and repugnant to the Act 8 & 9 Vict. c. 20.

Jones replied.

Our. adv. vult.

The following judgment was given, on June 27, by—

LORD COLERIDGE, C.J.—In this case the appellants seek to reverse a judgment of the County Court Judge, whereby he had held unreasonable the following bye-law of the appellants:—

"Any person travelling without a ticket or failing or refusing to shew or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of his journey."

The proceeding in the County Court was—as it only could be—an action for the fare authorised by the bye-law and not a proceeding for a penalty under 8 & 9 Vict. c. 20. s. 103. There is no suggestion that the defendant wished to defraud the company. His perfect good faith is admitted. He was simply travelling on the company's line without a ticket, and the action was to enforce

payment of a fare in excess of the fare for the distance he had travelled on the ground that when he arrived at his destination he had no ticket. The sum originally in dispute was but 1d., but the company have thought it worth while to appeal, paying all the costs of the appeal whatever may be its results on account of the great importance to them of the question raised by the case. The same reason led my brother Lopes and myself to take time to consider our opinion, and having fully considered the matter I am of opinion that the County Court Judge was right in holding this bye-law to be void. I think it void on two grounds—First, I think in substance it is an attempt to inflict a penalty for doing that without fraud which, by the joint operation of the 103rd and 109th sections of 8 & 9 Vict. c. 20, can be punished only if it is done with fraud. The principle of the decision in *Dearden v. Townsend* (2) appears to me to cover this case. It is true that in that case the bye-law which was the subject of decision went beyond the bye-law in this, because it professed to punish the non-payment of the excessive fare by a penalty not exceeding 40s., and the proceeding was a proceeding before justices to impose the penalty. The actual decision of the Court was that the company could not by a bye-law make that an offence irrespective of fraud which the Act of Parliament had expressly only made an offence with it; and that so to legislate would be repugnant to the Act, which gave power to the company to legislate only in accordance with and subject to the Act itself. But the judgments seem to me to shew that all the Judges of the Queen's Bench were not speaking with reference to the form of the procedure before them only, and that they would have thought this bye-law equally inconsistent with and repugnant to the spirit of the Act of Parliament, inasmuch as under it a perfectly honest person might be visited with highly penal consequences for an act sometimes, as railways are conducted, reasonable or even necessary; at all events an act perfectly innocent, or at most no more than careless. Moreover, if I rightly understand the reasoning of the Lord Chief

(5) 47 Law J. Rep. M.C. 50; s. c. Law Rep. 3 Q.B. Div. 289.

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afforded by this company for the purchase of tickets. But Judges cannot strip themselves of their ordinary knowledge. It is at least possible (numerous examples shew that it is highly probable) that tickets are sold by it with an almost contemptuous disregard of the commonest convenience of the public. A single small hole, open often only just as the train is starting, round which hole a struggling and eager crowd congregate, so numerous and so hurried that decent comfort and enquiry are out of the question, is the common facility, if so it must be called, to which railway companies possessed by Parliament of a carrying monopoly subject the long-suffering people of this country. No reason of common sense has ever been suggested, except that it might give the companies or their servants a little more trouble, why railway tickets should not be sold all day long at the stations like other tickets with which all of us are familiar. Yet a company which exposes an old man or a weak man or a woman to the alternative of a sharp physical struggle to get a ticket or the possible loss of a train, takes upon itself to mulct the same passenger in perhaps a highly penal sum because he travels without that ticket which they have themselves denied him the common and decent facilities to procure. Whether this is so or not with the appellant company I do not know. There is certainly nothing to prevent such a working of their traffic, and it is unhappily too common in point of fact; and I think for these reasons this bye-law is unreasonable and bad, as a bye-law very much the same as this, though with the addition or alternative of a penalty, was held to be in a recent case before the Queen's Bench—*Bentham v. Hoyle* (5). I am not at all insensible to the considerations which were very ably pressed upon us by Mr. Jeune as to the liability of the company to gross frauds at the hands of passengers, and the reasonable necessity for protecting them as far as may be from these frauds. That companies are often and seriously defrauded I do not at all doubt, and I am sure that Parliament would not refuse to give them well-considered and fair powers of prevention or redress. Baron Alder-

son, in an interlocutory observation made in the case above cited so far back as the year 1847, suggested one check on fraud which, if companies had a sufficiency of carriages and a sufficiency of servants, would seem to be effective enough. Lapse of time may have shewn, very likely, that other means should be added to those which he suggested. But, at any rate, the interest of companies is not the only interest to be considered, and companies must not protect themselves by bye-laws unfair and unreasonable against the consequences of their own inadequate, careless and inconvenient system of working. It has, indeed, been suggested that as the 108th section of 8 & 9 Vict. c. 20, gives the company power to make regulations for, *inter alia*, generally regulating the "travelling upon or using and working of the railway," this bye-law is within these words, and that, therefore, the company had authority to make it. But first the power given in the 108th section is limited by the words of the 109th, and bye-laws made to enforce such regulations must not be repugnant to the general law, nor to the Act itself. For the reasons already given I think this bye-law is repugnant to the Act; and, next, I should be prepared, if necessary, to hold that the words of the 108th section do not apply to such a regulation as this, and that the words regulating the travelling upon or using and working of the railway do not extend to such a bye-law as this, but, fairly construed, must be limited to the ordering of the traffic itself, and the physical use and working of the lines and stations of the company. It is not, however, necessary to decide this question, as upon other grounds I have arrived at the conclusion that the decision appealed from was correct, and that the appeal must be dismissed, and with costs.

LOPES, J., concurred.

Appeal dismissed with costs (6).

Solicitors—Norton, Rose, Norton & Brewer, for appellants; H. S. Smith, for respondent.

(6) Leave was given to the company to appeal, but only on their undertaking to pay the respondent's costs in any event.

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to hear the appeal on its merits. The facts were stated in a Special Case by the learned County Court Judge, the material parts of which are embodied in the judgment.

The material parts of the Inclosure Act, 1845, are sufficiently set out in the judgment of the Court.

Philbrick and Tindal Atkinson, for the defendant.

Oroome, for the plaintiffs.

Our. adv. vult.

The following judgment of the Court was (on July 2) delivered by

THE SINGER, L.J.—The question to be decided upon this appeal is whether the defendant is entitled to certain rights of way claimed by him over land belonging to the plaintiffs. Both parties derive their title from a Mr. Hardcastle, who previously to the year 1869 was seised of lands and hereditaments in the parishes of Writtle and Roxwell, in the county of Essex. In those parishes there were certain waste lands, for the inclosure of which proceedings under the General Inclosure Act had been going on for some time before 1869, and under which it was contemplated that Mr. Hardcastle, in respect of his ownership of the lands and hereditaments above referred to, would receive allotments. In that state of circumstances Mr. Hardcastle caused some of his lands and hereditaments to be put up for sale by auction, expressly reserving the allotments to be made to him of the waste lands. At the sale the defendant became the purchaser of some of the lots which were conveyed to him by two deeds dated September 29, 1869. Each of such deeds, after setting out the parcels by proper description and abutments, proceeded as follows: "Together with all lands, buildings, yards, gardens, orchards, walls, fences, hedges, ditches, timber and timber-like trees, woods, underwoods, ways, paths, passages, drains, water-courses, lights, easements, privileges and appurtenances to the said farm lands and hereditaments hereby conveyed, or any of them, belonging or in any wise appertaining, or held, used or occupied therewith, or known, accepted or reputed as part, parcel or member thereof." Between the

lands conveyed to the defendant and the high road to Roxwell some strips of land, forming part of the waste lands to be enclosed, were interposed, and over them there were track-ways which had been used by the owners and occupiers of the defendant's property conveyed to the defendant, for upwards of forty years, as a means of access, which were used by the defendant without dispute down to the time of the award under the Inclosure Act, which was provisionally made on the 5th of July, and confirmed on the 21st of July, 1871. In the meantime—that is to say, on the 14th of July, 1870—Mr. Hardcastle caused the allotments intended to be made to him to be put up to auction, and Robert Crush, under whom the plaintiffs claim title as devisees, became the purchaser of three of the allotments, subject to the conditions of sale, and such allotments were conveyed to him by Hardcastle on the 29th of November, 1871. The enclosure award, while setting out, as appears by the plan attached to the award, certain ways over the lands enclosed, did not set out any ways over the said allotments purchased by Crush, and on the part of Crush and the plaintiffs it was contended that, by virtue of section 68 of 8 & 9 Vict. c. 118, any rights of way which might have existed prior to the confirmation of the award were from that time extinguished. The defendant, on the other hand, contended that the track-ways, to which reference has been made, were not affected by the award, at least as between him and persons claiming under Hardcastle, and having entered upon the plaintiffs' allotments in assertion of his alleged rights of way, an action of trespass was brought by the plaintiffs in the County Court of Essex. It was proved "that there were other means of access to the lands of the defendant, though not so convenient as to some portion, than those now claimed by him; and it was found as a fact that they were not ways of necessity." It was also admitted that proper notices of the meetings of the commissioners for the purpose of hearing objections to the proposed award had been published, and that those meetings had been held after the defendant had become the owner of the land purchased by him of J. A. Hard-

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castle; that the defendant omitted to take the proper steps then or subsequently to have the track-ways now claimed by him set out upon the map forming part of the award of the commissioners. The learned Judge of the County Court decided in favour of the plaintiffs, and gave judgment for them, and upon appeal to the Divisional Court of Exchequer, that Court being equally divided in opinion, the judgment stood.

We have come to the conclusion that such judgment was right and should be affirmed. Our reasons may be stated as follows:—In the first place, it appears to us that the plaintiffs' right to have their allotments free from any ways not set out by the enclosure award, would be, if they did not derive title from Hardcastle, tolerably plain. It is urged on the part of the defendant that the section above referred to only enables the valuer acting in the matter of any enclosure to set out private ways for the use of persons obtaining allotments under such enclosures, and that the section, while it can give no ways to other persons, can take no rights of way from them. There is no doubt that the use of the words "for the persons interested in such lands or any of them," which are found in section 68, when coupled with the definition of "persons interested" in land subject to be enclosed under the Act given in section 16, create some difficulty in the construction of the first mentioned section; but on the other hand, the very object which the Act has in view, and the means given by the Act for carrying that object into effect, point to the words at the end of the section, to which I will refer directly, as having been used in the wide sense which their natural significance imports. The main object of the Act, as its preamble recites, is to facilitate the enclosure and improvement of commons and other lands, subject to rights of property which obstruct cultivation and the productive employment of labour. That object is effected, speaking generally, by schemes of enclosure under which rights of property are extinguished and the land freed from them is allotted, and it would be manifestly inconvenient if all rights of way could not be dealt

with by the valuer entrusted with the enclosure scheme. When the provisions of the Act are looked at, it appears that the valuer's powers are, in respect of rights of property, intended to be of the most ample kind. Section 46 provides that the valuer shall hold meetings for the examination of claims and otherwise in the matter of the enclosure. Section 47 provides that all persons claiming "any common or other right or interest in any land proposed to be enclosed, shall deliver such claims in writing to the valuer," and section 106 provides for the making of allotments in full bar of, and satisfaction and compensation for, lands, rights of common, and all other rights and properties whatsoever, not excepted by the Act or the award, and closes by enacting "that from and immediately after the confirmation of the award by the commissioners, or at such earlier time as the valuer, with the approbation of the commissioners, shall, by notice on the church door, direct all rights of common and all rights whatever by the enclosure intended to be extinguished, belonging to or claimed by any person whomsoever in or upon such lands, shall cease, determine and be for ever extinguished."

These sections shew the general character of the valuer's powers as regards rights of property in or upon the land to be enclosed, and indicate an intention to give him complete control over all rights not specifically excepted. But as regards ways, both public and private, there are further provisions. Section 62 enables the valuer to set out and make public ways over the land, to be enclosed and to stop up, divert or alter, any existing ways passing through such land, subject in respect of turnpike roads to the consent of the majority of the trustees, and in respect of other public roads to the giving of certain notices and to an appeal to quarter sessions, for which provision is made in sections 63 and 64. As regards public ways, therefore, there is no exception from the jurisdiction of the valuer. No reason can be suggested why his jurisdiction should not be equally wide in the case of private ways. Section 68 then provides that the valuer "may set out such private or occupation

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roads and ways through the lands to be enclosed as he shall think requisite for the use of persons interested in such lands or in any of them." Stopping at these words, I think that they may fairly be read as including, under the expression "persons interested in such land," persons who might under section 47 claim any common or other right or interest in the land to be enclosed, and that those words are wide enough to include persons in the position of the defendant claiming rights of way over the land. This is strengthened by the concluding words of section 68, which are these: "And after such setting out as aforesaid, all private or occupation roads or ways over, through and upon the lands to be enclosed, which shall not be set out as aforesaid, shall be for ever stopped up and extinguished." But whatever doubt may exist as to the proper construction to be put upon the earlier part of the section, the later words which I have quoted indicate so strongly the intention to include (to use the words themselves) all private ways, that we cannot read them in any other sense, especially when the *a priori* reason of the thing is consistent with that sense.

We are of opinion, therefore, that the rights of way in dispute would have been extinguished, apart from any consideration of the fact that the plaintiffs derive their title through Hardcastle. Does then that fact alter the position of matters? We think not. It is said that Hardcastle granted these rights of way by the conveyance of the 29th of September, 1869, and that neither he nor those who claim under him can derogate from his grant. But in the first place it is to be observed that at the date of the conveyance Hardcastle was not the owner of the servient tenement, and could not, therefore, in a legal sense, grant the easements in question, although he might convey, and did convey, his land to the defendant with all such rights of way as against third persons as he himself possessed. But even if he had been the owner of the soil of the wastes over which the track-ways were, we can see no reason why he should be precluded from setting in motion the proceedings under the Enclosure Act with the view of ob-

taining an allotment of the land free from all rights of way or other rights over it, any more than an owner of the wastes who was a stranger to the deed, but who must be presumed by himself or his predecessors to have granted the rights of way, would by reason of his grant be precluded from so doing.

The Act itself presupposes mutual rights and obligations, which as between the owners of the soil of the land to be enclosed and the owners of rights in or over the land might be enforced; and the very object of the Act is to establish a machinery by which those rights and obligations may be extinguished, due regard being had by the valuer in his award to the claims of the persons interested. While, therefore, the fact of a particular person having specifically and for good consideration granted a way, might afford reason for the valuer not interfering with the way so granted, or for giving due compensation in the shape of another way or an allotment of land as the case might be, it could not, in our opinion, have any further effect so far as the Act of Parliament is concerned, and could not legally or equitably be a bar to the grantor's setting in motion proceedings of a quasi-judicial character in which the grantee, if he pleased, might be represented, and might duly protect himself.

But, further, we think that when Mr. Hardcastle upon the sale to the defendant reserved the allotments to be made to him, he reserved all the rights which the Enclosure Act in respect of such allotments might give him. Section 84 provides for such a case by enacting that "it shall be lawful for any person entitled to any allotment to sell, dispose of or convey the estate in right of which he may be entitled to such allotment separate from and retaining to himself such allotment or the right thereto." Surely when the right to an allotment is reserved, the person in whose favour the right is reserved must be intended to preserve with the right everything which by the Act is included in that right; and if so, the power, through the medium of the valuer to extinguish ways, being one of the things included in the right, that power is reserved. We are of opinion,

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therefore, that the ways in dispute have been legally extinguished; that the defendant in asserting by entry his right to use them was a trespasser, and that the learned County Court Judge properly entered the verdict and judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors—Duffield & Bruty, for plaintiffs; Scarlett, agent for Jones & Scarlett, Chelmsford, for defendant.

[IN THE COURT OF APPEAL.]

1878. }
May 14, 16. } PORTEOUS AND OTHERS v.
July 2. } WATNEY AND OTHERS.*

Ship and Shipping—Bill of Lading—Charter-party—Consignee prevented from discharging within the Time by the Default of other Consignees—Demurrage.

The defendants were indorsees of a bill of lading for a portion of a cargo of wheat.

The charter-party under which the ship sailed stipulated that fourteen working days should be allowed for loading and unloading at the port of discharge, and ten days' demurrage at 35*l.* day by day, and the bill of lading contained the words, "paying freight and other conditions as per charter-party."

The defendants' portion of the cargo was stowed at the bottom of the hold, and in consequence of the delay of the consignees of the upper portions in taking delivery, the defendants were unable to clear their portion till after the expiration of the lay days:—

Held, that the defendants were liable in an action for demurrage, on the ground that the charter-party (which was to be read into the bill of lading) amounted to an absolute contract to pay demurrage unless prevented from doing so by the default of the shipowner.

This was an appeal from a judgment of Lush, J., after trial, at the Guildhall last Hilary Sittings.

It was an action for demurrage of a

* *Coram* Bramwell, L.J.; Brett, L.J.; and Theisiger, L.J.

vessel chartered to convey a cargo of grain from Cronstadt to London, to be delivered as directed by bills of lading.

The charter stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* day by day, that the captain was to have an absolute lien on the cargo for all freight, dead freight and demurrage, and that the cargo should be brought and taken from alongside the ship at the merchant's risk and expense.

The bills of lading, one of which, for a part of the cargo, was indorsed to the defendants, contained the words, "paying freight for the same goods and all other conditions as per charter-party." Seven days had been consumed at the port of loading, and consequently seven working days remained for unloading at the port of discharge.

The defendants' portion of the cargo was stowed at the bottom of the hold, and in consequence of the consignees of the upper portions of the cargo not being ready to take delivery as soon as the ship was ready to discharge, the defendants were not able to clear their portion of the cargo within the time stipulated by the charter. The ship lost three days' sail, and the plaintiffs sued the defendants for three days' demurrage.

It was argued on behalf of the defendants that the delay was the consequence of the inability of the master of the vessel to deliver the cargo in time, and that therefore the defendants, having committed no default, were not liable. And further, that the words of reference in the bill of lading imported into it only so much of the stipulations in the charter-party as applied to the particular goods named in the bill of lading, *i.e.*, that it gave the consignee such a proportion of the seven days for discharging them as his part of the cargo bore to the whole; and that in that view of the question the consignee had cleared his part of the cargo in time.

For the plaintiffs it was contended that the risk of being prevented from getting their goods by the delay of the other consignees was a risk which fell on the consignees, and not on the shipowner.

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LUSH, J., after taking time to consider, gave judgment for the plaintiffs. (See the case reported *ante*, page 365.)

The defendants now appealed.

Butt and J. O. Matthew, for the defendants.

A. L. Smith and R. T. Reid, for the plaintiffs.

(The arguments and the cases cited appear sufficiently in the judgment of the Court.)

Our. adv. vult.

On July 2nd the following judgments were delivered:—

THESIGER, L.J.—I am of opinion that this appeal should be dismissed.

By the terms of the bill of lading, the consignee is only to receive his goods on the payment of freight for them and on the fulfilment of all other conditions as per charter-party. Among those conditions is that by which the shipowner stipulates for payment of demurrage at a fixed rate, in the event of the vessel carrying the goods being detained beyond the working days allowed by the charter-party. The language used, if construed according to its natural meaning, imports a liability on the part of the consignee for demurrage, co-extensive with the liability of the charterer, and the Court ought not to depart from what is the natural meaning of words selected by the parties to the contract, unless compelled by strong reasons or distinct authority. In *Wegener v. Smith* (1) the words of the bill of lading were substantially the same as here, namely, "against payment of the agreed freight and other conditions as per charter-party," and the construction put upon them was that to which I have referred. It is true, as was pointed out by the later case of *Smith v. Sieveking* (2), that there the demurrage sued for had arisen from the default of the defendant; but this fact was not even alluded to in the judgments of the learned Judges who decided the case, and clearly was not the ground of the deci-

sion. In *Gray v. Carr* (3), the words were, "he or they paying freight and all other conditions or demurrage (if any should be incurred), for the said goods, as per the aforesaid charter-party," and although the Court of Exchequer Chamber decided against the shipowner on the ground that the claim set up by him for damages for short loading was not provided for under the term "dead freight" used in the charter-party, so that the case is not a direct authority upon the point under consideration, yet, inasmuch as the majority of the Court, consisting of four out of six Judges, were of opinion that, under the words "all the conditions as per the aforesaid charter-party," the holder of the bill of lading would have been liable for dead freight if any had been payable, the case, at least indirectly, confirms the authority of *Wegener v. Smith* (1). The cases of *Chappel v. Comport* (4), *Fry v. The Chartered Mercantile Bank of India* (5), and *Smith v. Sieveking* (2), which have been cited on behalf of the defendant in the present case, so far from weakening the authority of *Wegener v. Smith* (1), appear to me to tend still further to strengthen it. In each of them the reference to the charter-party contained in the bill of lading was either expressly, by the use of the words "freight as per charter-party," as in the two first cases, or impliedly, by the use of the words "paying for the said goods as per charter-party," as in the last case limited to the condition in the charter-party relating to freight, and was held to be made simply for the purpose of ascertaining the rate of freight and not for the purpose of imposing an obligation upon the holder of the bill of lading to perform the conditions of the charter-party generally. In none of these cases was any doubt thrown upon the correctness of the decision in *Wegener v. Smith* (1), while in *Smith v. Sieveking* (2) it is expressly approved of, and the Court in referring to the language of the bill of

(3) 40 Law J. Rep. Q.B. 257; s. c. Law Rep. 6 Q.B. 522.

(4) 10 Com. B. Rep. N.S. 802; s. c. 31 Law J. Rep. C.P. 58.

(5) 35 Law J. Rep. C.P. 306; s. c. Law Rep. 1 C.P. 689.

(1) 15 Com. B. Rep. 285; s. c. 24 Law J. Rep. C.P. 26.

(2) 4 E. & B. 945; s. c. 24 Law J. Rep. Q.B. 257.

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lading, says:—"This plainly indicated to the consignee that before he was entitled to the delivery of the goods he was bound to make a payment beyond the freight; and there was a reference to the charter-party for some condition to be performed beyond the payment of freight." That condition was payment of demurrage, and the bill of lading was construed as if it had expressly made the payment of demurrage a condition on the performance of which the goods were deliverable. The consignee accepting the goods under such a bill of lading could not escape the payment of demurrage by denying his liability to pay it. The true result of the authorities, therefore, is, that a bill of lading in which the words "and all other conditions as per charter-party," follow the expression "on paying freight," or "paying for the said goods," or similar expressions, imports a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of the charter-party to which it refers.

It is said, however, on the part of the defendants that the present case is distinguishable from those of *Wegener v. Smith* (1), and *Gray v. Carr* (3), by the fact that in them the bill of lading comprised the whole cargo, while here it comprises only a portion of the cargo; but, with the exception of an observation of Maule, J., made in the course of the argument in the former case, I can find nothing which would justify me in supposing that such a distinction exercised any material effect upon the decisions in those cases, and the absence of any reference in the judgments to it is an argument against its existence. For myself I feel a difficulty in seeing how the construction of a bill of lading, which on its face may not and in many cases will not prove the fact, whether the goods to which it refers do or do not constitute the whole cargo of a chartered ship, can upon a point like that under consideration alter according to whether the parol evidence establishes that fact in the affirmative or negative. One view by which it was suggested that this difficulty is met is that the construction is not altered, but the conditions of the charter-party are to be read into the

bill of lading, not absolutely, but with reference to the goods which are the subject of it, and that just as the freight, if regulated by the charter-party freight, is proportionate to the goods carried under the bill of lading, so the demurrage is to be divided among the consignees in proportion to the value of their goods. But this view, by attempting to remove one difficulty, raises another, for it would, if adopted, be impossible of being worked out, as a matter of commercial practice. It is impossible to suppose that a shipowner whose ship has been detained beyond the lay days could in practice assert liens, or bring actions against all the bill of lading holders for proportionate amounts of demurrage ascertained by a sort of average statement; and the result would therefore be that a clause in the bill of lading, which would appear to have been inserted for the very purpose of securing the liens to which the shipowner is entitled by the charter-party would become practically inoperative. Another view presented is, that the working days under the charter-party must be allocated among the consignees of the cargo in proportion to the amount of the cargo to be respectively received by them; so that if in the present case there had been seven consignees of the cargo in equal portions, then there being seven working days left for unloading at the port of discharge, each consignee would be entitled to one day for unloading, and would only be liable for demurrage if he exceeded, and to the extent that he exceeded, that one day. But this view is as unpractical as the other to which I have just referred, and would, if adopted, lead to the same consequence. There is in reality no practicable middle course between the right of the shipowner to treat each consignee as liable *in solido* for the demurrage secured by the charter-party, and the right of the bill of lading holder to have his goods entirely freed from the condition as to demurrage contained in the charter-party. And even if a middle course were practicable, the parties to the bill of lading contract could only be held to have adopted it by giving a strained interpretation to the words used

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by them. But then it has been urged upon us that the inconvenience and hardship which would arise if the consignee of a small parcel of goods were held liable for the whole demurrage under the charter-party afford a strong practical argument against the construction of the bill of lading contended for by the plaintiffs. This might be so if it were possible to construe the bill of lading so as to exclude altogether the condition as to demurrage; but if that condition must be included, (as for the reasons I have already given I think it must,) and the words by which it is included in their natural meaning import, (as I also think they do,) that the condition is to be read as if it was introduced into the bill of lading, while any other construction of the bill of lading would lead to an utterly impracticable result, the argument founded upon the alleged inconvenience and hardship to the consignee becomes of little force. It is, no doubt, a startling consequence of the construction which this Court puts upon a bill of lading, if, as it has been suggested, and as I understand Brett, L.J., holds, the shipowner can upon such a construction recover the demurrage against all as well as against any one or more of the consignees, so that he may be paid over and over again. If the words of the charter-party are to be read in the bill of lading in such a manner as that reference to the charter-party and to what is doing under the charter-party, except for the purpose of reading the words in, cannot be made, such a consequence would follow; but, in that case, *Leer v. Yates* (6) becomes an authority that notwithstanding that consequence the consignee is liable for the entire demurrage; and *Leer v. Yates* (6), notwithstanding the dissent from the doctrine laid down in it expressed by Lord Tenterden in the cases of *Rogers v. Hunter* (7), and *Dobson v. Droop* (8), still stands as an authority.

But, on the other hand, without taking upon myself to express an opinion upon a point which is not

directly before us, especially in the face of the opinion of Brett, L.J., I must at least say that I do not think it altogether clear that when a bill of lading stipulates that a consignee under it is to have his goods on payment of freight and on the performance of all other conditions of the charter-party, and, in point of fact, all demurrage due under the charter-party has been paid to the shipowner by some other consignee under a similar bill of lading, so that the condition in the charter-party as to demurrage has been performed, although not by the particular consignee, that fact would not constitute in equity, if not at law, a defence to an action for demurrage brought against the first consignee. Be this how it may, I feel bound by the language of the contract between the parties in this case to hold that the plaintiffs were entitled to recover against the defendants the demurrage claimed, and that consequently the decision in their favour by the learned Judge in the Court below was right, and should be affirmed.

COTTON, L.J.—I agree in the decision, and also in the reasons which have been given by Lord Justice Thesiger for the conclusion at which he has arrived. The question is, what is the contract the parties have entered into by the bill of lading? The words of the bill of lading are, "paying freight for the same goods and all other conditions as per charter-party." There is an express provision in the charter-party that the shipowner shall have an absolute lien on the cargo for all freight, dead freight, and demurrage. It is impossible not to import that into the contract entered into by the bill of lading. We are not at liberty to reject the words "all other conditions," unless there is something manifestly inconsistent in introducing them. The lien is on the cargo and on every part of it; and although the bill of lading refers to one part of the cargo, yet my opinion, as a matter of construction of the contract between the parties is, that this condition shall be introduced, and, being introduced, there is a lien on every part of the cargo for demurrage; and therefore,

(6) 3 Taunt. 387.

(7) Moo. & M. 63.

(8) Ibid. 441.

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on the construction of the contract, the plaintiffs are right. If parties choose to make these contracts they must take the consequences, and not come to the Court to enforce an unnatural construction of words simply for the purpose of avoiding an inconvenience, which possibly they may not have conceived, but which is the result of a fair construction of the contract into which they have entered. As regards the question whether the plaintiffs could recover from each holder of a bill of lading the full amount of the demurrage, the question does not arise before us, therefore I think it better not to express any opinion upon it. I think that the plaintiffs have, under their contract with the defendant, a right to recover the sums sued for.

BRETT, L.J.—I do not differ from the decision at which the Lords Justices have arrived, for to decide otherwise would be to break too many settled rules of law. The bill of lading is, "on paying freight for the same goods, and all other conditions, as per charter-party." I endeavoured in *Gray v. Carr* (8) to give what I thought was a reasonable interpretation of those words, "and all other conditions as per charter-party," but my interpretation was not accepted by the majority of the Court. I take the decision in *Gray v. Carr* (3) to have been that those words in a bill of lading are to be treated as words of reference to the charter-party, and that they therefore introduce into the bill of lading every condition that is in the charter-party by way of reference; so that they bring into the bill of lading every condition of the charter-party in its terms, and make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible; not because they are not introduced, but because being introduced they are impossible of application. The bill of lading must therefore be considered as if all the conditions of the

charter-party had been absolutely written into it originally, and then we have a bill of lading in this form: "fourteen working days for loading and unloading, and ten days on demurrage." It is impossible to say that condition is not applicable to a bill of lading, although the bill of lading represents only part of the cargo. It is applicable, although it seems to me strange that a person should enter into such a contract. Then there is another rule. The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence. They cannot be received in evidence in an action between the shipowner and the holder of a bill of lading, and therefore when it is said that the bill of lading represents a part of the cargo, and that the other bills of lading are in the same form, we break a rule which does not allow us to look at them, for we do not know whether the other bills of lading are in the same form. Then what is the contract represented by the bill of lading with the conditions in it? It seems to me that the cases of *Randall v. Lynch* (9) and *Leer v. Yates* (6), and particularly the case of *Tiss v. Byers* (10), shew what the contract is, when that contract is in this form. It is not that the holder of the bill of lading will discharge his cargo within a reasonable time after he is able to do so; it is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner. That is stated to be so in *Tiss v. Byers* (10). Therefore the holder of a par-

(9) 2 Camp. 352.

(10) 45 Law J. Rep. Q.B. 511; s. c. Law Rep. 1 Q.B. Div. 244.

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ticular bill of lading is bound to pay according to that contract for every day beyond the stipulated days during which the ship remains with the cargo in her, unless the delay is caused by the fault of the shipowner.

Now in this case there is no fault on the part of the shipowner; the delay might be caused by accidents over which none of the holders of the bills of lading had any control, or it may have been caused by delay of the holders of cargo above that of the defendant. But even supposing it is by their neglect, in the contract between the shipowner and the defendant there is no stipulation about the negligence of other people. The defendant is to pay, unless it is the fault of the shipowner. The negligence of the owners of the cargo above is not the fault of the shipowner. Therefore the negligence of owners of cargo above would be one of those negligences the consequence of which the defendant has undertaken to pay for. Therefore whether they were negligent or not, it seems to me that on his contract he must pay. If I could arrive at an opposite conclusion I would, for I do not share the doubt of Lord Justice Thesiger, I think that if the consignee of a portion of the cargo had a bill of lading in the same words, and had been called upon to pay, and had paid the whole demurrage to the shipowner, another holder of a bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship. Therefore, I think that we are bound to follow the decision of *Leer v. Yates* (6). I cannot do so without considerable hesitation, after the expressions of opinion of eminent Judges, of the authority of Lord Tenterden and Sir James Mansfield. We have to decide on a conflict of cases, and I prefer the de-

cision of *Leer v. Yates* (6) to the rulings laid down in *Rogers v. Hunter* (7) and *Dobson v. Droop* (8).

There is another solution of the problem, which has been ingeniously suggested by Mr. MacLachlan in the last edition of his book, at page 496, where he suggests that there are two elements which enter into this question, namely, time and amount, and he proposes a solution somewhat between the opinion of Sir James Mansfield and Lord Tenterden, but his solution would break the settled rules of law, and cannot be admitted.

It has suggested itself to me that if the holder of the bill of lading of cargo above were to delay the ship by some act of unreasonable delay, then it is possible that the holder of the bill of lading of cargo under him might have an action against him for damages. It may be they owe the duty to each other, that no one of them shall negligently delay; but there may be difficulties in bringing an action. He may not have notice of the contract, or there may be other difficulties, still I think it is possible he may have that remedy—it is reasonable—but he certainly can have no other; he cannot maintain an action against the others for contribution; and it does not seem to me that there is any equity between them. So that I accept the whole consequence that was seen by Sir James Mansfield in *Leer v. Yates* (6); but at the same time I think the rules of law oblige me to say that the holder of each bill of lading is liable if the ship is delayed beyond the number of days allowed in his bill of lading. The judgment of Lush, J., is correct, and must be affirmed.

Judgment affirmed.

Solicitors—Hollans, Son & Coward, for appellants;
Plews, Irvine & Hodges, for respondents.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1877. } THE QUEEN v. THE PRINCIPAL,
 Dec. 14, 15. } FELLOWS AND SCHOLARS OF
 1878. } HERTFORD COLLEGE, OX-
 May 2. } FORD.*

University Tests Act, 1871 (34 Vict. c. 26. s. 3)—Hertford College Act, 1874 (37 & 38 Vict. c. 55)—Endowment of New College with Religious Restriction as to Enjoyment—Endowment of New Fellowship in Old College—Mandamus.

The *University Tests Act, 1871*, having removed all restrictions, tests and disabilities from the holding of any lay office, or the taking of any lay degree in the universities or in any college or hall subsisting at the date of the Act, afterwards, in 1874, the non-corporate body of Magdalen Hall was by Act of Parliament dissolved, and its property transferred to Hertford College, which the same Act created and incorporated as a college. Power was given by section 7 of the Act to the college to accept endowments for various purposes upon such terms and conditions as might, with the sanction of the Chancellor of the University, be agreed on between the college and the donor; but section 13 provided that nothing in the Act contained should be construed to repeal any of the provisions of the *University Tests Act, 1871*.

By a gift, the terms of which were sanctioned by the chancellor and accepted by the college, a person endowed a fellowship in Hertford College, limiting it to members of certain churches. Notice of an election of a fellow upon the foundation having been advertised, the prosecutor asked to be admitted to the examination as a Non-conformist, but was informed by the authorities of the college that he would not be elected even if successful in the examination, on the ground that though otherwise well qualified he was not a member of any of the specified churches. The prosecutor did not attend the examination, and a person in all respects qualified was elected:—

Held, on demurrer to the return to a writ of mandamus commanding the governing body to examine the prosecutor as a candi-

date for the fellowship the election for which had been advertised, that the return, which set forth the facts of the case, was good, on the following grounds—

That the prosecutor had not presented himself for examination at the time appointed by the college, and examination was a condition precedent to the right of election.

That even if he had so presented himself and had been wrongfully refused examination or election, the wrong done him would have been corrigible by the visitor of the college and not by the Courts of law.

That the office which the prosecutor sought by mandamus to obtain was already legally full.

That the *University Tests Act, 1871*, does not prevent the creation of new colleges in the universities, the endowments of which may be confined to the members of a particular religious community; and that Hertford College, not having been a subsisting college at the time of the passing of the *University Tests Act, 1871*, is not governed by that Act *proprio vigore*.

That Hertford College is not made subject to the *University Tests Act* by the provisions of the *Hertford College Act*, except so far as relates to that part of the endowments which was transferred to the college from the old foundation of Magdalen Hall, and such other endowments as were already given at the time of the passing of the last-mentioned Act.

Semble, that the *University Tests Act* prevents the establishment of new foundations with religious restrictions in colleges subsisting at the date of the Act.

This was an appeal from a decision of the Queen's Bench Division, reported 46 Law J. Rep. Q.B. 729.

It was a demurrer to a return to a writ of mandamus addressed to the principal, fellows and scholars of Hertford College, and issued on the prosecution of Alfred Isaac Tillyard.

The writ and the return thereto are set out in full in the report of the case in the Court below, and the facts are fully related in the judgment.

The Queen's Bench Division (Mellor, J., and Lush, J.) decided that the mandamus must issue.

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J.; Bramwell, L.J.; and Brett, L.J.

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On appeal—

The Solicitor-General and Charles Bowen were for the defendant.

Herschell and R. S. Wright were for the prosecution.

The case was argued at great length, and the nature of the arguments and the authorities cited sufficiently appear in the judgment of the Court.

Cur. adv. vult.

The following unanimous judgment of the Court was (on May 2nd) delivered by

LORD COLERIDGE, C.J.—This is an appeal from a judgment of the Queen's Bench, ordering a peremptory mandamus to issue to the principal, fellows and scholars of Hertford College in the University of Oxford, commanding them, by the principal and fellows, to examine Alfred Isaac Tillyard on such subjects as the governing body shall determine, as a candidate for a vacant fellowship, the election for which was advertised to be held on the 2nd of December, 1875; and to proceed to the election of a fellow pursuant to the statutes of the college. The argument here and below took place on demurrer to the return; and it has been admitted that the return of the college states the facts contained in it fully and frankly, so that we have the whole case before us. Grave questions, not only as to Hertford College, but affecting the Universities of Oxford, Cambridge and Durham, have been raised and must be decided, whether we confine ourselves to the peculiar facts of this particular case, or consider the construction to be placed upon the University Tests Act, 1871 (1),

(1) By the University Tests Act, 1871 (24 Vict. c. 26. s. 3), "from and after the passing of this Act no person shall be required upon taking, or to enable him to take, any degree other than a degree in divinity within the Universities of Oxford, Cambridge or Durham, or any of them, or upon exercising, or to enable him to exercise, any of the rights and privileges which may heretofore have been or may hereafter be exercised by graduates in the said universities or any of them, or in any college subsisting at the time of the passing of this Act in any of the said universities, or upon taking or holding, or to enable him to take or hold, any office in any of the said universities or

in regard to colleges created after the passing of that Act, or in regard to en-

any such college as aforesaid, or upon opening, or to enable him to open, a private hall or hostel in any of the said universities for the reception of students, to subscribe any article or formulary of faith, or to make any declaration or take any oath respecting his religious belief or profession, or to conform to any religious observance, or to attend or abstain from attending any form of public worship, or to belong to any specified church, sect or denomination; nor shall any person be compelled, in any of the said universities or any such college as aforesaid, to attend the public worship of any church, sect or denomination to which he does not belong," subject to certain provisos with respect to clerical fellowships and offices.

By section 2 of the Hertford College Act, 1874 (37 & 38 Vict. c. 55), Magdalen Hall, Oxford, is dissolved, and Hertford College established.

By section 3 the property of Magdalen Hall is transferred from the trustees to Hertford College.

By section 5, "all persons who immediately before the passing of this Act were members of Magdalen Hall, or held any office of honour or emolument therein, shall immediately on the passing of this Act become and be members of, or, as the case may require, holders of the like offices in Hertford College, and shall (subject to any alterations which may hereafter be made by or according to the provisions of the statutes for the time being of the said college) be entitled to and have the like rights, privileges, honours and emoluments respectively, and shall hold their respective offices in the said college upon the like terms as they would respectively have been subject to and would have held office in the said hall if the same continued to exist unaffected by this Act."

By section 5, "subject to any Act for the time being in force for the government of the said university or the colleges therein, the principal and fellows for the time being of the said college may from time to time make, rescind and vary such regulations, ordinances and statutes for the government of the said college and the good discipline thereof, and the election of the fellows and scholars thereof as to them shall seem meet; provided that no such regulations, ordinances or statutes shall alter the trusts, intents, purposes, conditions, powers or provisions mentioned in the third section of this Act, or shall have any effect until the same have been confirmed by the chancellor of the said university as visitor of the college, and shall also have received the approbation of Her Majesty signified by an order in council, and forthwith published in the *London Gazette*, and shall have been laid before Parliament."

By section 6 it is enacted that statutes made by the principal and fellows for the above-mentioned purposes shall be submitted to Her Majesty in council for approval or amendment; and that in case statutes are not so made and submitted be-

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dowments first added after the passing of that Act to colleges subsisting when it passed.

The material facts are these :—

There is a distinction in the University of Oxford between colleges and halls. Colleges are corporations, with power to hold property, and with endowed fellowships belonging to them. Halls are not corporations, have not power to hold property, and have no endowed fellowships belonging to them.

There was a college in Oxford called Hertford College, which was put an end to by Act of Parliament in 1805. At that time there was near Magdalen College, and standing on ground belonging to that college, a hall, called Magdalen Hall. When Hertford College was put an end to, its property, site and buildings were conveyed by Act of Parliament to the chancellor, masters and scholars of the University of Oxford in trust for the principal and other members of Magdalen Hall, to enable the hall to be removed to the site of Hertford College, and there to be carried on as a hall. The removal took place, and about 600*l.* a year (besides the buildings of the hall) were held by the university, partly for the benefit of the principal of the hall, partly for certain university scholars, who were obliged to reside in the hall as students. The University Tests Act (34 & 35 Vict. c. 20) passed into law in 1871, and Magdalen Hall was within the second section of that Act, a subsisting "college" in the

university when it passed, and as such clearly within the scope of its provisions ; so it remained till the year 1874. In that year the Hertford College Act (37 & 38 Vict. c. 55) passed into law. By the effect of its second section Magdalen Hall was dissolved, and Hertford College was created and incorporated. The corporation consisted of the former principal of Magdalen Hall, who is made principal of the new college, and four other gentlemen, by name : the scholars who before the Act were scholars in Magdalen Hall, "and all persons who shall hereafter be duly appointed to be fellows and scholars respectively, of or in the college hereby created, and their respective successors as principal, fellows and scholars respectively of or in the said college."

Thirty thousand pounds had been given by a munificent person (whom there is no need to name), and this sum is by the Act, together with the former property of Magdalen Hall, transferred to the new corporation "for the endowment of fellowships in the said body."

It is not necessary to consider whether it could be disputed, because in this case it is not disputed, that all this endowment is held subject to the University Tests Act, and that no religious test can be applied to the principal, and to such fellows and scholars of Hertford College as hold offices, the emolument of which proceeds therefrom. But since the creation and incorporation of the college by the Act of 1874, that is to say in 1875, a very large sum of money, amounting to above 4,800*l.* a year, has been added to the endowment of the college, exclusive of the old Magdalen Hall property, and of the 30,000*l.* above mentioned. And arrangements have been made with the college, by which this additional endowment is to be further increased, so as to amount at last in the whole to above 8,000*l.* a year. The whole of this additional endowment has been given to the college, with "the desire and intention" of the donor, expressed in his instrument of gift, that it "should be limited to members of the Church of England or Ireland, or of the Protestant Episcopal Churches of Scotland, the British Colonies and the United States of America." It is in respect of a

fore the 1st of March, 1876, statutes are to be prepared by order of Her Majesty in council, and to be approved by her after having been published in the *London Gazette* and laid before both Houses of Parliament.

By section 7 that "the principal, fellows and scholars may from time to time accept, hold and enjoy such gifts and endowments as may be made to them for the endowment, improvement, establishment or maintenance of the principalship, fellowships, professorships, tutorships, lecturer-ships or scholarships within the said college, or for any other lawful purpose, upon such terms and conditions as may with the sanction of the chancellor of the said university be agreed on between them and the respective donors."

By section 13, "nothing in this Act shall be construed to repeal any of the provisions of the University Tests Act, 1871."

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fellowship founded in 1875, and endowed out of this latter and additional endowment, that the question before us has arisen. The fellowship in dispute became vacant by the marriage of the gentleman who held it in October, 1875. Two fellowships had already been filled up by election in the year 1875, beyond which number, by the 22nd section of the Hertford College Statutes, the college are not bound to fill up vacancies which occur within any one year. In the latter part of the year 1875, however, the college advertised that there would be an election to the fellowship now in dispute, and stated in the advertisement that candidates must be members of the Church of England or of Ireland, or of the Protestant Episcopal Churches of Scotland, the British Colonies, or the United States of America. The prosecutor thereupon, by a formal notice to the college, intimated that he intended to contest the legality of the limitation above mentioned, and that he proposed to present himself "as a Nonconformist candidate" for the vacant fellowship.

To this notice the principal replied, on behalf of the college, to the effect that the limitation mentioned in the advertisement would be adhered to. The subsequent proceedings, as much may turn upon the exact form of them, are best stated in the language of the return of the college.

"On the 13th day of December, 1875, the said Alfred Isaac Tillyard called on the principal at the said college and stated that he had called to make his application complete, and also to obtain a more definite reply to his question of the 9th day of December, and asked whether he could be admitted to an examination as a Nonconformist. He was informed by the principal that the election could only take place according to the advertisement. Thereupon the said Alfred Isaac Tillyard inquired if that was not tantamount to saying that he could not be admitted to the examination as a Nonconformist, and that it would of course prevent his going in for the examination if he knew that he should not be elected. The said Alfred Isaac Tillyard was thereupon informed

by the principal that he might be examined if he desired, but that he must understand that he would not be elected even if he stood at the head of the list.

"The examination of candidates for the vacant fellowship began on Tuesday, the 14th of December, 1875. Save as aforesaid, the said Alfred Isaac Tillyard did not present nor tender himself at or for such examination, nor was he examined among the candidates. The said examination terminated on Friday, the 17th day of December, 1875."

After the examination was over, on the 20th of December, the prosecutor again applied to be examined *and elected*.

"On the 20th day of December the said Alfred Isaac Tillyard wrote to the Reverend Richard Michell, D.D., Principal of the said college, two letters, in the words and figures following respectively:—

" 'The Avenue, Cambridge,
" 'December 20, 1875.

" 'Sir,—May I respectfully trouble you once more to lay the enclosed letter before the governing body of Hertford College? It contains a request that I may be examined and elected as a Nonconformist to the fellowship you have advertised. I shall reach Oxford to-day, and any reply to the Mitre Hotel, High Street, will receive immediate attention.

" 'Your most obedient servant,
" 'Alfred I. Tillyard.

" 'To Rev. R. Michell, D.D.'"

" 'The Avenue, Cambridge,
" 'December 20, 1875.

" 'Gentlemen,—I am informed that you proceed to the election of a fellow to-morrow (21st inst.). I request that you will examine and elect me as a Nonconformist. I shall be present at Oxford for that purpose, and any communication addressed to the Mitre Hotel, High Street, will receive immediate attention.

" 'Your most obedient servant,
" 'Alfred I. Tillyard.

" 'To the Governing Body of
Hertford College, Oxford.'"

"On the 21st day of December, 1875, the Reverend Richard Michell, Principal, as aforesaid, wrote and sent to the said

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looked at (and for this reason the paragraphs of the answer containing them have been set forth in the words of the return) afford a legal answer? We think they do. It seems plain that the prosecutor here did not pursue a proper course. By the general law, and by the statutes of Hertford College (see 19th section) (2), all that any one who desires to be elected can claim, at first, is to be examined in accordance with the 19th section. Whether the University Tests Act applies or does not apply to this fellowship is for this part of the argument immaterial; this, in any view, is the first claim which a man must make who is desirous to be elected. Passing an examination is indeed a condition precedent to election; but it does not follow, and the words of the statute are carefully framed to prevent its following, that superiority in the examination gives an absolute and unqualified title to be elected. The prosecutor apparently, from his letter of the 20th of December, 1875, assumed that it did; but this is a mistake.

Now the only thing, which, at the time he asked for it, he was entitled to ask for, was never refused him. Intellectual examination he may have been entitled to ask for, and intellectual examination was not only not refused him, but was in terms offered him by the principal. I am not forgetting the terms in which that offer was made; it was, however, made in fact. But he never presented himself for this intellectual examination; he had notice of the time and place of it, and he voluntarily stayed away. This being the case, what is there to shew, nay, what kind of presumption is there,

(2) The 19th section of the statutes of Hertford College enacts that "the governing body shall elect such persons to be fellows as, after examination in such subjects as the governing body shall with reference to each vacancy determine, the governing body shall deem to be the most deserving to be fellows of the college, and best qualified to promote its interests as a place of religion, learning and education: provided that if two-thirds of the total number of the governing body, other than the principal, at a meeting convened after notice at least thirty days before the day of election, shall, with the consent of the principal, determine to elect any person to be a fellow without examination, the governing body shall elect such person."

that, even on his own view of the statutes and of the law, he would have had a right to the fellowship? There is nothing. If we assume that the college are wrong in the view they take of the application to themselves of the University Tests Act, still the prosecutor is in no condition to avail himself of their mistake.

It is said, no doubt, and with truth, that he claimed to be examined and elected, in his own phrase, as "a Nonconformist candidate," and that as such the college refused to examine him. The phrase, to "examine as a candidate," may be open to exception; but probably the meaning which the prosecutor desires to convey is, that he was told that after he had been examined by the college, the college would not elect him, although he did best in the examination, because he was a Nonconformist. Let us assume that the reason given for the intention not to elect him, if he did best, was a reason not warranted by law. Still it seems that he must give some sort of reason for believing that otherwise, and independently of this wrong reason, he is entitled to what he asks for, or, in other words, that the wrong view of the law taken by the college is a wrong to him.

This is a proceeding to redress a personal grievance; and unless there is some sort of evidence that a personal grievance has been suffered, it is not our duty to correct by mandamus a theoretical mistake in law on the part of Hertford College, even if we thought they had made it.

Take a case strictly analogous, but free from the disturbing influence which the question of doctrinal tests appears to exercise over many minds. Suppose the case of a candidate for a fellowship, of unquestioned intellectual eminence among his fellow candidates, but believed, wrongly if you please, to have some grave disqualification of another sort, social, moral, or religious—brutality of manners, extreme profligacy, or open avowed disbelief in the foundations of all religion—and that such a man were told that whatever examination he passed the college would not elect him; could such a man decline the examination, dispense

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with any proof of his independent fitness, and come for a mandamus to vacate the election of a perfectly fit person on the ground of proof, conclusive if you will, that there had been a total mistake as to the existence of his own supposed disqualification? Surely not. But the case of such a man is in principle really the case of the prosecutor.

Furthermore, it is, as we have said, quite plain, that if the prosecutor had passed the best intellectual examination the college were not bound *ipso facto* to elect him. If, indeed, a man could shew a good ground for believing, as it is quite possible he might, that he had passed the best examination, that he had no moral or social disqualification, but that the college had, nevertheless, refused to elect him from motives wrong, illegal or corrupt, he would not be without a remedy; but his remedy would be, not mandamus, but appeal to the visitor. Not mandamus, because a Court of law can deal only with the acts not the motives of the actors; and if the electors' acts were legal, as where a discretion is left to them, and they act within it, mandamus is inapplicable. It has been suggested that the power of the visitor would be also an inapplicable remedy because it can be exercised only in respect of those who are already members of the college. For this proposition the case of *The King and The Queen v. St. John's College, Oxford* (3) was cited in the argument. But when that case is looked at it will be seen that there is no decision of the Court, as reported in 4 Modern; and the language cited to us is the language of counsel. It is certainly true that Lord Holt is made to say, in the report of the case in the volume which bears the name of his reports (Holt, p. 437), that a visitor has no jurisdiction over a scholar till he is admitted. The case is distinguishable, for an ascertained and definite private right of property in the Mayor of Bristol had been there interfered with by the college. But, at any rate, the case stands alone and has not been followed, while there are cases directly in point, and of great weight,

which shew that the authority of the visitor is as complete over admissions to fellowships as over amotion from or deprivation of them. Such is the case of *St. John's College, Cambridge v. Toddington* (4), from the historical collections of Rushworth. The form of the proceeding was prohibition. The college sought to prohibit the Bishop of Ely from proceeding to hear, as visitor, an application against them at the suit of a *rejected candidate*. After long and repeated argument the rule was discharged; and in the elaborate judgment of Lord Mansfield he lays down the proposition in terms that the bishop, as visitor, was judge of such a complaint, and that his jurisdiction was "most evident." And with him entirely agreed Sir Thomas Denison and Sir Michael Foster. In the case of *The King v. The Warden of All Souls, Oxford* (5), which was an application for a mandamus to the college at the suit of a rejected candidate, the very point is taken that though amotion and correction belong to the visitor, admission and refusal do not. But it is taken only to be overruled by the whole Court.

In the case of *Ex parte Wrangham* (6), there was an appeal to the Lord Chancellor as visitor of Trinity Hall, Cambridge, on the part of a rejected candidate. Lord Loughborough heard and decided the appeal without question as to his jurisdiction *on this point*, though he seems to have doubted at that time whether the Lord Chancellor were the proper minister to exercise the visitatorial power of the Crown. In the case of *The King v. The Master and Fellows of St. Catherine's Hall, Cambridge* (7), there was an application to the King's Bench for a mandamus to the college to declare a particular fellowship vacant, and to proceed to a new election. Lord Kenyon refused the rule on the express ground that the Lord Chancellor was the visitor, and that the jurisdiction over such a

(4) 1 Burr. 158; s. c. 1 Burn's Eccl. Law, ed. 1842.

(5) T. Jones, 174.

(6) 2 Ves. jun. 609.

(7) 4 Term Rep. 233.

(3) 4 Mod. 368.

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matter was with the visitor, and not with the Courts of law.

It is useless to multiply cases after authorities such as these. It might be done, however, and I abstain from it only because the contention on the part of the prosecutor is new, and seems unfounded. Certainly at one time of my life I was familiar with appeals to the visitors of colleges by rejected candidates to reverse the results of elections; and perhaps I may be forgiven for saying that the college of which I was a fellow was ordered, while I was one, by the visitor to admit, and did admit, to a fellowship, a gentleman whom the college had rejected upon grounds which the visitor, the Bishop of Exeter, deemed insufficient, and against which the rejected candidate successfully appealed.

If from cases of admission and refusal, we turn to cases of amotion from fellowships, the books are really full of cases in which the Courts have refused to interfere, and have remitted the applicant to the visitor.

It is true that in cases of this sort the applicant *had been* a member of the college; in the case before us, and in like cases, he desires to become one. But in neither class of case is *he* a member at the time of the application, and we are unable to see that the distinction in fact makes any difference in principle. There are cases no doubt, of which *The Queen v. St. Peter's College, Cambridge* (8), is an example, where the question arising on a pure point of law, as a right to nominate entirely apart from the statutes, the college being indifferent, the machinery of mandamus has been used for the purpose of trying title, but such cases in no way interfere with the principle just laid down. There are cases also, no doubt, in which the Court has granted a rule when the existence of a visitor is left in doubt, in order to see upon the return whether they have jurisdiction or not.

It has been argued that in this case the appeal to the visitor would be nugatory, because the Chancellor of Oxford is the visitor appointed by the statutes, and he has already, under the same sta-

tutes, sanctioned the conditions of donation, which it is contended are illegal. If, however, the visitor have jurisdiction, and if the reasons given by Lord Mansfield in *St. John's College, Cambridge, v. Toddington* (4) for confining college disputes to college tribunals are, as we think they are, still strong and cogent, this is no argument; and it is, moreover, reasonably certain that the chancellor would hear the matter argued in a judicial spirit, uninfluenced by any previous opinion of his own, and probably with the assistance of some eminent lawyer as his assessor. In this respect also, therefore, we think that the prosecutor has not followed the proper course, and that the particular circumstances of this case are an answer to his application.

The further point has been made that the office is full, and that therefore if the writ goes the college cannot obey it. It has been answered that this would indeed be so if the office were the proper subject of a *quo warranto*; but that, as it is not, it follows that mandamus lies. For that proposition no authority is cited in the Court below except *The Queen v. St. Martin in the Fields* (9). But that decides no such proposition; it decides only that where an office, to which *quo warranto* applies, is full, mandamus will not be granted. The converse of that proposition is not necessarily implied in the decision of the Court; and the expressions of the judges in the case of *The King v. The Mayor of Cambridge* (10), *The King v. The Corporation of Bedford Level* (11) and *The King v. The Churchwardens of St. Pancras* (12) (each of these cases decided with expressions of doubt and on their own particular circumstances) by no means warrant the unqualified proposition laid down in the Court below by my brother Lush that "where *quo warranto* does not lie mandamus is the only remedy." Probably the expressions of Sir Hugh Hill in the case of *In re Barlow* (13) are a more correct statement of the law,

(9) 17 Q.B. Rep. 149; s. c. 20 Law J. Rep. Q.B. 423.

(10) 4 Burr. 2008.

(11) 6 East, 356.

(12) 1 Ad. & E. 80.

(13) 30 Law J. Rep. Q.B. 271.

(8) 9 Law J. Rep. Q.B. 321.

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"unless the Court can see clearly that there is another remedy equally convenient, beneficial, and effectual, the writ of mandamus will be granted, *provided the circumstances are such in other respects as to warrant the granting of the writ.*" To the proposition thus limited we should without difficulty assent, but in this case the circumstances are not such as to warrant the granting of it.

On the point that the office is full, and that this is of itself an answer to the application for the mandamus, as an abstract point of law, the cases and the dicta are conflicting. *Bassel's Case* (14) is cited in *Viner, Mandamus*, r. 13, for the proposition (which, when looked at, it hardly sustains) that it is no good return that the office is full; while on the other hand the judgments of Lord Macclesfield and Eyre, J., in *Sir Gilbert Heathcote's Case* (15) seem to assume that mandamus will not be granted where an office is full of a candidate properly qualified. We should, however, agree with the Court below in their conclusion on this point if we agreed with their premises. If the election of Mr. Maude were absolutely null, if the election had been merely colourable, we should be prepared to hold that the circumstances of its having taken place in fact, and of the candidate being accidentally well qualified, might be disregarded; and that, as there had been in law no election, mandamus ought to go to compel the college to hold one. But this is not in our judgment the true view of the case. It is on all hands conceded that the Courts have no power to compel the election of a particular person, and that the discretion of the college, as to electing this candidate or that, is left by the statutes absolute. "Such persons as they shall deem to be most deserving to be fellows of the college and best qualified to promote its interests as a place of religion, learning and education," are the words which ascertain the duty. But this is not a legal duty, nor have the Courts the power to enforce it. It is a moral duty, to the discharge of which the conscience is

bound, and which there is no reason to doubt has been discharged in the colleges of the universities since the passing of the University Tests Act, and, in reference to its provisions, with honour and integrity. But the election being thus discretionary, and no legal consequence of the result of the examination, the cases cited to us, in which it has been held that the exclusion of a qualified candidate (who, in certain events, would have had a legal right of election) makes the subsequent election null and void, have no application. And in this sense, and with these qualifications, we think that the office being full is another answer to this proceeding.

It has been said that this line of reasoning seems to shew that even the "subsisting" colleges, those to which in its terms the University Tests Act applies, may evade its provisions with impunity, at least as regards any interference of the Courts of law. They may; as other men may evade plain duties which bind in honour and in conscience, if they hold their peace and disregard clear moral obligation. It is not lightly to be supposed that bodies of educated men will unite in dishonourable and unconscientious courses; but if such things often happened, there can be no doubt that Parliament would not, as it ought not, to hesitate to turn a moral obligation disregarded into a legal one which could be enforced. That is no reason, however, why a Court of law should do what Parliament has deliberately abstained from doing. We may refer with entire agreement to the instructive judgment of Lord Loughborough, in the case already cited, for strong reasons of sense and convenience, why we should not even desire to bring questions relating to college fellowships under the jurisdiction of Courts of law. For these reasons, then, upon the facts of this particular case, we think there is no ground for issuing the mandamus. The prosecutor was not refused examination, he did not place himself in a condition to claim more of the college than the college had offered; if he had, and if they had improperly refused him, his wrong would be one corrigible by the visitor and not by the Courts of law; and in the sense

(14) *Siderfin*, 286.

(15) 10 Mod. 48.

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in which we have explained it the plenarity of the office is an answer to the writ.

Such are the reasons, apart from the broader questions raised and decided in the Court below, which have led us to differ from the conclusion of that Court. But the case fairly raises those broader questions, and we proceed to give judgment on them. Besides the duty of not encouraging doubts on an important practical matter which we do not in any degree share, these questions are raised by the return, they were argued and decided in the Court below, they were elaborately argued before us, and if this case should go further it may be essential, for the guidance of the college in this very election, that they should be decided.

The questions are two—

1. Does the University Tests Act bind Hertford College *proprio vigore*? 2. Is Hertford College made subject to the University Tests Act by the provisions of the Hertford College Act?

Upon the first point the Judges below differed. My brother Mellor held that the University Tests Act did govern Hertford College *proprio vigore*; my brother Lush held that it did not. On this point we agree with my brother Lush. Hertford College was not a subsisting college when the University Tests Act passed; and it is to subsisting colleges in terms that the third section of the Act, and as far as the imposition of tests is concerned the whole Act, is carefully confined. It is said, indeed, by my brother Mellor, that "it could never have been intended by Parliament that the repeal of the restrictions, tests and disabilities effected by the University Tests Act should be limited to existing colleges and existing endowments." We are not, however, concerned with what Parliament intended, but simply with what it has said in the statute. The statute is clear, and the parliamentary history of a statute is wisely inadmissible to explain it, if it is not; but in this case, if it could be referred to, it would appear beyond all controversy, *Parliamentum voluisse quod dicit lex*.

We are clearly of opinion that the University Tests Act does not of itself prevent the creation in the universities of fresh colleges, the endowments of which

may be confined to the members of a particular religious community.

It does not, indeed, appear to have been the intention of Parliament that no endowments should be allowed to be created in colleges which might be founded after the passing of the University Tests Act in favour of particular forms of religious belief. The Act provided that the wishes of founders expressed, speaking generally, centuries ago, should not now prevail in a state of things altogether different, which could not have been foreseen, and which might, possibly at least, have modified the expression of their wishes. But it was to "subsisting colleges" only that its operation was expressly confined. The statute, as we have said, is clear, and we are satisfied that in thus construing its language we are following its spirit, and effecting its real object.

In considering the second question it is important to bear in mind the particular circumstances of the creation of Hertford College, which in the earlier part of this judgment we have set out in detail. It is formed in part out of an institution which was a "subsisting college" within the meaning of the University Tests Act, and the buildings and endowments of that institution are part of the endowments of Hertford College. It is carefully provided by the 3rd and 4th sections of the Hertford College Act (37 and 38 Vict. c. 55) that endowments belonging to, and holders of office in, the old institution shall remain, on being transferred to the new institution, subject to the same legislation which would have governed them if they had still belonged to, and held offices in, the old. To these endowments, therefore, and to the persons who held in the new college the emoluments which proceed from these endowments, the University Tests Act undoubtedly applies. Such persons cannot be required in the words of the Act "to belong to any specified church, sect or denomination." Furthermore, as the college statutes and the Hertford College Act do not either of them authorise in terms the imposition of any tests in respect of the 30,000*l.* which is mentioned in the preamble and dealt with in the second section of the Act, it is clear, at

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least at present, that no test could be imposed by the college in respect of offices endowed out of that sum without some alteration of the language both of the Act and of the statutes of the college (16). But the question before us does not arise as to any such office. It arises in respect of an office created and endowed after the passing both of the University Tests Act and of the Hertford College Act, and it is contended that endowment and office are nevertheless both within the provisions of the latter Act, because the 13th clause of the Hertford College Act is in these terms: "Nothing in this Act contained shall be construed to repeal any of the provisions of the University Tests Act of 1871."

Now, first by the 5th section of the Hertford College Act, the college may "make such regulations, ordinances and statutes for the election of the fellows thereof as to them shall seem meet," subject, it is very true, "to any Act for the time being in force for the government of the university or colleges therein;" that is to say, subject to the law. But we have said already that the University Tests Act, though, no doubt, prospective and for all time as to the university, is not prospective in regard of tests as to the colleges, except such colleges as were subsisting therein at the time of the passing of the Act.

The 3rd section of the University Tests Act is in the clearest terms prospective in respect of *any* office, including fellowships, in *any* college subsisting at the time of its passing. So that, while it leaves the matter open as to any possible future colleges, it prevents the application of any test to any endowment, present or future, in subsisting colleges. It therefore is not a statute subject to which this power of the college is to be exer-

cised. The proviso in the 5th section of the Hertford College Act prevents in effect the exercise of this power in respect to old offices or old endowments; and the 6th section, though not directly applicable to this argument, has yet an important practical bearing on the question, as shewing that with regard to certain statutes the control of the Queen in council and the power to interpose by either House of Parliament, is carefully preserved.

But the 7th section is still more important. By it the college are empowered "from time to time to accept such gifts and endowments as may be made to them for the endowment, improvement, *establishment* and maintenance of (*inter alia*) "fellowships within the said college, and for any other lawful purpose, upon such terms and conditions as may with the sanction of the chancellor of the said university be agreed on between them and the said donors." It is in respect of a fellowship established under the provisions of this clause, as to the endowment of which all the conditions of this clause have been complied with, that the question before us has arisen.

It is very probable that the clause was passed with the knowledge that what has happened was about to happen, and for the purpose of legalising the creation and endowment of this very fellowship. But, whether this is so or not, it would be difficult to find apter words to describe the transaction than the words of the clause, which college and donor alike have understood as authorising them to transact it. It is said, however, that the 13th section makes the transaction nugatory and unlawful, incorporates the University Tests Act with the Hertford College Act, makes the college a subsisting college within the University Tests Act, and prevents the reception by it, though otherwise on this view lawful, of any endowment confined to the members of any specified church, sect or denomination. This would be, as it seems to us, to put an altogether unreasonable and strained construction on a section expressed in the language of the 13th section here. It is a complete and sufficient answer to say that, as the new col-

(16) Section 17 of the Hertford College Statutes enacts that "the provisions contained in the fourteen following sections of these Statutes" (which comprise all the provisions in respect of the election of fellows, and contain no mention of tests) "shall apply to the fellowships already founded, and also to all fellowships which may be hereafter founded, so far as such provisions shall not be expressly modified by the terms on which the endowments of such fellowships shall be accepted by the governing body."

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lege and the new offices are not and never were subject to the University Tests Act, none of the clauses of the Hertford College Act are, according to the interpretation we have put upon them, construed so as to conflict with the 13th section. But it is also true that there is enough in the history of the foundation of Hertford College, and the incorporation into it of the old endowments and old offices belonging to Magdalen Hall, to explain the general saving of existing rights effected by the words before us. The earlier sections of the Hertford College Act had specially dealt with these matters, and the last section may have been well added to secure the important objects dealt with in those sections; to ascertain their meaning, if it was obscure; to effect their object, if the language of the sections themselves had left it doubtful; and to provide that such parts of the new institution as had been subject to the old law should so remain, notwithstanding their forming part of a whole, which, as a whole, was not so subject. Had it been intended to incorporate the University Tests Act with the Hertford College Act—a sort of incorporation of which the statute book affords countless examples—there are words familiar to us all and in common use which might have been, and which we think it is fair to say would certainly have been, used. And no example was given us in which such an incorporation of one statute with another had been held to be the effect of such language as this. On this point, therefore, we differ from the Court below, and are of opinion that the University Tests Act does not affect this fellowship, through the Hertford College Act, any more than it does by its own strength.

For all these reasons we are of opinion that the return of the college in this case is good, and that the judgment of the Court below must be reversed.

Judgment reversed.

Solicitors—Woollacott & Leonard, for the prosecution; Markby, Tarry & Stewart, for the defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }

June 24. }

Ex parte RAYNER.

Costs—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 176, 179 and 180—Lands Clauses Consolidation Acts, 1845 and 1869—Compulsory Taking of Lands—Assessment of Compensation—Costs of Arbitration.

An arbitration held for the assessment of compensation in respect of lands taken compulsorily by a local board by virtue of the powers of the Public Health Act, 1875, is not an arbitration under that Act within sections 179 and 180, but is regulated by the provisions of the Lands Clauses Consolidation Acts incorporated by section 176. The costs of such arbitration are, therefore, not in the discretion of the arbitrator.

This was a rule for a mandamus to the Master to tax the costs of the applicant, Mr. Rayner, in respect of an arbitration between himself and the Local Board of Chelmsford.

The local board had by virtue of powers contained in the Public Health Act of 1875 taken certain land belonging to Mr. Rayner for sanitary purposes. The amount of compensation to be paid for such land was not agreed upon between the board and Mr. Rayner, and an arbitration was held to determine it before two arbitrators and an umpire, the result of which was an award in favour of Mr. Rayner of 3,000*l.*, a sum larger than had been offered by the board, the latter having in fact only offered a nominal sum to enable the real value to be assessed in the mode which they desired, namely, by arbitration. The award was silent as to costs, but application was made to the Master on behalf of Mr. Rayner to tax his costs, on the ground that he was entitled to them under the Lands Clauses Consolidation Acts, as having been awarded a larger sum than that offered by the board. The Master refused, holding that the arbitration was one under the Public Health Act, 1875, s. 180, and not under the Lands Clauses Consolidation Act, and that consequently the costs were in the discretion of the arbitrators, who had not awarded them. A rule nisi

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for a mandamus to the Master to tax having been obtained, on the ground that the provisions of the Lands Clauses Consolidation Acts were, in reference to the compulsory taking of lands, incorporated in the Public Health Act of 1875—

Tindal Atkinson now shewed cause against the rule.—It is true that there is an incorporation of the powers conferred by the Lands Clauses Consolidation Acts as to taking lands compulsorily in the Public Health Act, 1875, but that incorporation, though enabling local boards to take lands, does not extend to the costs of arbitrations held under the Public Health Act, where it is necessary to assess compensation for lands so taken in such a mode. Section 34 of the Lands Clauses Act is excepted, for section 179 following the incorporation section applies the rule, placing costs in the discretion of the arbitrator, to all arbitrations under the Act. The applicant here is therefore not entitled to costs.

Grantham and A. P. Stone, in support of the rule.—This is not an arbitration under the Public Health Act, 1875, so as to fall within the words in section 180. It is within the exception in section 179, being a case “where the mode of determining the amount of disputed compensation is specially provided for.” The compulsory taking of lands is governed entirely by the provisions of the Lands Clauses Consolidation Act, 1845, which are incorporated expressly by section 176. Arbitrations in reference to other matters under the Public Health Act, 1875, are subject to the provisions in sections 179 and 180, but the Legislature has thought it best to leave the taking of lands to be regulated by the Lands Clauses Act. There are numerous questions of compensation to be decided as arising under the Public Health Act, 1875, such as appear from sections 22, 52, 61, 155, 228, and the rule as to costs in section 180 applies to these. The two Acts are to be read together, and the manifest intention is that, while the compensation for the compulsory purchase of lands is subject to the Lands Clauses Act, the provisions of the Public Health Act itself apply to compensation for other and minor matters

authorised by it. Then the Act of 1869, which relates to nothing but the taxation of costs, is in terms incorporated, shewing, as is contended, that the intention was that costs under section 176 of the Public Health Act, 1875, should be dealt with exactly as costs under section 34 of the Lands Clauses Act, 1845.

COCKBURN, L.C.J.—I think that this rule must be made absolute. Power has been given under a recent Act of Parliament to local boards to take lands compulsorily, when before that Act they were not empowered so to do. The provisions relating to the taking of lands by local boards expressly provide that the Lands Clauses Consolidation Acts shall be incorporated in the statute in question, namely, in the Act of 1875, and if it stood there this case would present no difficulty, because by the Lands Clauses Consolidation Act, when lands are taken compulsorily, and the owner chooses to adopt arbitration as the mode of assessing the amount he was to receive, it followed that if the result of the arbitration gave him a larger sum by way of compensation than had been offered to him, he was entitled *ex jure* to his costs. If the recent legislation had stopped there, I should feel no difficulty, as the lands here were taken, and the compensation awarded was large.

But then it is said that the effect of the statute is qualified by the provisions inserted after the incorporation clause—by the provisions, that is to say, for arbitrations taking place under the Act itself. It is said that these provisions, if they apply, would be inconsistent with the contention of the claimant here, because it is expressly provided that, in an arbitration “under this Act,” the costs shall be in the discretion of the arbitrator.

It is difficult at first sight to reconcile the apparent differences arising upon the two sets of clauses. But when the matter is looked into closely it becomes plain enough.

There are numerous matters which under the recent legislation may be referred to arbitration, and this provision, therefore, in section 180 must refer to arbitrations specially provided for by the Act, and not to arbitrations as to the

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taking of lands under the Lands Clauses Consolidation Acts.

It was intended, I think, that where lands are taken compulsorily, the proceedings should be as under the Lands Clauses Consolidation Acts, and costs should follow the successful establishment of the claim; and that in other cases the proceedings should be under the recent Act. In the present case I think that the Acts of 1845 and 1869 are in terms incorporated, and the claimant is entitled to his costs.

MELLOR, J.—At first I was rather taken by the point suggested by Mr. Atkinson, but upon consideration I agree with my Lord, that the claimant is entitled to his costs by virtue of the Lands Clauses Act; and, therefore, that he must proceed to get his costs under that Act, which is incorporated for that purpose in reference to the taking of lands compulsorily.

Our construction does not prevent the arbitrator from giving costs or not in other arbitrations, and the Master will in such cases still tax them if given, for I think that the words in the Act of 1869 are large enough to include the taxation of all arbitrations by the Master.

I agree in thinking this rule to tax should be made absolute.

LUSH, J.—I am of the same opinion. In this case an arbitration was held in order to assess the value of lands taken by the sanitary board, and an award was made giving more than had been offered, a result which, if under the Lands Clauses Consolidation Acts, would entitle the claimant to his costs. Under the Act of 1869 costs in all cases are to be taxed by the Master.

I feel no doubt that the Act of 1875 incorporates all the provisions of the Lands Clauses Consolidation Act except section 127, and therefore incorporates all provisions so far as they relate to the purchase of land. Among those are such as give the right to the owner of the lands taken to have the compensation settled by a jury or by arbitration, and as to costs such as give them as of right when the sum awarded exceeds the sum offered. That is exactly this case, and the claimant

is entitled to costs. The difficulty felt by the Master arose on section 180 of the Act of 1875, but section 179 says, "Except when the mode of determining the amount of compensation is specially provided for, the mode there given shall be adopted." Here, however, it is specially provided for, and section 180 must refer to all the new rights to compensation given under the sections of the Act of 1875, to which we have been referred.

This construction makes the sections consistent one with another and intelligible. I therefore agree that the rule should be made absolute.

Rule absolute.

Solicitors—Collyer-Bristow & Co., for claimant; Whites, Renard & Co., agents for A. Meggy, Chelmsford, for local board.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1878. } FIELD v. THE GREAT NORTHERN
July 15. } RAILWAY COMPANY.

Costs—Practice of Taxing Office—Judicature Act (Rule of Court, 1875, Order LV.)—Costs to follow the Event—Verdict on Second Trial carries Costs of previous Trial.

Where plaintiff recovers a verdict, and a new trial is ordered on the ground of excessive damages, in which new trial plaintiff again obtains a verdict in his favour, the second verdict is the "event," within the meaning of Order LV., which the costs of the whole action are to follow, including the costs of the abortive first trial.

This was an action for damages for personal injuries caused to the plaintiff by the defendants' negligence. At the first trial on the 14th of December, 1876, before Cleasby, B., the negligence was not disputed, and plaintiff recovered a verdict for 750*l.* On the 21st of December, 1876, a rule was obtained in the Exchequer Division for a new trial, on the ground of excessive damages; and on the 20th of June, 1877, this rule was ordered to be made absolute, unless the plaintiff would

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consent to reduce the damages to 375*l*. Nothing was ordered as to costs, except that the costs of the rule were to be costs in the cause. The plaintiff refused to accept the terms offered in the rule; and at the new trial on the 12th of February, 1878, before Huddleston, B., he recovered a verdict by consent for 490*l*. On plaintiff taking in his costs for taxation, the Master taxed his costs for one trial only (including the costs of the rule), and disallowed altogether his costs of the first trial, in accordance with the usual practice of the taxing office. Plaintiff then took out a summons calling upon the Master to review his taxation, which was heard on the 27th of June by Cleasby, B., and by him dismissed with costs.

Bigham now moved, on behalf of the plaintiff, that Cleasby B.'s order dismissing the summons should be set aside. Prior to the Judicature Act costs of abortive proceedings were not costs in the cause; and a plaintiff who obtained a verdict in a second trial did not get his costs in the first trial, if the verdict in the first trial had been set aside. But by Order LV. of the Rules of Court, 1875, costs of any action tried before a jury are to "follow the event." It has moreover been decided by the Court of Appeal in *Oreen v. Wright* (1) that the costs which follow the event are "the costs of all proceedings incident to the litigation."

Meadows White, for the defendants.—Cleasby, B., from whom this appeal is brought, had presided at the first trial, and had also formed part of the Court which granted the rule and made the rule absolute. This is properly a question that ought to be decided by the rules recognised in the taxing office, and is not affected by the Judicature Act. In cases of this sort, even prior to the passing of that Act, a successful plaintiff was always entitled to get his "costs of the cause," which then as now abided the result of the trial. But the Taxing Master always excluded from taxation the costs of a former trial, when the first verdict had

been set aside. This was the universal practice of the taxing office, pursuant to rule 54 of the General Rules of Hilary Term, 1853, and it remains in force unless expressly altered by the Judicature Act. See the Judicature Act of 1875, section 21, and the Note at the head of the Rules of Court. When the rule for a new trial was granted nothing was said about costs. This is like the case of an unsuccessful interlocutory application when nothing is ordered as to costs; then each party bears his own costs, whichever succeeds in the ultimate result of the action. Or, again, suppose a case in which one party succeeds in some important issue, but the other party on the chief event, then the costs can only be distinguished in accordance with the rules recognised in the taxing office.

KELLY, C.B.—I am of opinion that the plaintiff is entitled to his costs of the first trial. It is quite true that according to the old practice the costs of the first trial would have been thrown away, and it is also true that the old practice still prevails unless it has been altered by the Judicature Act. The only question is, whether Order LV. of the Rules of Court, 1875, has not altered the practice. That Order says that, "where any action is tried by a jury, the costs shall follow the event, unless the Judge . . . shall otherwise order." Now in this case no order was made by the Judge at either trial. The question therefore simply resolves itself into the proper construction of the words "costs shall follow the event." I grant that the first trial was, in one sense, abortive, but can it be said to have had no event? Surely "event" means the final conclusion of the litigation. We must remember that this Order was intended to put an end in the future to all disputes about costs, by giving them to the successful party in a jury trial, unless the Judge thinks it his duty to interfere. It is the evident object of the Legislature that the party who recovers a verdict shall have his whole costs from beginning to end, from the issuing of the writ to the final judgment. So much for the construction of Order LV. But *Oreen v. Wright* (1) is a clear authority

(1) 46 Law J. Rep. C.P. 427; s. c. Law Rep. 2 C.P. Div. 354.

Field v. Great Northern Rail. Co., Q.B.

of the Court of Appeal in favour of this construction—that the “event” upon which costs depend is the event of the latter of two trials, which governs the costs of both. In that case we have the distinct judgments of Lord Coleridge, C.J. and Bramwell, L.J.; and though Brett, L.J., in delivering his opinion used some words which are rather obscure, they are to be explained by looking at the whole tenour of his judgment. In *Green v. Wright* (1) the plaintiff had been nonsuited in the first trial. But this case is stronger than that, for here the plaintiff has been in the right throughout. He refused to have his damages reduced by one-half, and the event justified his refusal. Equally upon the construction of Order LV. and upon the authority of *Green v. Wright* (1) I am of opinion that the plaintiff ought to get his costs of both trials.

MELLORE, J.—I am of the same opinion, notwithstanding the arguments of Mr. White. I think that the words of Order LV. of the Rules of Court, 1875, are conclusive, especially as interpreted by the Court of Appeal in *Green v. Wright* (1). Under the old practice costs went in a variety of different ways in the case of a new trial. The object of Order LV. is to introduce uniformity; and we should be leaving all the old mischiefs open if we did not so interpret it. Except in jury cases, the Judge has now an absolute discretion as to costs; but in jury cases, unless the Judge interferes, the successful party is to have his costs, *i.e.*, the entire costs of the litigation. I can see no distinction between this case and that of *Green v. Wright* (1), which is binding upon us. I cannot recognise the suggested analogy of interlocutory applications. The costs of the first trial form part of the necessary costs of the action. The first trial was but one stage in a course of litigation which finally resulted in favour of the plaintiff.

Order dismissing the summons set aside with costs.

Solicitors—Chester & Co., agents for Wright, Stockley & Co., Liverpool, for plaintiff; Johnston, Farquhar & Leech, for defendants.

[IN THE COURT OF APPEAL.]

1878. }
June 25. } *ETTY v. WILSON.**

Practice—Nonsuit—Appeal—New Trial—Court of Appeal—Jurisdiction—Order XL. Rule 4.

Where a plaintiff has been nonsuited at the conclusion of his case, the appeal must be by application to a Divisional Court for a new trial, unless the nonsuit has been entered upon admitted facts.

Where the nonsuit has been entered upon admitted facts,—Semble, that an appeal lies to the Court of Appeal under Order XL. rule 4.

This was an action tried before Denman, J., at Liverpool.

At the close of the plaintiff's case the defendant's counsel submitted that there was no case to go to the jury, and [his Lordship directed a nonsuit to be entered.

French, for the plaintiff, now moved the Court of Appeal to enter judgment for the plaintiff, on the facts as shewn at the trial.

Charles Russell and *W. R. Kennedy*, for the defendant, took the preliminary objection that the application should have been to the Divisional Court for a new trial.

French, contra.—The plaintiff is in the same position as if the judgment had been entered upon admitted facts, and leave reserved to move for judgment under the old system. I ask that judgment should be entered for the plaintiff on the facts as proved, under Order XL. rule 4.

Russell, in reply.—The facts here were not admitted. There was a long cross-examination, and the defendant was ready to give evidence. If the nonsuit is not right, there should be a new trial.

BRAMWELL, L.J.—I think that this objection ought to prevail. It may be that now the Judge can nonsuit a plaintiff, whether he will consent or not, upon the facts brought before him, and it would be very strange if, when the Judge

* *Coram Baggallay, L.J.; Brett, L.J.; and Thesiger, L.J.*

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directs a verdict for the defendant, the appeal should lie to the Divisional Court, whereas, if he directs a nonsuit, it must come to the Court of Appeal.

THESIGER, L.J.—I am of the same opinion, and I will only add that I express no opinion as to the case where the nonsuit is directed upon admitted facts entered on the Judge's notes. It may be that the appeal would then be to this Court. But here that is not the case. The plaintiff was cross-examined, and the defendant was prepared to give evidence. That being so, we must adhere to the rule laid down the other day.

BRAMWELL, L.J.—If the facts were admitted, it would be a mere idle ceremony to say to the jury, "You must find that the facts are so."

THESIGER, L.J.—In such a case there are two ways in which the appeal may be said to lie to this Court. The proceeding may be regarded either as a discharge of the jury and judgment entered upon a finding of the facts by the Judge, or a judgment entered upon facts which, being admitted, are regarded as the finding of a jury.

BAGGALLAY, L.J., concurred.

Appeal refused.

Solicitors—H. G. Field, agent for Etty, Liverpool, for plaintiff; J. & R. Gole, agents for Evans & Lockett, Liverpool, for defendant.

[IN THE COURT OF APPEAL.]

1878.
June 4, 5, 6, 7. } KENDALL AND ANOTHER v.
July 23. } HAMILTON.

Partners — Partnership Debt — Joint and several Liability—Judgment recovered against one or more of several Co-contractors—Merger of Debt in Judgment.

The defendant being jointly interested with the firm of W. & Co. in a contract in respect of which they were indebted to the plaintiffs, the plaintiffs recovered judgment

* *Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.*

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against W. & Co. W. & Co. afterwards became bankrupts. The defendant proved against their estate, and then brought an action on the contract against the defendant:—Held, that the judgment obtained against W. & Co. was a bar to the action.

Partnership debts are not necessarily several as well as joint in equity; the liability of the estate of a deceased partner on a partnership contract being based on the ground that where there is no survivorship of interest there ought not to be survivorship of liability.

This was an appeal from a judgment of Huddleston, B., in favour of the plaintiffs after trial without a jury.

The defendant was jointly interested with a firm of Wilson, MacKay & Co., in a contract made between them and the plaintiffs. The plaintiffs recovered judgment in an action upon the contract against Wilson, MacKay & Co., and that firm soon afterwards became bankrupt, and their estate was sequestered according to the law of Scotland. The plaintiffs proved for the amount of his judgment under the sequestration, and afterwards, finding that the defendant was jointly interested with the firm in the adventure out of which the contract arose, brought this action in respect of the same debt for which he had sued the firm. The defendants pleaded the judgment recovered by the plaintiffs against Wilson, MacKay & Co., as a bar to the action, but Huddleston, B., gave judgment for the plaintiff, on the authority of *Devaynes v. Noble (Sleech's Case)* (1). The facts will be found more fully stated in the judgment.

On appeal.

Benjamin and Rigby (of the Equity Bar), for the defendant.—The defendant is not a partner in the firm of Wilson, MacKay & Co., but in the adventure. The plaintiffs have recovered judgment against the firm, and the original debt is merged in the superior obligation of the judgment—*King v. Hoare* (2). The

(1) 1 Mer. 539.

(2) 13 Mee. & W. 494; s.c. 14 Law J. Rep. Exch. 20.

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plaintiff has elected to treat the debt as a joint liability, and is estopped both at law and in equity from now treating it as a several obligation. It is suggested on the part of the plaintiffs that a partnership debt is both joint and several on the authority of *Thomas v. Fraser* (3) and other cases. But that case only shewed that under certain circumstances a partnership bond may be considered as joint and several. The Lord Chancellor (Eldon) says—"I do not see how the bond was better than the note" (a partnership note) "unless it was joint and several." He relies on the intention. An ordinary partnership debt, therefore, is only a joint debt. No cases are inconsistent with that proposition. The question was first discussed in *Devaynes v. Noble* (*Sleech's Case*) (1), where the Master of the Rolls (Sir William Grant) says in his judgment at page 562, that the rule in equity does not entirely adopt the rule of the *Lex Mercatoria* as to there being no survivorship of interest in partnership matters that a creditor has an equity against a deceased partner's separate estate, and that equity will hold certain partnership bonds to be joint and several on the ground of intention. But the right to go against the separate estate is confined to the case of a deceased partner. See *Lane v. Williams* (4), *Wilkinson v. Henderson* (5). The debt is merely joint and several when you come to the administration of assets. In *Lindley on Partnership*, vol. 2, p. 1095, 3rd edit. and p. 1055, 4th edit., it is said that from the doctrine that partnership debts are several as well as joint, it would logically follow that the creditors of a partnership should be entitled to rank against the assets of the deceased *pari passu* with his separate creditors. But the statement that partnership debts are joint and several is merely an expression used in equity, the true expansion of which is that the creditors of a partnership have on the death of one of the partners a right to obtain payment from the surviving partners and also out of the estate of the deceased partner.

(3) 3 Ves. 399.

(4) 2 Vern. 277.

(5) 1 Myl. & K. 582; s. c. 2 Law J. Rep. Chanc. 191.

The principle is shewn in *Beresford v. Browning* (6). James, L.J., says in that case—"The case is within the rule that the liability of partners for property acquired by them as partners is in equity joint and several. That is the usual form of expressing the rule, but it would be more accurate to say that so far as regards partners, where there is in equity no survivorship of property, there is in equity no survivorship of liability." And Mellish, L.J., says, "Supposing one partner were to die, and one to retire, he could not by so retiring avoid his liability at law to the executors of the partner who had died. If this be so, I can see no difference in equity between the case of a retiring partner and one dying, and if one partner retiring does not cease to be liable at law, I think it clear that if one dies his estate cannot escape liability." In any joint liability, when a joint judgment has been obtained the separate estate of a dormant partner can be reached—*Ex parte Hamper* (7); and in *Ex parte Hodgkinson* (8) Lord Eldon says, "It has been constantly held that if I deal with A., knowing nothing of his dormant partner, and they become bankrupt, I, having dealt with A. alone, may choose to be considered his separate creditor. If B. was his dormant partner, I may in respect of his having received profits choose to hold him also as my debtor. But it has constantly been taken as clear law that a creditor dealing with A. and knowing nothing of a dormant partner may consider himself a separate creditor." And if he does so knowing of the partnership, and sues and recovers judgment against one of the partners, the debt is merged in the judgment, even though it is defeated by a bankruptcy, *Ex parte Higgins* (9). According to the rule of equity, therefore, the defendant in this case is not liable, and under the Judicature Act, 1873, ss. 24 & 25, the rules of equity are now to prevail. Once having elected to go against A. for a partnership debt

(6) 45 Law J. Rep. Chanc. 36; s. c. Law Rep. 20 Eq. 564, Chanc. Div. 30.

(7) 17 Ves. 403.

(8) 19 Ves. 291 (at p. 294).

(9) 3 De Gex & J. 33; s. c. 27 Law J. Rep. Bankr. 27.

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of A. & B., the plaintiff is estopped from further proceedings against B., for B. may have changed his position by paying A half the debt. Then suppose A became bankrupt, it would not be equitable for the creditor to proceed against B.

Watkin Williams (Charles Bowen with him), for the plaintiffs.—The first question is, have the plaintiffs elected to treat the debt as the joint debt of Wilson & MacKay & Co.? He cannot have made the election, for no choice was given him. He did not know of the dormant partner. Nor does the election, if he made it, preclude him from bringing his action against the defendant. The debt is not merely joint but joint and several, and the judgment against one debtor does not bar the remedy against another. The two remedies are concurrent. The question is, whether the original debt of Hamilton is merged in the judgment against Wilson and MacKay. No doubt that would be so if there was but one single liability. The case of *King v. Hoare* (2) decides that, and if this debt were merely a joint debt, that case would govern this. See the judgment of Parke, B., at p. 504. The cause of action being single, cannot be divided, and therefore, on the authority of *Brown v. Wootton* (10), judgment against one debtor bars the action of the debt. But it is not so where the liability is several as well as joint, i.e., where there is no survivorship. All commercial contracts by partners are thus in substance several as well as joint, for there is no survivorship—See *Buckley v. Barber* (11), and *The King v. The Collector of Customs* (12). Though technically partners are joint owners of the partnership property, there is no *jus accrescendi*. See per Parke, B., in *Buckley v. Barber* (11), citing *Coke's Inst.* 182 a. The same doctrine is laid down in *Storey's Equity Jurisprudence*, § 676, and note, and in *Thorpe v. Jackson* (13). The doctrine is not confined to cases where one of the partners is dead, but the liability of the deceased partner's

estate is based on the fact that the original liability is, in equity, several as well as joint—*Lindley on Partnership*, p. 382, 3rd edit., and 369, 4th edit.; *Wilmer v. Currey* (14); *Bishop v. Church* (15); *The Liverpool Borough Bank v. Walker* (16).

[COTTON, L.J., referred to *Jacomb v. Harwood* (17)].

The cases cited for the defendant, *Lane v. Williams* (4), *Wilkinson v. Henderson* (5), *Devaynes v. Noble* (1), and *Beresford v. Browning* (6), all support the same view.—See the remarks of Leach, V.C., in *Wilkinson v. Henderson* (5), and of the Master of the Rolls in *Devaynes v. Noble* (1). In no case is the several liability confined to the estates of deceased partners. In *Lane v. Williams* (4) the "note" referred to was the note of one partner. *Ex parte Higgins* (9) was purely a bankruptcy case, and turned entirely on the rules of proceedings in bankruptcy.

Benjamin replied.

Cur. adv. vult.

The judgment of the Court was delivered (on July 23) by

THESIGER, L.J.—This was an appeal from a decision of Baron Huddleston, who, after trying the case without a jury, gave judgment in favour of the plaintiffs. The action was to recover a sum of money alleged to be due to the plaintiffs under a contract made by them with the defendant. The contract on which the action was founded was in fact made by the firm of Wilson, MacKay & Co. In that firm the defendant was not a partner. He was, however, jointly interested with the firm of Wilson, MacKay & Co. in certain adventures in respect of which the contract sued upon was made. But his connection with them in the matter was not known to the plaintiffs till long after the time at which the contract sued upon was made. He was, as regards his liability to the plaintiffs, in the position of a dormant partner.

(10) *Yelv.* 65.

(11) 6 *Exch. Rep.* 164; s.c. 20 *Law J. Rep. Exch.* 114.

(12) 2 *M. & S.* 223.

(13) 2 *You. & C.* 553.

(14) 2 *De Gex & S.* 347.

(15) 2 *Ves. sen.* 100 and 371.

(16) 4 *De Gex & J.* 24.

(17) 2 *Ves. sen.* 265.

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In the month of April, 1874, after the claim which is the subject of this action had arisen, there was a meeting between the plaintiffs and the partners in the firm of Messrs. Wilson, MacKay & Co., or some of them, at which the defendant was present, and, in our opinion, the fair result of the evidence is, that the plaintiffs then learned that the defendant had an interest in the contract sued on. The plaintiffs claim that a large sum was due to them under that contract, and in August, 1874, they obtained judgment on the contract against the members of the firm of Wilson, MacKay & Co. for a considerable sum, and afterwards, in the month of September in the same year, for a further sum. The sums covered by these judgments included what is sought to be recovered in the present action. In the following year Messrs. Wilson, MacKay & Co. became bankrupts in Scotland, and the plaintiffs proved against their estate. The appellant relied on what took place in or with reference to the Scotch bankruptcy or sequestration, as an answer to the plaintiffs' action.

Afterwards, that is to say in the month of July, 1877, the plaintiffs commenced this action against the defendant Hamilton alone, and after hearing the case, Baron Huddleston gave judgment in favour of the plaintiffs.

The defendant appealed, and the point principally relied upon by his counsel was the effect of the judgments obtained by the plaintiffs against the persons constituting the firm of Wilson, McKay & Co. It was contended that the contract on which the plaintiffs are now suing was the joint contract of the defendant and those persons, and that the judgment recovered against some of the joint contractors is a bar to an action against the other co-contractor, on the ground that the original cause of action is merged in the superior obligation of the judgment. It was contended, on the part of the plaintiffs, that even at law this was not the effect of the judgments.

We are of opinion that this contention on behalf of the plaintiffs cannot be maintained, and that at law the judgments obtained against Wilson, MacKay & Co.

would be a bar to the action, see *King v. Hoare* (2). The plaintiffs, however, also contended, that whatever might be the effect at Common Law of the judgment every partnership contract is in equity several as well as joint; that the High Court is now a Court of Law and Equity, and that the Court, having regard to the rules of Equity, is bound to hold that the plaintiffs can sue the defendant as on a several contract, and are not bound by the judgments recovered in the actions against the other parties interested in the joint adventure. And it was on this ground that Baron Huddleston decided in favour of the plaintiffs. There is no doubt that the judgments referred to will not bar the present action if the contract entered into by Wilson, MacKay & Co., on behalf of themselves and the defendant, is to be considered several as well as joint. The plaintiffs, in support of their proposition that the contract is several as well as joint, have relied on a long series of cases in the Court of Chancery, in which in administering the estate of a partner who died leaving partners or a partner him surviving, the Court has admitted the creditors of the partnership to prove against the estate of the deceased partner, though at law the survivor was alone liable, and although it was originally doubted whether this could be done, have even allowed partnership creditors to institute proceedings for the purpose of obtaining administration of the estate of the deceased partner, and payment out of his assets. It was contended that these authorities are founded on and establish the principle that in Equity every partnership contract is several as well as joint, and in support of this view the plaintiffs refer to expressions used by Sir William Grant in *Devaynes v. Noble* (*Sleech's Case*) (1), and by Sir John Leach in *Wilkinson v. Henderson* (3), which state, in general terms, that in equity a partnership contract is several as well as joint; and they also refer to similar expressions used by the present Master of the Rolls in the case of *Beresford v. Browning* (6). It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership

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creditors, though at law the survivor has become solely liable.

And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor. There is, however, no case in which the point now to be decided has ever arisen, and the question is whether the decisions to which we have referred do establish a principle which supports the plaintiffs' contention in the present action.

It is difficult to understand how the Court of Equity came to interfere with the legal liability of partners, and although it has done so, it has, in giving the partnership creditor relief, dealt with him in an anomalous way, that is to say, except in cases where there has been no joint estate, the Court has only admitted the partnership creditors to rank against the estate of the deceased after all his private and separate debts have been paid.

This is not consistent with the view that the contract of the deceased with these creditors is several as well as joint.

Lord Eldon does not seem to have considered that the relief thus given to the partnership creditor was to be considered as establishing a principle that in equity a partnership contract is for all purposes, or in the lifetime of the co-contractors, to be considered as several as well as joint.

For in *Ex parte Kendall* (18), he says, "Upon the authority referred to and others, where parties think proper to enter into a joint instead of a joint and several contract, though I am surprised that Courts of Equity have not left that to its fate as a joint contract, they have, I admit, said that there is a remedy against the assets of one deceased if the survivors cannot pay."

And in *Beresford v. Browning* (6), Lord Justice James says that the more accurate mode of expressing the rule applicable to partnership contracts is, "That so far as regards partners, where there is in equity no survivorship of property, there is in equity no survivorship of liability." It must also be remembered that the Court of Bankruptcy is a Court of

Equity as well as of law, and that in bankruptcy the partnership creditor is not, where there are any joint assets, entitled to prove against the separate estate in competition with the separate creditors, but can only obtain payment out of the separate assets when all the separate creditors are paid. This affords a strong argument in favour of the view that the decisions in equity, on which the plaintiffs rely, do not establish the proposition that partnership contracts are for all purposes to be treated as several as well as joint during the lifetime of the partners. With the exception of those cases where relief has been given in equity against partners for breaches of trust or other torts (where the relief is always several as well as joint), Courts of Equity have given relief in respect of partnership contracts when in consequence of the contract being at law joint only there has been no remedy at law, only where the claims have been against the estate of a partner who had died leaving others him surviving.

In our opinion, instead of holding that these cases establish the principle that all partnership or mercantile contracts are for all purposes several as well as joint, it is more correct to say that relief was originally given in these cases as a consequence which equity attributed to the rule "*jus accrescendi inter mercatores locum non habet*," namely, that as the estate of the deceased, notwithstanding his death, retained an interest in the partnership property, his estate ought not to be protected or relieved by his death from liability in respect of contracts of which it still retained the benefit; and that to this extent partnership contracts were to be considered several, or in other words, that in partnership contracts of which the profit does not go exclusively to the survivors, there is in the view of a Court of Equity an implied stipulation that in the event of the death of any of the contractors his estate shall still remain liable, and that in this way the estate of each partner is in equity severally liable. This is probably the explanation of what is said by Lord Eldon in *Ex parte Kendall* (19),—"Without going

(18) 17 Ves. 514, at p. 522 and p. 525.

(19) 1 Bro. C.C. 27.

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through all the authorities, and repeating Lord Thurlow's doubt in *Hoare v. Contencin* (20), and my own surprise that a Court of Equity should have interposed to enlarge the effect of a legal contract, the modern doctrine certainly is that where a man has chosen to take the joint credit of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a Court of Equity will under certain modifications constitute that demand." Whether or no the Courts of Equity were right in thus interfering with the legal effect of partnership contracts, it is well established that relief will be given against the estate of a deceased partner; but in our opinion the cases in which this relief has been given cannot be considered as establishing that partnership contracts are to be considered several for all purposes, and so as to alter during the lifetime of the parties the effect and incidents of the contracts. In our opinion the expressions used by the learned Judges above referred to, must be understood with reference to the cases in which they are used, and as stating either that as regards the estate of a deceased partner the contract must be treated as several, or as shortly, though somewhat inaccurately, stating the effect which a Court of Equity after the death of one of several partners gives to these contracts. It is unnecessary to go through the numerous cases which were cited during the argument, but it will be right to refer to the cases of the *Liverpool Borough Bank v. Walker* (16) and *Jacomb v. Harwood* (17), as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in equity against the estate of a deceased partner. But in each of these cases the judgment was not recovered until after the death of partners against whose estate the creditor was seeking relief, and the cases in which relief has been given in equity against the estate of a deceased partner, certainly establish that from and after his death his estate

is subject to a separate or several liability. This does not establish that a partnership contract in its inception, or during the life of all the co-contractors, is several as well as joint. In our opinion the cases relied on do not establish any principle which entitles the plaintiffs to be relieved from the legal effect of the judgments obtained by them against the defendant's co-contractors, Messrs. Wilson, MacKay & Co., and we hold that these judgments are a bar to the present action.

The appeal must be allowed, and the judgment of the Court below reversed with costs, including the costs of the appeal.

Judgment for the defendant.

Solicitors—Freshfields & Williams, for plaintiffs;
John W. Sykes, for defendant.

IN THE COURT OF APPEAL]

(*Appeal from the Common Pleas Division.*)

1878.	}	BRYANT AND ANOTHER v. HERBERT.*
May 30.		
July 2.		

Costs—Detinue—Contract or Tort—30 & 31 Vict. c. 142. s. 5 (County Court Act, 1867).

Detinue is an action founded on tort within the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 5.

In an action brought for the wrongful detention of a picture, the plaintiffs obtained a verdict of 10l., the value of the picture, and 1s. as damages for its detention. The Judge at the trial refused to make any order for the delivery up of the picture, and made no order as to costs:—Held, that the plaintiffs were not deprived of their costs by 30 & 31 Vict. c. 142. s. 5.

This was an appeal from a decision of the Common Pleas Division, reported *ante*, p. 354, where the facts of the case are fully stated.

The Divisional Court decided in favour of the defendant on the ground that the action of detinue was founded on con-

* *Coram* Baggallay, L.J.; Bramwell, L.J.; and Brett, L.J.

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tract within the meaning of 30 & 31 Vict. c. 142. s. 5.

The plaintiffs now appealed.

Finlay (*Denman* with him), for the plaintiffs.

Henry Matthews (*Bagnall Wild* with him), for the defendant.

The arguments used and the authorities cited were substantially the same as in the Court below.

Cur. adv. vult.

The following judgments were delivered on July 2:—

BRAMWELL, L.J.—It seems to me that the question in this case is, what is the meaning of the words “in any action founded on contract” and in “any action founded on tort.” Before discussing that, it should be noticed that the statute applies whether the case is decided by verdict, demurrer or other means.

It seems, therefore, inasmuch as no facts are known when the decision is on demurrer, except those stated on the pleadings, that “founded on contract” or “founded on tort” must mean so founded on the face of the pleadings. If so, there seems to me less difficulty than if the facts of the case are to be considered. But either way, what is the meaning of “founded on contract” and “founded on tort?” The words are not words of art even as much as “*ex contractu*,” “*ex delicto*” would be. They are plain English words, and are to have the meaning ordinary Englishmen would give them. What is the foundation of an action? Those facts which it is necessary to state and prove to maintain it: and no others. This really seems a truism. Unless those necessary facts exist the action is unfounded. All other facts are no part of the foundation. There

(1) By 30 & 31 Vict. c. 142. s. 5, “If in any action commenced after the passing of this Act in any of Her Majesty’s Superior Courts of Record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment or default, or on demurrer or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in the Superior Court, or unless the Court or a Judge in Chambers shall by rule or order allow such costs.

is a further observation. This statute passed after the Common Law Procedure Acts. They did not abolish forms of actions in words. The Common Law Commissioners recommended that, but it was supposed that if the recommendation were adopted the law would be shaken to its foundations. So that all that could be done was to provide as far as possible that though forms of actions remained there never should be a question what was the form. This was accomplished, save as to this very question of costs in actions within the County Court jurisdiction. Until the passing of the statute we are discussing, it was necessary to see if an action was *assumpsit*, case, &c. But the Common Law Procedure Act having passed, and forms of action being practically abolished, the Legislature pass this Act, dropping the words “*assumpsit*,” “case,” &c., and using the words “founded on contract,” “founded on tort.” This shews to me that the substance of the matter was to be looked at. One may observe there is no middle term. The statute supposes all actions are founded either on contract or on tort—contract if not tort. Then is this action on the face of the statements of claim and defence, founded on contract or on tort? All that is alleged is that the plaintiffs are owners of the picture, and that the defendant detains it. This means “wrongfully detains it,” not merely has in his possession, and negatively does not give up. See *Clements v. Flight* (2).

Then the action is manifestly founded on tort on the pleadings. But so it is if the facts are looked at. I doubt if there was any contract between the parties. It is said that the defendant agreed to give up the picture. I think not. He was to let the owner take it away; but that is an obligation the law casts on every one who has another’s property in his possession. But assuming there was some agreement, the action is not founded on it. Mr. Matthews was driven to contend that it was, and that the property was still in the plaintiffs, who could come and take it, or maintain another action for it.

(2) 16 Mee. & W. 42; s. c. 16 Law J. Rep. Exch. 11.

Bryant v. Herbert, App.

This is impossible, and shews therefore that the action was for the tortious detention of the picture, and that the action was founded on the tort to the right of property, and not on any contract. Suppose the plaintiff had sold the picture to A. B., he might have maintained this action. On what would it then have been founded? Clearly not on contract, therefore on tort. So it is now. These are the considerations on which I think this case ought to be decided, and not by enquiries whether *detinue* is an action "*ex contractu*" or "*ex delicto*." I think that the Legislature intended that the substance of the action, and not its form, should be looked at. It leaves out what was in the former Act—"assumpsit," "case," &c.—and uses the general words "founded on contract," "founded on tort." But if the old learning, as it was called, is to be brought to help us, I should come to the same conclusion. No doubt dicta and decisions are to be found that *detinue* is an action *ex contractu* or *ex quasi contractu*, &c., but there are dicta and decisions the other way. It is not easy to make sense of them; perhaps the nature of the thing does not admit of it. It cannot be settled by saying that debt and *detinue* could be joined, and that actions of tort could not be joined with actions on contract.

Actions on contract could not be joined, *e.g.*, debt and *assumpsit*; the reason being unconnected with the question whether the action was *ex contractu* or *ex delicto*. The last case I know of is *Clements v. Flight* (2). This clearly holds that the action is founded on a tortious detention. I should therefore come to the same conclusion if these considerations governed the case. But I believe that it was intended that all this useless, and worse than useless, learning should be disregarded and the matter decided on its substance.

BRETT, L.J.—I concur in the judgment of my learned brother Bramwell, but I do not agree with his reasons. The question is, what is the meaning of the words "founded on tort" and "founded on contract," in section 5 of 30 & 31 Vict. c. 142. With the greatest deference to

my learned brother, I do not think those words can be called plain English; for they seem to me to be technical terms.

The conclusion to which I have come is this: that the action of *detinue* is, technically speaking, "founded on contract." The form of action was invented to avoid the technicalities of the old law, the intention being to state a contract which could not be traversed. Therefore I think that, technically speaking, the action of *detinue*, so far as the remedy is concerned, was, in its legal signification, an action founded on contract. But did the statute we have to construe mean to use these terms in the same technical sense? I am by no means sure that it did not; but at the same time I am not prepared to disagree with the conclusion that the statute meant to deal not with the form of action but with the facts with reference to which the form of action is to be applied. If that be so, the question is whether the cause of action here is in fact "founded on contract" in the sense of its being a breach of contract, or whether it is "founded on tort" in the sense of its being founded on a wrongful act. I have come to a very clear conclusion that where a person is sued in *detinue* for holding goods to which another person is entitled the real cause of action is a wrongful act; for it may arise where there is no contract; and the remedy sought is not one which would arise upon a breach of contract. The real and substantial cause of action is a wrongful act, and I am not prepared to say that the words "founded on contract" and "founded on tort" in the statute do not mean "founded on a breach of contract" and "founded on a wrongful act." If so, this action is founded on a wrongful act, and therefore "founded on tort" within the meaning of the statute.

BAGGALLAY, L.J., concurred in the result of the above judgments.

Judgment reversed.

Solicitors—E. W. Parkes, for plaintiffs; Field, Roscoe & Co., for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. }
 May 9. } JONES v. ROBINSON.
 June 26. }

Will—Construction—“Personal Estate, Property, Chattels and Effects”—“Seised”—Freehold Estate not included.

A testator by his will disposed of his property as follows: “I give and bequeath unto my wife (here followed various sorts of personal property, specifically enumerated), and all other my personal estate, property, chattels and effects whatsoever and wheresoever to which I am now seised, possessed or entitled to, or may hereafter acquire, or can hereby dispose of, to hold the same unto my said wife, her executors, administrators and assigns, for her and their own use and benefit absolutely.” The testator then disposed of the real estates, vested in him by way of mortgage and in trust, by “devise” to his wife and brother, “their heirs and assigns,” the money secured on such mortgages to be “considered as part of my personal estate:”—

Held, that the testator’s freehold estates did not pass under the will.

SPECIAL CASE.

John Jones duly made and executed his last will, dated the 28th day of September, 1849, and such will was (so far as is material for the present case) in the words following, that is to say,—

“I appoint my wife Mary Jones and my brother Thomas Jones, of Blackthorn, in the county of Oxford, farmer, executrix and executor of this my last will and testament. I direct that all just debts, funeral expenses, and the charges of proving this my will, may be fully paid and satisfied; and after payment and satisfaction thereof, I give and bequeath unto my wife Mary Jones all my household goods and furniture and implements of household farming, stock, cattle, growing crops and other my effects in and about the house and upon the farm and lands in my occupation at Stratton-Audley aforesaid, and also all my ready money and money out at interest and securities for money, mortgages, bonds, bills, book debts and all other my per-

sonal estate, property, chattels and effects whatsoever and wheresoever to which I am now seised, possessed or entitled to, or may hereafter acquire and can hereby dispose of, to hold the same unto my said wife Mary Jones, her executors, administrators and assigns, for her and their own use and benefit absolutely; and I do hereby devise all such real estates as are now vested in me by way of mortgage in fee, unto and to the use of the said Mary Jones and Thomas Jones, their heirs and assigns, subject to such equity of redemption as may affect the same estates respectively at the time of my decease, but the money secured on such mortgages shall be considered as part of my personal estate. I also devise to the said Mary Jones and Thomas Jones all such estates as are now vested in me upon any trust or trusts, to hold the same estates unto and to the use of the said Mary Jones and Thomas Jones, their heirs and assigns, upon the trusts affecting the same estates respectively.”

The testator was at the time of his death seised for an estate of inheritance to him and his heirs according to the custom of the manor of the prebend of Buckingham-with-Gawcott, in the county of Buckingham, of certain hereditaments therein situate.

He died on the 9th day of May, 1866, without having revoked or altered his will, which was duly proved by the said Mary Jones and Thomas Jones.

Upon the death of the testator his widow, Mary Jones, entered into possession of the said hereditaments, and continued in uninterrupted possession thereof up to the time of her death.

She died on the 24th day of December, 1871, having by her will, dated the 23rd day of February, 1867, devised all her real estate unto trustees upon trust for sale.

Subject only to the question hereby submitted for the opinion of the Court, the defendant was a *bona fide* purchaser from the trustees of the will of Mary Jones of the said hereditaments for valuable consideration.

The defendant as such purchaser as aforesaid, entered into possession of the said hereditaments on the 25th day of

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March, 1872, and had ever since been in uninterrupted possession thereof.

The heir of the testator John Jones, according to the custom of the said manor, was his nephew, John Jones, junior, who died on the 21st day of November, 1868, intestate, leaving his eldest son, the plaintiff, his heir according to the custom of the said manor.

The question submitted for the opinion of the Court was—Whether, according to the true construction of the said will of the said testator, the said hereditaments were thereby effectually devised to the said Mary Jones, or whether he (the said testator) died intestate in respect thereof.

Fawcett, for the plaintiff.—The word “property” is no doubt applicable to real as well as personal estate, but that word inserted, as it is here, with other property of a purely personal character, must be taken to mean personal property only.

The Court here called on

Pauli, for the defendant.—The leaning of the Courts is against intestacy. The word “personal” is exhausted by the first substantive—namely, estate—leaving the word “property” clear. “Property” will pass real as well as personal property, and the word “seised” precludes the word “property” being governed by “personal.” “Seised” is a word exclusively applicable to real property, and words which may comprise real estate are to be taken to include it. See 1 *Jarman on Wills*, 3rd ed. p. 687, where many cases are cited to shew that in order to confine the word “estate” to personal estate there must be a clear indication of an intention in the will so to confine them, otherwise the word is to be held in its unrestricted sense; and at page 693 the author, in summarising the decisions, indicates the inclination of the Courts “to hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personality only.”

[*LOPES, J.*, referred to *Pogson v. Thomas* (1).]

The learned counsel referred to *Evans*

v. Jones (2), *Hughes v. Pritchard* (3), and distinguished *Belaney v. Belaney* (4) on the ground that the word “seised” was not there used.

Fawcett replied.

Cur. adv. vult.

The judgment of the Court (5) was (on June 26) delivered by

LOPES, J.—The facts are clearly and concisely stated in the Special Case, and the material part of the will is as follows. (His Lordship read the will from the Special Case.)

The only question is, whether the real estate of the testator passed under these words to his widow, so as to be vested in the defendant, a *bona fide* purchaser from her, or whether it has passed to the plaintiff, the eldest son of the heir-at-law of the testator, as upon an intestacy. The testator having carefully enumerated many kinds of personal property, proceeds thus: “and all other my personal estate, property, chattels and effects whatsoever and wheresoever to which I am now seised, possessed or entitled to, or may hereafter acquire or can hereby dispose of, to hold the same unto my said wife Mary Jones, her executors, administrators and assigns, for her and their own use and benefit absolutely.” Most of the expressions used are applicable, it is to be observed, exclusively to personality—indeed the only word technically applicable to realty is “seised.”

In determining the construction to be put upon a will, every reasonable intentment should be made against an intestacy. It is, however, a canon of construction that the words are to be taken to be used in their proper meaning, unless something is found in the will to shew the testator intended to use them in a different sense. Wills are not frequently expressed in the same language, and it is therefore difficult to find any authority precisely in point. The case of *Belaney v. Belaney* (4) is very similar, and the judgment of Lord

(2) 46 *Law J. Rep. Exch.* 280.

(3) 46 *Law J. Rep. Chanc.* 840; *s. c.* *Law Rep.* 6 *Chanc. Div.* 24.

(4) 36 *Law J. Rep. Chanc.* 265; *s. c.* *Law Rep.* 2 *Chanc.* 138.

(5) *Lopes, J.*; and *Denman, J.*

(1) 6 *Bing. N.C.* 337.

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Chelmsford seems to cover this case. The words of the will in that case, so far as material, were as follows:—"I hereby give and bequeath to my said wife the whole of my personal property, estate and effects of every and whatsoever kind they may be, for her sole use and benefit." It was held that these words were not sufficient to pass the real estate, and Lord Chelmsford said, "If the words of this will are read according to their ordinary sense and construction, the word personal overrides all the subsequent words, property, estate and effects. It has been urged that the will is to be read as if there was a comma after the word property, and that the effect of the word personal is exhausted upon the word property, and extends no farther. I am, however, bound to ascertain the meaning of the testator from his words, and I cannot doubt that 'personal' extends to these subsequent words as well as to property. The cases cited for the appellant were only cases where the word estate was held not to be qualified by being associated with words relating only to personalty, and have no bearing upon a case where the word estate is overridden by the word personal. I might guess that it was the testator's intention that all his interest in this property should go in the same direction, but that would be mere conjecture, and I should have to strike out the word personal in order to give the will such a construction." Adopting the meaning in the above case, we think in this case that the word personal overrides the word "estate," and extends to the subsequent words "property," "chattels" and "effects," and that the mere introduction of the word "seised" in the passage, "to which I am now seised, possessed or entitled to," is not sufficient reason for holding otherwise. The case of *Evans v. Jones* (2) is distinguishable from the case now before us. The words there were, "First, I give and bequeath to my said wife all my household furniture, linen, glass, china, plate, farming stock and all my personal estate and effects whatsoever and wheresoever, and of what nature and kind soever, or whatever I may be possessed of at my decease, to and for her sole use and benefit." It was held in that

case that the latter words need not be read as part of one clause containing general words following a particular enumeration, but that they might be read as introducing a new subject by the word "or." On this ground it was held that the real property passed. There are no such comprehensive words here, and there is nothing to disconnect the subsequent general words from the governing word "personal" which precedes them.

A case of *Smyth v. Smyth* has been recently before Vice-Chancellor Malins, and is reported in the *Weekly Notes* of June the 22nd last, where it was held that real estate passed under the words, "All the rest, residue and all other his effects" in the following gift in a will—"And lastly, I give my sheep and all the rest, residue, moneys, chattels and all other my effects, to be equally divided among my four brothers, whom I hereby constitute and appoint to be sole executors of this my last will and testament." It is to be observed that there is no general and qualifying word like "personal," and the case is distinguished from the present on this ground. In the present case it is to be observed that the testator appears to have understood the distinction between real and personal estate, and the distinction between the appropriate words for disposing of them respectively. At a later part of the will, when he proceeds to deal with the estates vested in him by way of mortgage in fee, he uses apt language, and while he devises them to Mary Jones and Thomas Jones, their heirs and assigns, he directs that the money secured is to form part of his personal estate. The testator also uses apt and appropriate language when he disposes of his trust estates.

We think the words relied upon are insufficient to pass real estate, and that the plaintiff is entitled to judgment and costs.

Judgment for the plaintiff with costs.

Solicitors—Lovell, Son & Pitfield, agents for Dayman & Walsh, Bicester, for plaintiff; Risley & Hoker, agents for Nelson, Hearn & Langdon, Buckingham, for defendant.

[IN THE DIVISIONAL COURT FOR THE
Q.B., C.P. AND EXCH. DIVISIONS.]

1878. } TWYCCROSS (*administratrix*) v.
July 22. } GRANT AND OTHERS.*

Parties to Actions—Survival of Cause of Action—Statutory Fraud—Death of Plaintiff—Right of Administratrix to be joined as Party—Rules of Court, 1875, Order L. Rules 1, 4.

The original plaintiff had recovered a verdict in an action against the defendants for statutory fraud. Pending an appeal to the House of Lords, the plaintiff died:—Held, that the administratrix of the plaintiff was entitled to be joined as a party to the action, under rule 4. of Order L. of the Rules of Court, 1875.

This action had been brought against the defendants as promoters of a joint-stock company, the declaration setting out certain contracts made by them, the suppression of which, it was alleged, must be "deemed fraudulent" in accordance with section 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131). After a trial before Lord Coleridge, C.J., lasting from the 26th of May to the 13th of July, 1876, the plaintiff recovered a verdict for 700*l.* On the 24th of July the defendant Grant obtained a rule *nisi* for a new trial, which rule was discharged by the Court of Common Pleas (1) on the 12th of February, 1877, and judgment given for the plaintiff. On appeal, the Court of Appeal (2) were equally divided in opinion, and consequently the judgment in favour of the plaintiff stood. [See *Twycross v. Grant* (3).]

During the pendency of an appeal to the House of Lords the original plaintiff died. On the 18th of May, 1878, his widow and administratrix, Ellen Twycross, obtained an *ex parte* order from Master Bennett, in accordance with rule

4. of Order L. of the Rules of Court, 1875, making her a party to the action and directing that the proceedings should be carried on between the defendants and herself. On the 13th of June the defendant Grant applied to Fry, J., sitting in chambers, to discharge this order on the ground that the cause of action did not survive. Fry, J., referred the matter to the Court.

Pollard, for the defendant Grant.—This order must be judged by the circumstances which existed at the time that it was made. Another application has since been made to the Court of Appeal that the judgment in the action should be entered *nunc pro tunc*, and an appeal on that application is pending before the House of Lords at the present time. The procedure in cases of abatement has been altered by the Rules of Court, 1875, framed under the Judicature Act. The old proceeding under the Common Law Procedure Act of 1852, sections 135–139, was by suggestion entered on the record. Now an application must be made *ex parte* to a Master, with liberty to appeal. Rule 1. of Order L. of the new Rules of Court lays down that "an action shall not become abated by reason of . . . death . . . if the cause of action survive. . . ." The proceedings to be taken, when the action is not abated, are prescribed in rule 4 of the same Order. Is this, then, a case in which the cause of action survives? This action is founded upon a statutory fraud, upon a suppression of contracts which the Legislature has declared "shall be deemed fraudulent." It is, therefore, framed in tort, analogous to the common law action of deceit. The old maxim, *actio personalis moritur cum persona*, still holds good in all actions of tort unless altered by 4 Edw. 3. c. 7, the well known statute entitled *de bonis asportatis in vita testatoris*, which first gave an action to the executor for trespasses to the goods of the testator in his lifetime. The early cases under that statute were all framed in trespass, but later cases have included trover, escape, false return, &c. [In this portion of the argument the following authorities were cited—*Williams on Executors*, 7th ed. (1873), 789–808; 1 *Williams' Saunders*

* *Coram* Field J., and Huddleston, B.

(1) Lord Coleridge, C.J.; Grove, J.; and Lindley, J.

(2) Cockburn, L.C.J.; Kelly, C.B.; Bramwell, L.J.; and Brett, L.J.

(3) 46 *Law J. Rep.* C.P. 636; s. c. *Law Rep.* 2 C.P. Div. 469.

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(1871); notes to *Wheatley v. Lane*, 239-246; *Hambly v. Trott* (4), *Chamberlain v. Williamson* (5), *Knights v. Quarles* (6), *Peek v. Gurney* (7), *Davidson v. Tulloch* (8), *Flinn v. Perkins* (9).] Since the passing of 4 Edw. 3. c. 7 certain classes of cases have been brought within the operation of the statute by the remedial interpretation given to it by the Court, but there is no case in the books of an executor bringing an action for a fraud committed in the lifetime of his testator. This argument from novelty and negative usage was held almost decisive in the great case of *The Duke of Newcastle v. Clark* (10) by a strong Court, consisting of Dallas, C.J., Park, J., and Burrough, J. It has been decided in *Hodgson v. Sidney* (11) that a similar action for misrepresentation passes to the assignee of a bankrupt. But the circumstances of bankruptcy and death are in no way analogous. The assignee may very well be in a better position than the executor. For example, libel might pass to an assignee but not to an executor. *Personalis actio moritur cum persona* is not a maxim of bankruptcy law. There is nothing to limit the right to bring an action to solvency as there is to life. If the defendant had died, the cause of action would not have survived against his executor—*Lane v. Johns* (12). In all the cases it has been necessary to allege specifically that the estate of the testator has been diminished, and there is no such allegation upon the record in this case. It must also be remarked that in Order L. of the Rules of Court the language of rule 1 is not identical with the language of rule 4. According to rule 1 the cause of action must survive, or in other words, the death must be coupled with a transmission of interest. Death alone is not enough, for if that were so, the maxim *personalis actio mori-*

tur cum persona would be implicitly abrogated. But in rule 4 the language used is "death . . . or any other event causing a transmission of interest." It is submitted that this language must be construed and limited by the meaning of rule 1. The main question is—could or could not the administratrix have brought this action in her own name, in the same form as in the present declaration? But a further question remains. Even supposing that the action might survive to an executor, it does not necessarily follow that it would also survive to an administrator. The executor's right is given by 4 Edw. 3. c. 7. By 25 Edw. 3. s. 5. c. 5, the same right is extended to executors of executors, who are thereby given actions of debts, accounts and goods carried away of the first testators. The original authority to the ordinary to create administrators is conferred by a statute of the same reign (31 Edw. 3. st. 1. c. 11), which only gives the administrator actions for debts, and omits all mention of "goods carried away." There is no further legislative enactment extending the powers given to administrators by this statute. In practice the same rights have been permitted to administrators as to executors, and they are treated in the same way in the text books; but statutory rights do not pass by mere right of representation.

Sir Henry James (*Morgan Howard and Tindal Atkinson* with him), for the plaintiff.—Since Master Bennett made his order, the Court of Appeal has ordered judgment in this action to be entered *nunc pro tunc*.

[HUDDLESTON, B.—If we had known that, we need not have listened to all this learning.]

An appeal against the order of the Court of Appeal has been brought to the House of Lords; and under certain circumstances the judgment of this Court upon the present point may become material. This action is based upon a breach of duty, which the Legislature has declared shall be deemed fraudulent. It was not necessary for the original plaintiff to allege damage to his estate, though it might have been necessary for the present plaintiff to do so if it had been her

(4) Cowp. 375.

(5) 2 M. & S. 408.

(6) 2 B. & B. 102.

(7) 43 Law J. Rep. Chanc. 19; s. c. Law Rep. 6 H.L. Cas. 377.

(8) 3 Macq. H.L. 783.

(9) 32 Law J. Rep. Q.B. 10.

(10) 8 Taunt. 602.

(11) 35 Law J. Rep. Exch. 182; s. c. Law Rep. 1 Exch. 313.

(12) Weekly Notes, 1878, p. 127.

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original action. But the declaration does shew damage to the estate. It states that "the shares were and are of no value to the plaintiff, and he has lost the moneys he so paid to the company." The administratrix, therefore, would have been able to sue in her own right upon the present pleadings. [The following additional cases were cited—*Wilson v. Knubley* (13), *Williams v. Cary* (14.) *Sir Henry James* was here stopped by the Court.

Pollard, in reply.—The cases of trover and false return are both within the terms of the statute *de bonis asportatis*.

FIELD, J.—In this case we are called upon to construe the terms of rule 4 of Order L. of the Rules of Court, 1875. That is a new provision in the nature of an equitable regulation, intended to prevent the scandal of actions becoming fruitless after having reached an advanced stage. It is quite true that *actio personalis moritur cum persona* is still a maxim of the law, but the principle of the matter is entirely in favour of the order made by Master Benett. I should be content to take my stand upon the judgment of Lord Ellenborough in *Chamberlain v. Williamson* (5). The principle of that judgment is that executors and administrators are the representatives of the wrongs of their testators, where those wrongs operate to the injury of the personal estate. Lord Ellenborough also held in *Wilson v. Knubley* (13) that the statute *de bonis asportatis* is a remedial measure, not to be strictly construed. The question in the present case is, whether the interest of the intestate is transmitted to his administratrix? Now what was the interest of the intestate? On the faith of a prospectus issued by the defendants he had been induced to take shares of no value. He lost his money by reason of conduct which the statute (30 & 31 Vict. c. 131. s. 33) declares "shall be deemed to be fraudulent." Therefore he has suffered an injury to his personal estate, for which he or his representative is entitled to be recouped. As far as regards the language of rule 4, I incline to think that the

words "transmission of interest" must be limited to "any other event," and do not refer to the event of death. The point we have to determine is, whether by reason of death it is desirable that any other person should be made a party to this action. I am of opinion that this case falls within both the meaning and the words of the rule, and that the order of Master Benett is right.

HUDDLESTON, B.—I am of the same opinion.

Order affirmed with costs.

Solicitors—Mercer & Mercer, for plaintiff; Ridley, for defendant Grant; Blunt, Tebb & Lawford, for defendants Clark & Punchard.

[IN THE QUEEN'S BENCH DIVISION.]

1878.

May 13. }

In re TODD.

Alehouse—9 Geo. 4. c. 61. s. 14—"Any New Tenant"—*Transfer of License*—*Application to Special Sessions for License to New Occupier, when to be made*—*Expiration of License of Preceding Occupier.*

[For the report of the above case, see 47 Law J. Rep. M.C. 89.]

[IN THE QUEEN'S BENCH DIVISION.]

1878.

June 1.

July 2. }

BEW (*appellant*) v. HARSTON
(*respondent*).

Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17—*Suffering Gaming on Premises by Licensed Person*—*Playing at "Puff and Dart"*—*Receipt by Winner of Prize*—*Entrance Money*—*Game of Skill.*

[For the report of the above case, see 47 Law J. Rep. M.C. 121.]

(13) 7 East 218.

(14) 4 Mod. 404.

[IN THE COMMON PLEAS DIVISION.]

1878. }
 June 28. } WILKINSON v. CALVERT.

Landlord and Tenant—Yearly Tenancy—Agreement for a Six Months' Notice to quit—Year's Notice not necessary—Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), ss. 51, 54, 56, 57.

Section 51 of the Agricultural Holdings Act, whereby it is enacted that "Where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same," does not apply to a yearly tenancy where the parties have expressly agreed for a six months' notice to quit.

Demurrer to a statement of claim.

The statement of claim alleged that one Francis Hully, by deed dated the 29th of May, 1868, demised to the defendant, at the yearly rent of 55*l.*, certain premises for and during the term of one year, and so on from year to year, the said tenancy being determinable at the end of the first or any subsequent year, on six months' notice to quit from either party to the other party previous to the time of entry in any year, the said tenancy to commence as to the lands for all purposes on the 2nd of February then last past, and as to the messuages and buildings on the 12th of May then instant.

The defendant entered into possession of the premises under the lease on the 10th of April, 1877. Hully by deed conveyed to the plaintiff all his estate, interest and reversion in the premises, subject to the lease.

On the 2nd of August, 1877, the plaintiff gave the defendant notice to quit the premises as to the lands on the 2nd of February then next, and as to the messuages and buildings on the 12th of May then next. The plaintiff demanded of the defendant possession of the premises according to the notice, but the defendant refused to deliver up the same.

The plaintiff claimed possession of the premises.

The defendant demurred on the ground that section 51 of the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), made a year's notice necessary for the determination of the tenancy, and that the notice to quit was therefore insufficient.

Forbes (Lofthouse with him), for the defendant in support of the demurrer, contended that section 51 of the Agricultural Holdings Act, 1875, applied; for that section 56 extended the Act to future tenancies; and the application of the Act not having been excluded by a notice under section 57 of a desire that the tenancy should remain unaffected by the Act, the defendant was entitled to a year's notice.

Anstie, for the plaintiff in support of the statement of claim, contended that as the parties had expressly agreed for a six months' notice, the tenancy was not within section 51, which only applied to tenancies in which a half year's notice was by law necessary; that the effect of the deed was to create a tenancy from year to year, determinable by a six months' notice; and that as section 51 did not apply, sections 56 and 57 could not affect the tenancy.

LORD COLERIDGE, C.J.—I am about to give a decision which I regret, because it narrows the construction of a useful Act of Parliament; but I must decide according to the law. This tenancy, which was created on the 29th of May, 1866, was for one year certain, and so on from year to year, determinable at the end of the first or any subsequent year on six months' notice to quit, the said tenancy to commence as to the land on the 2nd of February, and as to the messuages and buildings on the 12th of May. Notice to quit was given according to the terms of the contract, that is, a six months' notice; and the question to determine is whether under these circumstances the Agricultural Holdings Act has any application to the contract, so as to make it necessary that a year's notice should be given before the tenancy determined. That question turns on the construction of four sections of the Act. By section

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51, "Where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same." No doubt, in an ordinary tenancy from year to year, created, as is commonly done, by acts of the parties or other of the ordinary ways, it is incidental to such tenancy that it cannot be put an end to except by a half year's notice, terminating at the end of the year of tenancy; and the Act accordingly enacts that where a half year's notice, expiring with a year of tenancy is by law necessary, in such case a year's notice shall for the future be necessary. Then comes section 54, which says that "nothing in this Act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof." In the present case the landlord and tenant have entered into "such an agreement as they think fit," for they have stipulated in effect for a tenancy of two years, to be followed by a yearly tenancy terminable at the end of any year by a *six months' notice*, and therefore they have done that with which section 54 says "the Act shall not interfere."

Then comes section 56, enacting that the Act shall apply to future tenancies; and this section might be important if the true view of the case were that this tenancy from year to year became a new tenancy after the 13th of August, 1875; but I do not think that is the true view. By section 57, "In any case of a contract of tenancy from year to year or at will, current at the commencement of this Act, this Act shall not apply to the contract, if within two months after the commencement of this Act the landlord or the tenant gives notice in writing that he (the person giving the notice) desires that the existing contract of tenancy between them shall remain unaffected by this Act . . . and in the absence of any such notice, or on revocation of every such notice, this Act shall apply to the contract." No such notice was

given, and therefore if the Act is applicable to the tenancy, nothing has been done under section 56 to take it out of the operation of the Act.

But I am afraid I must decide that the Act does not apply. The true effect of the deed seems to be that all the holding is under the deed. From the slightness of a tenancy from year to year, and the cost of deeds, it is not usual to create such a tenancy by deed; but there is no rule of law which forbids parties from contracting by deed. The present case is in my opinion a tenancy from year to year, created by deed. It is a contract by which the landlord and tenant agree that a six months' notice shall be sufficient to determine the tenancy. Now, in cases of high authority, I find it to be an inflexible rule that in order to determine a yearly tenancy a six months' notice is not, except the parties have agreed to it, sufficient, but that a half year's notice is necessary—*Parker d. Walker v. Constable* (1); *Doe d. Flower v. Darby* (2). In the latter case one of the greatest Judges who has sat in Westminster Hall, Buller, J., has said, "The moment the year began, the defendant had a right to hold to the end of the year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in the case, upon the distinction between six months and half a year. The case in the year books requires half a year's notice; but here there is less than half a year's notice, and it is bad on that ground also."

Here the six months' notice which was agreed upon was given; and with reluctance I hold the notice to have been sufficient to determine the tenancy, and I overrule the demurrer.

Judgment for the plaintiff.

Solicitors—Crowder, Anstie & Vizard, agents for Pearson & Pearson, Kirkby Lonsdale, for plaintiff; Ridsdale, Craddock & Ridsdale, agents for W. Hartley, Settle, for defendant.

(1) 3 Wils. 25.

(2) 1 Term Rep. 159.

[IN THE COMMON PLEAS DIVISION AND
IN THE COURT OF APPEAL.]

1877. } STONE v. THE CITY AND
June 27. } COUNTY BANK.
Nov. 24, 26, 27. } COLLINS v. SAME.*

Company—Voluntary Winding-up—Repudiation of Shares bought under Fraudulent Representation.

The principle that a shareholder who has been induced to take shares in a company by the fraudulent representations of the directors, cannot repudiate his shares or recover back the price paid for them after the company has been ordered to be wound up, if at the time of the intended repudiation there are any debts of the company unpaid, extends to the case of a voluntary winding-up without supervision.

These were both cases from the Common Pleas Division, which were by consent heard together before Lindley, J. The former on a Special Case, and the latter on further consideration after a trial by that learned Judge without a jury.

STONE v. THE CITY AND COUNTY BANK.

This was a Special Case stated pursuant to an order of the Common Pleas Division, with power for the Court to draw inferences.

CASE.

1. This is an action brought by the plaintiff against the defendant banking company to recover back 500*l.* which the plaintiff paid to the defendants for certain shares in the defendant company. The defendants by way of counter-claim demand of the plaintiff as shareholder in the defendant company 200*l.* in respect of calls on the said shares.

2. The defendants are a joint stock company incorporated under the Companies Acts, 1862 and 1867, limited by shares, with a capital of 500,000*l.* divided into 100,000 shares of 5*l.* each, and carry on business at No. 33, Abchurch Lane in the City of London, and certain

persons carrying on business as bankers in Leeds, under the style of William Williams, Brown & Co., and in London under the style of Brown, Janson & Co., purchased the assets and undertook to pay all the debts proved or to be proved against the defendant company under the circumstances and in the way hereinafter more particularly mentioned. The London firm of Brown, Janson & Co. were the clearing bankers of the defendant company.

3. The defendants about Midsummer, 1874, issued a prospectus, describing their bank as in active and successful operation, and stating that the business already done had enabled the directors to declare dividends, commencing December, 1872, at the rate of 5*l.* per cent. per annum, and gradually increasing to 7*l.* per cent. for the twelve months ending the 30th of June, 1874. The said prospectus also described the business of the company as profitable.

4. The defendants also issued a report and balance-sheet for the half-year ending the 30th of June, 1874. From this report and balance-sheet it appeared that the defendants had in the said half-year made sufficiently large profits to enable them to declare a dividend at the rate of 7*l.* per cent. per annum for the said half-year. The said balance-sheet misrepresented the amount of the cash in hand at bankers, in the way and to the extent hereinafter fully described, and also treated a considerable amount of bad debts due to the defendant company as being good and valuable assets of the defendant company.

5. The plaintiff, who is a gentleman residing at Nuneaton, near Warwick, received from the defendants a copy of the said prospectus in August, 1874, and also the said report and balance-sheet hereinbefore mentioned, and was induced by the statements contained in the said prospectus, report and balance-sheet, to apply to the defendants on or about the 2nd day of September, 1874, for 200 shares in the capital of the defendant company, and paid to the defendants in respect thereof the sum of 500*l.*, and the defendants allotted to the plaintiff 200 shares accordingly. But for the said mis-

* *Coram* Lindley, J.; and on appeal *coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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representation as to the amount of the cash in hand at bankers the plaintiff would not have applied for the said shares.

6. The statements contained in the said prospectus as to the bank being in active and successful operation, and as to the business already done enabling the directors to declare dividends at the rates therein stated, and also as to the profitable nature of the business of the company, were false to the knowledge of the directors of the company. The said balance-sheet also, as the directors of the defendant company well knew, did not truly represent the financial position of the defendants, the company not being in truth and in fact entitled to place on the credit side of their balance-sheet the amount that therein appears.

7. The defendants issued and published the said prospectus, report and balance-sheet so received by the plaintiff as aforesaid, for the purpose of inducing the plaintiff and others to take shares in the said company, and did induce the plaintiff and others to take shares on the faith of the same.

8. On the 16th of July, 1875, the resolution hereinafter set out for the voluntary winding-up of the defendant company was passed, and in the month of November, 1875, a criminal charge was made and heard at the Mansion House, in the City of London, against the directors of the defendant company for the frauds hereinbefore mentioned, and the plaintiff then first became aware of the said frauds. The investigation of the said charge was continued into the month of December, 1875, and on the 14th of January, 1876, and (as a matter of fact apart from all questions of law arising upon the other facts herein stated) within a reasonable time after the false and fraudulent nature of the said prospectus, report and balance sheet had come to his knowledge, the plaintiff repudiated the said shares so allotted to him as aforesaid.

9. The plaintiff claims in this action to be repaid by the defendants the sum of 500*l.* so paid by him as aforesaid, together with interest, at the rate of 5*l.* per cent. per annum, from the date of the allotment to him of the said shares.

10. The defendants, at the time they commenced the business of bankers in London had no sufficient subscribed capital of their own wherewith to carry on such business, but assistance was afforded by Brown, Janson & Co., to whom the defendants were always indebted in a large amount.

11. At the close of each day after the 28th of October, 1873, the current account of the defendants with Brown, Janson & Co. was overdrawn (except on the special occasions referred to in paragraphs 14 and 15), so that the defendants were entirely dependant upon Brown, Janson & Co, who thenceforth had it in their power each day and every day to put an immediate stop to the business of the defendants by refusing to honour their cheques. Such power was in fact exercised by Brown, Janson & Co. on the 15th of May, 1875.

12. It is the almost universal custom with bankers to balance their books as of the 30th of June and 31st of December in every year, and the defendants balanced their books at those dates, and it was also the custom of the defendants to print and publish a balance-sheet, which purported to shew their financial position at the close of such half-yearly periods in order to induce the public to apply to them for allotments of their unsubscribed capital.

13. Many of such applications were made through Brown, Janson & Co., who received the moneys payable in respect of such applications, and also the moneys payable on and after allotment, and they credited the defendants with such moneys when received. Such applications were in fact numerous, and continued down to the time of the suspension of the defendants hereinafter mentioned.

14. On the afternoon of the 30th of June, 1874, one of the London partners of Messrs. Brown, Janson & Co., at the request of one of the officers of the defendant company, entered to the credit of the defendants' current account the sum of 15,000*l.* by way of a loan, and the defendants' pass book was balanced as of the close of that day, making it appear that the defendants had to the credit of their said banking account the sum of 12,175*l.* 18*s.* 1*d.* The said sum of

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15,000*l.* was entered in the books of Brown, Janson & Co. as a loan by them to the defendants, but the understanding between the defendants and the said London partner in the firm of Brown, Janson & Co. was that such loan was to be written off on the following morning and was not to be drawn upon by the defendants. On the morning of the 1st of July, 1874, the sum of 15,000*l.* was accordingly entered to the debit of the said current account, with one day's interest, and appears in the pass-book as the first debt entry of that day, and was credited to the loan account, whereupon the said current account of the defendants with Brown, Janson & Co. shewed an overdraft of 2,824*l.* 1*s.* 11*d.* according to the true state of the account instead of the said apparent credit balance of 12,175*l.* 18*s.* 1*d.* Messrs. Brown, Janson & Co. had no part or concern in or knowledge of any fraud or misconduct of the directors of the defendant company in any way whatsoever. Their said London partner made the said loan without any enquiry as to the defendants' object in requiring the same. In granting the said loan without any such inquiry the said London partner of Messrs. Brown, Janson & Co. acted with an unbusiness-like want of caution, but without the least suspicion that it was intended to be used or would be used in any improper way.

15. An operation precisely similar in every respect had been gone through at the close of the previous half-year with the sum of 5,000*l.*, and at the close of the half-year previous to that with the sum of 1,500*l.* and on no other occasion.

16. The defendants' purpose with regard to such entries was to conceal from their shareholders and the public the fact of their current account with their clearing bankers being overdrawn, and the absence of cash reserves available for carrying on business, and they so used the same in the balance sheet hereinbefore set out.

17. In the month of October, 1874, a discussion took place among the partners in the firm of Brown, Janson & Co. with respect to the said loan of 15,000*l.*, and their attention was called to the fact that

it had been granted at the end of the financial half-year. They became alive to the fact that it might have been used for an improper purpose, and they determined that no loan of the kind should ever be made by them again and so instructed their said London partner. They did not look at the prospectus and balance-sheet issued at the end of the said half-year, nor did they ascertain whether the said loan had in fact been used for the purpose of misrepresenting the financial position of the defendant company.

18. On or about the 11th of February, 1875, the defendants paid to the plaintiff one half-year's dividend on his said shares at the rate of seven per centum per annum.

19. On the 18th of May, 1875, the defendants stopped payment, and Messrs. Brown, Janson & Co. presented a petition to the Court of Chancery that the defendant company might be wound up compulsorily under the direction of the Court. On the same day several other petitions for the compulsory winding-up of the defendant company were presented by shareholders and creditors respectively, including one by a shareholder of the company named Hird. On the 22nd of May, 1875, Mr. Hart was, on the petition of the said Hird, appointed provisional liquidator of the said company. Messrs. Brown, Janson & Co. took out a summons to discharge the order appointing the said Hart provisional liquidator, which summons was dismissed on the 25th day of May, 1875. On the 27th of May, 1875, a document of that date was drawn up and executed by Messrs. Brown, Janson & Co. and the said directors of the defendant company, whereby it was provided that the whole assets of the bank, including the uncalled capital, should be forthwith transferred to Messrs. Brown, Janson & Co., and that Messrs. Brown, Janson & Co. should pay all the debts and liabilities of the bank as stated in the schedule to the said document, and should indemnify the said bank and every shareholder thereof against the same. The schedule to the said document contained a list of liabilities of the defendant company on bills and to customers on current accounts, and the said document

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and the schedule thereto is annexed to and forms part of this case.

20. On May 28th, 1875, an order was made upon the petition of the said Hird for the compulsory winding-up of the said company, and on the 8th day of June, 1875, at a meeting of shareholders of the defendant company, convened at the instance of Messrs. Brown, Janson & Co., the following resolutions were passed:—

"(1.) That the agreement of the 27th day of May, 1875, made between the City and County Bank (Limited) thereafter called 'the bank,' and William Jones, John Axtell Deacon Cox, James Hole, Henry James Godden, Alfred Marsh, and William Archer Redmond, M.P., for the payment by Messrs. Brown, Janson & Co., of the debts and liabilities of the bank, and for the transfer to Messrs. Brown, Janson & Co. of the assets of the bank be, and the same is hereby confirmed, and declared to be binding on the bank.

"(2.) That it has been proved to the satisfaction of the bank that the bank cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

"(3.) That the bank be wound up voluntarily.

"(4.) That Mr. Samuel Lowell Price be, and is hereby appointed liquidator, for the purpose of winding up the affairs of the bank."

21. Messrs. Brown, Janson & Co. appealed against the said order of the 28th of May, 1875, and on the 28th day of June, upon the hearing of the said appeal, the Lords Justices of Appeal discharged the said order of the 28th of May, with liberty to the defendant company to call a meeting of the shareholders of the defendant company, for the purpose of considering the said agreement of the 27th of May, proposed as aforesaid by Messrs. Brown, Janson & Co., and on the 16th day of July, 1875, at an extraordinary general meeting of the shareholders of the defendant company, of which due notice, specifying the intention to propose thereat such resolution had been given, the following extraordinary resolution was passed, that is to say,—

"(1.) That it has been proved, to the satisfaction of the shareholders, that the bank cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

"(2.) That the bank be wound up voluntarily, under the provisions of the Companies Acts, 1862 and 1867.

"(3.) That Mr. Samuel Lowell Price, of No. 13, Gresham Street, in the City of London, public accountant, be appointed liquidator, for the purpose of winding up the affairs of the bank.

"(4.) That the agreement dated the 27th of May, 1875, and made between the City and County Bank (Limited) and William Jones, John Axtell Deacon Cox, James Hole, Henry James Godden, Alfred Marsh, and William Archer Redmond, M.P., directors of the bank, of the one part, and Samuel James Brown, Henry Oxley, James Walker Oxley, Thomas Harrison, John Whitaker Cooper, and Basil Braithwaite, trading under the style or firm of Brown, Janson & Co., of the other part, being an agreement for the payment by them of the debts and liabilities of the bank, and for the transfer to Messrs. Brown, Janson and Co. of the assets of the bank be, and the same is hereby confirmed, and declared to be binding on the bank.

"(5.) That the said Samuel Lowell Price, as such liquidator as aforesaid, be requested, authorised and empowered to carry out and complete the same forthwith."

The following resolutions, of which notice had not been given, were also passed at the said meeting, that is to say,—

"(6.) That the committee of investigation be requested to continue their services.

"(7.) That it is the opinion of this meeting that the liquidator be represented by solicitors, independent of the solicitors of Brown, Janson & Co., and that the same solicitors should act for the committee of investigation."

The plaintiff, by his proxy, voted at the said meeting in favour of the said resolutions.

22. On the 23rd day of July, 1875, the matter came again before the Lords Justices of Appeal, and a discussion took

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place with respect to the said document of the 27th of May, 1875, and it was suggested that there might be other debts and liabilities of the defendant company, of the same kind and description as those enumerated in the said schedule, which were not included in the said schedule, and thereupon Messrs. Brown, Janson & Co., by their counsel, submitting to the jurisdiction of the Court, undertook to pay all the debts proved, or which should be proved, against the City and County Bank (Limited), whether scheduled to the said agreement of the 27th of May or not. In giving the said undertaking, the counsel for all parties were treating and agreeing with reference only to debts and liabilities of the kind appearing in the schedule to the said document, and not with reference to any claims by the shareholders themselves to have money repaid to them on the ground of fraud.

23. Before the said 23rd day of July the attention of Messrs. Brown, Janson & Co., and their solicitors, had been called to certain frauds which had been committed by the directors of the defendant company, for the purpose of inducing persons to take shares in the defendant company, and they had notice of an affidavit which had been sworn by Mr. Harper, the plaintiff's solicitor, in which certain charges of fraud had been made.

24. Brown, Janson & Co. on the 23rd of July, 1875, had, and ever since have had, ample means of their own to pay all creditors of the defendant company, and either before the commencement of this action or since have, in fact, paid all the creditors claiming in respect of debts of the kind and description scheduled to the said document. They have not paid any of the claims by the shareholders themselves, claiming from the defendant company a return of moneys paid by them to the defendants in respect of shares which they were induced to take by the fraud of the defendants. At the time of the stoppage of the defendant company the debt due from them to Messrs. Brown, Janson & Co. amounted to the sum of 45,000*l.*, or thereabouts, and the assets of the defendant company are insufficient to satisfy the debts of the defendants (apart

from the debt due to Brown, Janson & Co., and apart from claims by shareholders for the return of moneys paid in respect of shares), and Messrs. Brown, Janson & Co. will ultimately be out of pocket to a considerable amount by reason of the said undertaking given by them, as in the 22nd paragraph of this Case mentioned.

25. By the memorandum and articles of association of the defendant company it is provided that every shareholder shall be liable to pay the amount of every call to the person, and at the time and place appointed by the board, and twenty-one days' notice shall be given of the time and place appointed by the board for the payment of every call. On the 18th of May, 1875, it was resolved by the board of directors of the defendant company that a call of 1*l.* per share be and was thereby made, such call to become due, and be payable as follows:—10*s.* on the 21st of June, and 10*s.* on the 21st of July then next, and that such call be hypothecated to Messrs. Brown, Janson & Co. No place or person, at which or to whom the said call was to be paid was mentioned in the said resolution. No notice of the said call was ever given by the directors of the defendant company, but on the 26th of August, 1875, the said Samuel Lowell Price, the liquidator of the defendant company, who had been so appointed as aforesaid, gave notice to the shareholders of the said call, and requested them to pay the same to Messrs. Brown, Janson & Co., 32, Abchurch Lane, London, E.C., on or before Saturday, the 18th of September then next. The said last-mentioned notice was received by the plaintiff on the 27th or 28th of September, 1875, upon his return from abroad, but he has not paid the said call, or any part thereof.

26. On the 12th of October, 1875, the plaintiff was settled on the list of contributories of the defendant company, at a meeting convened for that purpose, of which he had received notice.

27. Before the plaintiff repudiated his said shares, as in the 8th paragraph of this Case mentioned, Messrs. Brown, Janson & Co. had acted upon the said agreement and undertaking, in the 22nd paragraph

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of this Case mentioned, and had paid certain of the debts of the defendant company.

The questions for the opinion of the Court are—

1. Is the plaintiff, under the circumstances hereinbefore set forth, entitled to recover against the defendants the said 500*l.* and interest?

2. Are the defendants entitled to recover against the plaintiff the said 200*l.* and interest?

COLLINS v. THE CITY AND COUNTY BANK.

Declaration for money received for plaintiff's use and for interest.

Particulars.

1875.				
February 26th.	To Cash . .	£10	0	0
March 8th	The like . .	20	0	0
		£30	0	0

Pleas. 1. Except as to 30*l.* never indebted.

2. And for a second plea the defendants, as to the 30*l.* parcel of the plaintiff's claim, for defence on equitable grounds, say that the defendants are a company limited by shares registered and incorporated under the Companies Acts, 1862 and 1867, with a capital of 500,000*l.* divided into 100,000 shares of 5*l.* each, and that the directors of the said company issued and published a certain prospectus, report and balance-sheet, containing certain false and fraudulent misrepresentations and statements as to the said company and its financial position, with the intent to induce and by the said misrepresentations and statements induced (amongst others) the plaintiff to become a member of the company and the holder of twenty shares of the company, and to pay to the company the said sum of 30*l.* upon and in respect thereof. And the defendants further say that afterwards, while the plaintiff and divers other persons were members of the company and the holders of divers shares of the company, and before the plaintiff disaffirmed his rights or liabilities as a member of the said company and the holder of the said shares, or repudiated

the said shares or any of them, the said company duly passed an extraordinary resolution within the meaning of the Companies Act, 1862, to the effect that it had been proved to their satisfaction that the said company could not by reason of its liabilities continue its business, and that it was advisable to wind up the same, and that the said company be wound up voluntarily under the provisions of the Companies Acts, 1862 and 1867, and a liquidator was duly appointed to wind up the affairs of the said company; and the defendants further say that the assets of the company were and are insufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, to wit, by an amount exceeding the sum of all the amounts remaining unpaid upon all the shares of the company held by the members thereof, and that before the plaintiff disaffirmed his said rights and liabilities, or repudiated his said shares or any of them, creditors of the company and other persons having claims against the company acquired rights and interests disentitling the plaintiff to disaffirm his said rights and liabilities, or to repudiate the said shares or any of them, and that the plaintiff is a contributory of the said company, and liable to contribute to the assets of the said company required for payment of the debts and liabilities of the said company, and the costs, charges and expenses of the winding-up, to the extent of the amount unpaid upon his said shares. And the defendants further say that the plaintiff's claim herein pleaded to is a claim to recover back the said sum of 30*l.* so paid by him to the said company as aforesaid, on the ground that he was induced to become a member of the said company and the holder of the said shares, and to pay the said sum of 30*l.* by the fraudulent misrepresentations and statements contained in the said prospectus, report and balance-sheet, and not otherwise.

Second replication, on equitable grounds —The plaintiff says that the said extraordinary resolution included a resolution in the words and figures following:—

“(4.) That the agreement dated the 27th day of May, 1875, and made between the City and County Bank, Limited, and

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William Jones, John Axtell Deacon Cox, James Hole, Henry James Godden, Alfred Marsh and William Archer Redmond, M.P., directors of the bank, of the one part, and Samuel James Brown, Henry Oxley, James Walker Oxley, Thomas Harrison, John Whittaker Cooper and Basil Braithwaite, trading under the style or firm of Brown, Janson & Co., of the other part, being an agreement for the payment by them of the debts and liabilities of the bank, and for the transfer to Messrs. Brown, Janson & Co. of the assets of the bank, be and the same is hereby confirmed and declared to be binding on the bank."

And by the said agreement the said Brown, Janson & Co. agreed to take over all the assets of the defendant company, and in consideration thereof to pay all the liabilities of the defendant company included in a certain schedule to the said agreement annexed, and afterwards, on the hearing of a certain appeal before the Lords Justices of Appeal, against certain orders made in the Court of Chancery in the matter of a petition for the compulsory winding-up of the defendant company, the said Brown, Janson & Co., who were represented by counsel on the hearing of the said appeal, undertook to pay, not only all the liabilities of defendant company included in the schedule to the said agreement, but also all the liabilities of the defendant company whether included in the said schedule or not, and the said undertaking of the said Brown, Janson & Co. was made through their counsel on the hearing of the said appeal, and was embodied in the order made by the Lords Justices of Appeal disposing of the said appeal, and the whole of the beneficial interest in the assets of the defendant company vested in the said Brown, Janson & Co. in pursuance of the said agreement and undertaking; and the plaintiff further says that the said Brown, Janson & Co. have sufficient assets to pay the whole of the liabilities of the defendant company in full with all interest, and that this action is being defended for the sole benefit of the said Brown, Janson & Co., who have as aforesaid undertaken to pay all the liabilities of the defendant company, and in whom as aforesaid all

the assets of the said company have vested; and the plaintiff further says that the said Brown, Janson & Co. were privy to the said false and fraudulent representations and statements made by the directors at the time of the making thereof, and before the said agreement of the 27th of May, 1875, as amended by the said undertaking, became binding on Brown, Janson & Co., and before the plaintiff was induced to become a holder of the said shares in the said company and to pay the said 30*l.*, of which said sum the said Brown, Janson & Co. have the benefit, not only as assignees of the said assets of the defendant company, but as creditors of the said company.

Second rejoinder—The defendants say that the said agreement dated the 27th of May, 1875, was in the words and figures following:—

Then follows the agreement, of which the following is the material part.

(3.) If Messrs. Price, Waterhouse & Co. shall on or before the 29th of May, 1875, report to Messrs. Brown, Janson & Co. that the said statement is correct, then the said Messrs. Brown, Janson & Co. shall pay all the debts and liabilities of the said bank as stated in the said schedule, and shall indemnify the said bank and every shareholder thereof against the same.

(4.) The whole assets of the bank, including under such term the uncalled capital and any arrears of calls already made, but exclusive of any goodwill or alleged goodwill of the bank which is retained by the bank, shall be forthwith transferred by the bank to Messrs. Brown, Janson & Co., who shall be empowered in such manner as Messrs. Brown, Janson & Co. shall direct to collect and get in all the said assets, and the bank and the directors thereof shall execute all such instruments and do all such things as Messrs. Brown, Janson & Co. shall require for the purpose of giving effect to the aforesaid transfer. The bank and the directors thereof shall on request deliver to Messrs. Brown, Janson & Co., or such person as they shall in writing appoint, all the books, papers and securities of the bank.

(5.) The bank shall admit Messrs.

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Brown, Janson & Co. as creditors against the bank in respect of all payments made by Messrs. Brown, Janson & Co. to or on behalf of the bank.

(6.) If after payment to Messrs. Brown, Janson & Co. of all moneys paid by them for or in respect of the debts and liabilities of the bank, with interest at 4l. per cent. per annum on such moneys from the date of the payment thereof, and the payment of all costs of and attending and preliminary to these presents, and of realising the said assets and ascertaining the said debts and liabilities, and the petitions for winding up the bank and consequent thereon and in connection therewith, there shall remain any surplus of the assets of the bank, Messrs. Brown, Janson & Co. shall pay such surplus to the liquidator of the bank.

Then follows the order of the Lords Justices. See *ante*, Stone's Case.

And the defendants further say that the plaintiff's claim in respect of the matters in the second plea pleaded to is not a debt or liability included in the said schedule to the said agreement, and is not a debt within the meaning of the said undertaking; and the defendants further say that the said Brown, Janson & Co. have not sufficient assets of the defendant company to pay the whole of the liabilities of the defendant company in full with all interest. And that this action is not being defended for the sole benefit of the said Brown, Janson & Co. And that the said Brown, Janson & Co. were not privy to the said false and fraudulent representations and statements as alleged. Issue.

O. Russell and *R. V. Williams*, for the plaintiff.

Wood Hill (*Thesiger* and *Cohen* with him), for the defendants.

Our. adv. vult.

On the 7th or June, the following judgment was given by

LINDLEY, J.—In these two cases of *Stone v. The City and County Bank* and *Collins v. The City and County Bank*, I do not think it necessary to refer at any length to the facts which are really not in dispute.

The plaintiffs in these actions seek to recover from the defendants' company the moneys they paid to the company in respect of shares in the company allotted to them, and the ground of action is in both actions the same, namely, that the plaintiffs were induced by the fraud of the company to apply for and take the shares allotted to them. The fact that the plaintiffs were induced by fraud on the part of the company to take the shares is admitted by the pleadings in *Collins's* action, and is found in the Special Case in *Stone's* action; and I therefore assume this point in favour of both plaintiffs. It is further found in one action and admitted in the other that the plaintiffs repudiated their shares before action, and in a reasonable time after they discovered the frauds. Under these circumstances, if the company were not being wound up as hereinafter mentioned, the plaintiffs would, in my opinion, be entitled to succeed. But before these actions were brought, and before the plaintiffs repudiated their shares, and before in fact they discovered the fraud entitling them to repudiate the shares, a resolution was passed for winding the company up voluntarily, under the provisions of the Companies Act, 1862, and it is admitted in the one action and found in the other, that at the time of the commencement of the winding up, the assets of the company, including its uncalled capital, were not sufficient to pay its undisputed debts and liabilities.

Now, assuming that the resolution to wind up was valid, and that the company was really being wound up under it, I am of opinion that this winding up and state of the assets are fatal to the plaintiffs, and afford a complete defence to both actions. My reasons for this opinion are that the plaintiffs are not suing the company for unliquidated damages for the frauds of which they complain. I have looked at the pleadings, and I am satisfied that they do not admit of any such claim, and it is far too late now to treat the pleadings as amended, so as to raise an action of that kind.

The plaintiffs are seeking to recover what they paid for their shares; their claims are based on the theory that they

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are no longer shareholders; on the theory, namely, that, notwithstanding the winding up and the state of the assets to which I have alluded, they had a right to rescind and had rescinded their contracts before the commencement of their actions, and if the plaintiffs had no right to rescind, their actions are not sustainable.

Now it appears to me that *Oakes v. Turquand* (1) shews conclusively that the plaintiffs had no such right. It was contended by the plaintiffs that for several reasons this decision did not apply to the present case. First, it was said that it does not appear that any of the debts of the company were contracted on the faith of the plaintiffs being members of it, and that the decision in *Oakes v. Turquand* (1) was based on what Lord Campbell said on the subject of estoppel in *Henderson v. The Royal British Bank* (2). But, in the first place, it did not appear in that case that Henderson trusted the Royal British Bank by reason of Goddard being a shareholder in it; nor was there any evidence in *Oakes v. Turquand* (1) that any creditors in particular had trusted Overend, Gurney & Co. limited, by reason of Oakes being a shareholder therein. The observations in both these cases on the subject of estoppel are of a general nature, and, as I understand them, are applicable to all registered companies whose registers of shareholders are open to inspection, without reference to the question whether any particular member has more or less induced credit to be given by any particular creditor. But it further appears to me that *Oakes v. Turquand* (1) decides at least the general proposition that a person induced by fraud to take shares in a company formed and registered under the Companies Act, 1862, cannot repudiate those shares after the company has been ordered to be wound up by the Court, or subject to its supervision, if at the time of repudiation there are any debts of the company unpaid.

Then it is contended that *Oakes v.*

Turquand (1) does not apply, as the winding up of the defendant company is purely voluntary, and in support of this proposition the differences between a voluntary winding up and the other modes of winding up were minutely examined; the omission of the word "creditors" from section 188, and the remedy given to creditors by section 145, were dwelt upon, and the observations of the present Master of the Rolls in *In re The Poole Fire Brick Company* (3), and the decision of Vice-Chancellor Bacon in *Hall v. The Old Talargoch Lead Mining Company* (4) were relied on. But it appears to me impossible to hold that the right of members to rescind their contracts with the company can depend on whether the company is being wound up in one way rather than in another. The object of all modes of winding up is to ensure an equal division of the company's assets, first amongst all its creditors, and then amongst all its members according to their rights *inter se*; and sections 131, 132, 133, 138 and 158, which I do not stop to read, shew conclusively to my mind that although the remedies open to creditors are somewhat different in the case of a voluntary winding up from what they are in other cases, yet their rights, as distinguished from their remedies, are in no respect different, unless it be as regards the time when interest on their debts ceases to run. No case, I believe, exists which is inconsistent with this view. In *Hall v. The Old Talargoch Lead Mining Company* (4) the plaintiff had repudiated his shares before the commencement of the winding-up, which accounts for the Vice-Chancellor Bacon's remark that "no relief is asked against the company beyond what the law allows, or which is inconsistent with the Winding-up Acts," an observation which the facts of the cases before me render applicable to them. In a voluntary winding-up protection is afforded to creditors by allowing them to bring actions without the leave of the Chancery Division, and to apply for a compulsory order to wind up, or for a supervision order; but the

(1) 36 Law J. Rep. Chanc. 949; s. c. Law Rep. 2 H.L. Cas. 325.

(2) 7 E. & B. 356; s. c. 26 Law J. Rep. Q.B. 112.

(3) 43 Law J. Rep. Chanc. 447; s. c. Law Rep. 17 Eq. 268.

(4) Law Rep. 3 Chanc. Div. 749.

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obligations of the company and of its members, whether statutory or otherwise, do not depend upon or vary with the manner in which the winding-up is conducted. In all cases all the assets are distributed *pari passu* amongst all the creditors, and all the assets include uncalled up capital.

Next, it is contended that the defendant company was not in fact being wound up voluntarily under the Companies Act, 1862, and if this could be established, I should agree that *Oakes v. Turquand* (1) did not apply. It becomes necessary, therefore, to investigate this contention.

First, it was suggested that Collins could not be bound by the resolution to wind up, as he had not received any notice convening the meeting at which the resolution was passed. But this point was disposed of by proof that notice was sent to him by post to his address, as entered in the register of members.

Secondly, it was suggested that the notice convening the meeting, because it was so framed as to lead those to whom it was addressed to conclude that whatever might be resolved upon at that meeting would be subject to confirmation at a subsequent meeting, and in support of this objection reliance was placed on the case of *In re The Bridport Old Brewery Company* (5). But in this case the notice was in the very words of section 129, clause 3, of the Companies Act, 1862, and no person, aware of the difference between a special resolution and an extraordinary resolution, as defined by the Act, could be misled by the notice, and persons not aware of the difference cannot derive any advantage from their ignorance in this respect.

Thirdly, it was contended that even if the resolution to wind up was valid, the company was not being wound up under it, but under a special agreement inconsistent with a liquidation under the Act. This agreement, however, was one which was in fact sanctioned by an extraordinary meeting of shareholders, duly convened for the purpose of sanctioning it (I looked particularly to the notice to see that, and found it was so), and was and

is, in my opinion, binding on all who were members of the company when so sanctioned, whether they voted for it, as Stone did, or whether they did not, as was the case with Collins (see section 136). Whether the arrangement was binding on the creditors of the company depends upon the proportion of creditors who acceded to it; but as no person who was a creditor when the arrangement was made has ever questioned it, this point need not further be considered. It is impossible to treat the plaintiffs as creditors of the company when the arrangement was made for the sums they seek to recover in those actions, for they had not then repudiated their shares, even if they had a right to do so, which I think they had not after the resolution to wind up had passed.

But then it is said that all the creditors of the company except Brown, Janson & Co. have been paid, and that Brown, Janson & Co. are disentitled by the part they took in assisting the company in its fraud from standing as creditors as against the plaintiffs. To this, however, the short answer is, that the debts of the company other than that due to Brown, Janson & Co. were not paid before the commencement of those actions; and that even if they had been, the true effect of the arrangement under which those debts were paid was to keep alive those debts as against the company and in favour of Brown, Janson & Co., to the extent necessary to entitle them to recoup themselves in respect of their payments and of the assets of the company, including its uncalled up capital. That this is the true effect of the agreement I think is plain, notwithstanding the last words of clause 3, by which the company and its shareholders are indemnified against such debts. With reference to that, I will just turn to the agreement itself, which is set out in Collins's case. The material parts of this agreement are the 3rd, 4th, 5th and 6th clauses. Now the 3rd clause says that Brown, Janson & Co. shall pay all the debts and liabilities of the bank, as stated in the schedule, and shall indemnify the bank and shareholders against the same. If the agreement had stopped there, one would

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have supposed that no call could be made upon the shareholders, even for the payment of these debts, or to recoup Brown, Janson & Co. for what they might pay in respect of them. But that construction is obviously inconsistent with the next clause of the agreement, which goes on to say, "The whole assets of the bank, including under such term the uncalled capital and any arrears of calls already made, but exclusive of any goodwill," and so on, "shall be forthwith transferred by the bank to Messrs. Brown, Janson & Co., who shall be empowered in such manner as Messrs. Brown, Janson & Co. shall direct to call and get in all the said assets of the bank." Then there is the next clause 5, which also shews that that indemnity at the end of clause 3 cannot be carried to this extent, that Brown, Janson & Co. were to pay these debts, and forego their right to call up the uncalled capital of the company, because clause 5 is, "The bank shall admit Messrs. Brown, Janson & Co. as creditors against the bank in respect of all payments made by Messrs. Brown, Janson & Co. to or on behalf of the bank." I think it is quite plain, therefore, reading those clauses together, and taking them as a whole, that whatever doubt might be thrown upon this question by the concluding words of clause 3, the real meaning and effect of this agreement is this—that Brown, Janson & Co. are to pay the debts, but are to have, in order to recoup themselves, or to enable themselves to pay them, the assets of the bank, including all uncalled up capital, and they are to reserve the right of insisting upon payment of the calls through the liquidator, notwithstanding the words of indemnity at the end of clause 3. I have no doubt myself that this is the true construction.

For the reasons I have given, therefore, I am of opinion that the agreement with Brown, Janson & Co. does not confer upon the plaintiffs a better right to maintain these actions than they would have had if no such agreement had been made. The agreement however does, I think, place an additional difficulty in the plaintiffs' way; for they cannot derive any benefit from the fact

that the debts of the company have been paid by Brown, Janson & Co., and repudiate their right to have the unpaid capital of the company called up to recoup them in respect of their payment to the other creditors of the company. The circumstance that at the commencement of the winding-up the assets of the company were insufficient to pay its debts, even excluding the 45,000*l.* due to Brown, Janson & Co., renders it unnecessary to consider whether their rights as creditors would prevent the plaintiffs from recovering in these actions, regard being had to the alleged complicity of Brown, Janson & Co. in the frauds, on which the plaintiffs rely. The same circumstance also renders it unnecessary to determine the important question raised by Mr. Wood Hill upon the wording of the 131st section, namely, whether it is possible for any shareholder under any circumstances to repudiate his shares after a resolution to wind up has been passed. A repudiation of shares necessarily involves an alteration in the status of the repudiating shareholder; and the right of the contributories amongst themselves can be adjusted without any such alteration; nor do I at present see how the language of that section is to be got over; but it may be that the words relied upon are only important for the protection of creditors. However, for the reason I have given, it is unnecessary to pursue this enquiry further on the present occasion. Nor, in the view which I take of this case, is it necessary for me to put any construction on the undertaking given by Brown, Janson & Co., and embodied in the order of the Lords Justices. Whatever may be the meaning of the word "debts" in that undertaking, it gives the plaintiffs no right of action which they would not have had without it; and if the plaintiffs rely on the undertaking, they cannot repudiate their liability to pay up their shares in full.

It was strongly urged that if these actions could not be sustained, the plaintiffs would be wholly without a remedy for the fraud from which they have suffered. But the answer to this is, that they can bring actions for damages

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against those who defrauded them, and against the company itself if the frauds of which they complain were in point of law imputable to the company, which, on the materials before me, I take to have been the case.

It only remains to consider the counter-claim of the company in Stone's case. A call was made in May, 1875, before the commencement of the winding-up by the directors payable in June and July; but no notice was given by them of this call. After the winding-up, namely, on the 26th of August, 1875, the liquidator gave notice to the shareholders of the call, and required payment of it. I am of opinion that he had power to do this under section 133, clauses 5 and 7, and section 95, clauses 4 and 8. No reason was given and no authority was cited to shew the contrary; and the only doubt I had in my own mind was whether, considering the time which had elapsed from the making of the call, the directors themselves could in August have enforced payment on their giving notice of it. I, however, think they could. The point is only material as regards costs and interest; as, even if this call is not payable, a fresh call can be made in the winding-up. The argument that the claim for calls was really the claim of Brown, Janson & Co., and that they cannot sustain such claim, is met by the agreement with them. The plaintiffs cannot avail themselves of this agreement for the purpose of maintaining their argument without paying up their shares to the extent I have before referred to.

Upon all points, therefore, I am in favour of the defendant company in both actions, and I pronounce judgment for the company accordingly.

Judgment for the defendants in both cases.

R. V. Williams applied for leave to amend the declaration and special case by inserting claims for damages for fraudulent representations.

The learned Judge declined to grant such leave.

The plaintiffs in both cases appealed.

O. Russell, Whitehorse and R. V. Williams (on Nov. 24, 1877), for the plaintiffs, cited The Supreme Court of Judicature Act, 1873, sec. 24. subsec. 7. Order XXVII. rule 1; *King v. Oorke* (6); *Roe v. Davies* (7); *Budding v. Murdoch* (8); *Watson v. Rodwell* (9); *Lindley on Partnership*, bk. 2, ch. 1, s. 4, p. 333, 3rd ed.; *Barwick v. The English Joint Stock Bank* (10); *Swift v. Winterbotham* (11); *Swift v. Jewesbury* (12); *Mackay v. The Commercial Bank of New Brunswick* (13); *The Western Bank of Scotland v. Addie* (14); *Griessell's Case* (15); *Black, Hawthorn & Co.'s Case* (16); *In re The Keynsham Company* (17); *In re The Life Association of England* (18); *In re The Peninsular Banking Company* (19); *Kellock's Case* (20).

Cohen (Wood Hill with him) cited *The Brighton Arcade Company v. Downing* (21).

Russell did not reply.

The arguments are fully stated in the judgments.

BRAMWELL, L.J.—I am of opinion that in the form that these two claims are presented to us the plaintiffs are not entitled to recover as upon a claim for unliquidated damages. The Special Case settled by agreement between the parties under which Stone's case is brought

(6) 45 Law J. Rep. 190; s. c. Law Rep. 1 Chanc. Div. 57.

(7) Law Rep. 2 Chanc. Div. 729.

(8) 45 Law J. Rep. Chanc. 213; s. c. 1 Chanc. Div. 42.

(9) 45 Law J. Rep. Chanc. 744; s. c. Law Rep. 3 Chanc. Div. 380.

(10) 36 Law J. Rep. Exch. 147; s. c. Law Rep. 2 Exch. 259.

(11) 42 Law J. Rep. Q.B. 111; s. c. Law Rep. 8 Q.B. 244.

(12) 43 Law J. Rep. Q.B. 56; s. c. Law Rep. 9 Q.B. 301.

(13) 43 Law J. Rep. P.C. 31; s. c. Law Rep. 5 P.C. 394.

(14) Law Rep. 1 H.L. Cas. 145.

(15) 35 Law J. Rep. Chanc. 752; s. c. Law Rep. 1 Chanc. 528.

(16) 42 Law J. Rep. Chanc. 404; s. c. Law Rep. 8 Chanc. 254.

(17) 33 Beav. 123.

(18) 34 Law J. Rep. Chanc. 64.

(19) 35 Beav. 280.

(20) Law Rep. 3 Chanc. 769.

(21) 37 Law J. Rep. C.P. 125; s. c. Law Rep. 3 C.P. 175.

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before us presents the matter in this way. The plaintiff says: "I was defrauded into entering into this contract. I have a right to rescind it, and have my money back." And the question put to the Court is, "Is the plaintiff, under the circumstances hereinbefore set forth, entitled to recover against the defendants the said 500*l.* and interest?" And in Collins's case also it is clear from all the pleadings that the claim is for the specific sums of 10*l.*, 20*l.* and interest, and not for an unliquidated sum by way of damages. In both cases the claims are on the footing that the plaintiffs are to get back what they have paid; and I can very well understand that that was the most preferable way of presenting their cases, because they would be much better pleased to get back their money or get a judgment for it, with the consequence that no doubt they would contend followed from it, namely, that they would not be liable as contributories, than to get a judgment for large damages which they could never realise by any execution or proof against the estate. Both claims therefore are for liquidated damages.

At the trial of Collins's case my brother Lindley declined to allow an amendment, so as to put the claim as for unliquidated damages. It is said that we ought to do so now. I think we ought not to do so; for when a plaintiff puts his case in a particular way—and one cannot help thinking here for particular reasons—I have grave doubts whether the Judge at the trial ought to amend; and certainly if he, in the exercise of his discretion, chooses to decline to allow his amendment, we should not interfere with that discretion. I will not say that if a substantive application were made to the Common Pleas Division, an amendment would not be allowed; and if so, that the plaintiffs would not succeed in their claims for damages—but here we cannot interfere.

The actions, then, being for the return of money paid for shares, the question arises, can the plaintiffs recover? The learned counsel for the plaintiffs say they can. The defendants' counsel say: "No, you cannot recover, because there

has been a winding-up. The case of *Oakes v. Turquand* (1) shews that you cannot rescind after a winding-up, and therefore you cannot rescind here, and get your money back." The first distinction that has been made between this case and *Oakes v. Turquand* (1) is, that in the latter case the winding up was under supervision. I protest I cannot see that that makes any difference. No doubt there is a difference in the fact, because the one is and the other is not under supervision; but the reasoning in *Oakes v. Turquand* (1) is as precisely applicable to this case as it possibly could be. Mr. Williams said that a compulsory winding-up is in the nature of a bankruptcy or statutory execution for the benefit of creditors. All that may be true for aught I know; but it makes no difference upon what I understand to be the principle of *Oakes v. Turquand* (1), which is this: Where there is, perhaps not a general insolvency, not a general stoppage of payment, but where there is an insolvency shewn by the winding-up order (that is, where the line is drawn), and the rights of creditors would be interfered with who had given credit to the company upon the strength of the uncalled capital and the names on the register—not that they looked at it, but that it is so, and there are names on the register—then the power to rescind is gone. I cannot see but what that reasoning is as strongly applicable to a voluntary winding-up without supervision as it is to one with supervision, as the case was there.

Mr. Williams made a point, I confess I thought it was rather subsidiary to the one I have been mentioning, that in this case the only creditors had become, as it were, Messrs. Brown, Janson and Co.; all the other creditors were satisfied, and therefore that the reasoning of *Oakes v. Turquand* (1) no longer applied. I suppose he would have said the same thing if it had been a compulsory winding-up, with a similar disposition of assets. I cannot agree to that. I think that the effect of the arrangement is to give Messrs. Brown, Janson & Co. a right to call upon the company or the liquidator to put into force—for the benefit of credi-

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tors I should say, but what one may perhaps say is for their benefit as having purchased the assets—all such rights as could have been put in force for the benefit of the creditors if the creditors had still remained creditors. Therefore I cannot accede to that point of Mr. Williams.

Then there was a point of Mr. Whitehorne to which attention ought to be called, which is this: He says that this is not a voluntary winding-up within the statute, and properly enough he pushes his argument to the consequences. He says that it is null and void, and ought to be treated as a nullity. The reason he gives for that is that under the statute, in a voluntary winding-up, all persons having claims are to share in the assets, and the resolution for the winding-up mentions an arrangement by which all persons having claims are not to have a share in the assets, therefore, he says, they have come to an arrangement *ultra vires*, which they could not come to, and this voluntary winding-up therefore is null. I think the first answer to be given to that is, that there is a good resolution by itself; secondly, that the bank may wind up voluntarily under the provisions of the Companies Acts, 1862 and 1867; and that, if there is in that series of resolutions one which they had no power to enter into, it does not affect that resolution which they had power to enter into. The two are not combined together.

Now I wish to call attention to what seems to me to be another answer to this, and it would be worth the attention of Mr. Cohen's client for reasons that will appear. The fourth resolution, which Mr. Whitehorne impugns, is, I think, not open to the objection which he takes to it. It is that the agreement, dated the 27th of May, 1875, between the directors, as I suppose they are, and Brown, Janson & Co., is an agreement for the payment by them of the debts and liabilities of the bank and for the transfer of the assets. It is contended that there was no such agreement. I am very much inclined to think there was not, because it appears to me that the original agreement was to pay the debts in the schedule. At the

time when this resolution was come to, that had not been altered. I should doubt very much if that resolution was not a good one at the time; it would be sufficient if it were afterwards altered by a verbal statement of counsel before the Lords Justices; but before the Lords Justices the additional obligation of Messrs. Brown, Janson & Co. is only to pay debts; and I doubt very much therefore whether this resolution does truly recite the agreement, because it says, there is an agreement by Messrs. Brown, Janson & Co. for the payment by them of the debts and liabilities. If there had been such an agreement Mr. Whitehorne's objection fails. If there is not such an agreement, I do not think that this resolution can be said to be invalid on the face of it. What the consequences will be, whether because that agreement has been mis-recited and mis-stated therefore it is not binding upon the company, or whether the mis-statements of it will be called a false demonstration and otherwise would be good, and whether, if it otherwise would be good it would be bad because it is *ultra vires*, are interesting questions which I recommend Messrs. Brown, Janson & Co. well to think over, in common with their advisers. But I do not think it is necessary to go further into this matter.

I am of opinion that on the ground that there is a separate good resolution for voluntary winding-up, and, if necessary, also upon the ground that this resolution does not upon the face of it shew that the persons are coming to a resolution *ultra vires*—upon those two grounds it appears to me that there is a good resolution to wind up, and consequently that Mr. Whitehorne's point fails him.

Then if that is so, still a point is made and mainly made by Mr. Williams which is to this effect as I understand. He says, be it that there is a voluntary winding-up, and be it that *Oakes v. Turquand* (1) shews that a person who has been defrauded into becoming a shareholder of the company and who has repudiated and endeavoured to get rid of his shares and rescind the contract in a reasonable time,—be it that *Oakes v. Turquand* (1) shews that such a person nevertheless must be

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kept upon the list of contributories for the benefit of creditors, that does not shew, says Mr. Williams, but what he is entitled to rescind the contract, and consequently to have his money back and have judgment. He says the condition of things is this: He is on the list for the benefit of contributories; but as between him and his fraudulent partners, or those with whom he is associated through the fraud of their agent, it is still open to him to rescind the contract. I cannot think so. It seems to me to follow as a consequence that he is a shareholder for all purposes, and that his remedy must be, not by an action to get his money, but by an action for unliquidated damages. Mr. Williams said it was a case of estoppel, I doubt whether that was right; however, I think my brother Brett suggested it was not, but it seems to me that the case, instead of being one of estoppel is more like the case Mr. Williams cited of *Kingsford v. Merry* (22), where a man sells goods, and is induced to enter into the contract of sale by some fraudulent representation of the vendee, and before he discovers the fraud and rescinds the contract, a third person acquires some right to the goods. In that case, what is his condition? If it were such as Mr. Williams would have us say, he would have a right to rescind the contract as between him and the purchaser, and yet he would remain in some way liable to the rights of creditors which had been acquired by the buyer. But that is not the way the law deals with it. What the law says is, when the rights of third persons intervene, you can rescind no longer, the contract is not "rescindable" if that is English—the contract is no longer subject to rescission. You must treat it as a binding contract, and seek your remedy against the person who has defrauded you by an action for unliquidated damages. I think therefore that point also fails.

I think I have touched on every point. In the result, then, I am of opinion that this claim is put on the footing of rescinding, and that there is a good voluntary

(22) 11 Exch. Rep. 577; s.c. 25 Law J. Rep. Exch. 166.

winding-up. I am of opinion that the case of *Oakes v. Turquand* (1) shews that where there is a winding-up, whether voluntary, with or without supervision, it is too late for a person who has been defrauded into becoming a shareholder to rescind. I am of opinion that that case shews, not only that the name must be on the register, but that it is too late to rescind. Upon these grounds I am of opinion that this voluntary winding-up is good, and, upon the authority of the case of *Oakes v. Turquand*, (1) this action, based upon the footing of recovering the consideration money back, fails, and that our judgment must be for the defendants.

Then upon the counter-claim, it is enough to say that the only difficulty suggested was that the liquidator could not give notice of a call due, and virtually made by the directors, but of which no notice had been given by the directors when they were *sui juris*. I am of opinion that he can. I think the authorities referred to shew that he can. In the result I think our judgment must be against the plaintiff on his claim and for the defendants on their counter-claim.

BRETT, L.J.—I am also of opinion that we ought not in this case to amend, and for these reasons: that in neither case was the action really brought or really insisted upon as an action to recover damages for fraud. It seems to me that both actions were brought and substantially tried on claims to rescind the contracts, and to get back the prices paid by the shareholder for the shares; and that, after the cases have been not only brought but substantially insisted upon and tried as in one view of the remedy, that if an amendment is necessary the Court is not in duty called upon and in fact exercising its discretion ought not really to amend, so as to give substantially a new cause of action. If, therefore, any amendment was necessary in either case, I think that we ought not to amend at this stage, and I think my brother Lindley was right in not amending.

Now, as to whether any amendment was necessary here, it seems to me that in the case in which the special case is stated, the question must be taken to be

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the question agreed upon by the parties when the special case is stated, and that they do not leave the suggested claim open; and on the other hand I do not think that the mere allegation by the defendants in the answer, of the fraud by which the plaintiff was induced to take the shares, used in the answer for the purpose for which it is used, is enough to give the plaintiff, without an amendment of the statements of claim and of the request for remedy, a claim to have the judgment of the Court in his favour upon that other cause of action. I therefore think that there could have been no recovery upon the supposed cause of action without an amendment, and I think an amendment ought not to be made.

That being so, both claims must be looked upon as claims to rescind the contracts by the plaintiffs, and to recover the prices paid for the shares. I am of opinion that, upon the facts proved in the one case and stated in the other, that the plaintiffs could not rescind; and that because in each case a voluntary winding-up was commenced and supervened before the plaintiffs attempted to rescind the contracts. I am of opinion that they could not, after the voluntary winding-up had been commenced and supervened, by reason of the authority of *Oakes v. Turquand* (1); and that case really decides that by reason of the Companies Act, 1862, and upon a true construction of that statute, shareholders in such companies as these, although they have been induced to become shareholders by a fraudulent representation, yet being shareholders, and not only being shareholders, but being upon the register, are forbidden by the statute to rescind after the winding-up has commenced; and, in a voluntary winding-up, therefore, after the resolution to wind up has been passed, which is the commencement of the voluntary winding-up.

Now in order to take this case out of the authority of *Oakes v. Turquand* (1), two arguments have been used before us, one by Mr. Whitehorne, and the other by Mr. Williams, and both, as might naturally be expected, exceedingly ingenious. Mr. Whitehorne, in order to take the case out of any application of *Oakes v.*

Turquand (1), argued that in this case there was no voluntary winding-up at all; and the ground upon which he put that was, that the winding-up was, or the terms of the winding-up were, inconsistent with the intention of the statute in a voluntary winding-up. He said that the terms of the winding-up were inconsistent, because he said that the winding-up was founded upon an agreement with Brown, Janson & Co., and that that agreement would not oblige them to pay the present plaintiffs if the plaintiffs could succeed in establishing their claim for damages at some subsequent period. Now, I am prepared to say that even though that were the effect of the agreement with Brown, Janson & Co., that would not prevent there being a voluntary winding-up here, that is to say that it would not make the resolution of the company (which was passed according to the statute in other respects) to wind up a nullity, and would not prevent therefore there being a winding-up according to the statute, at all events until some Court or other had superseded that voluntary winding-up, and ordered a winding-up under supervision or a compulsory winding-up. It cannot be said that even if that agreement had the effect suggested, it would make the resolution a nullity, so that there should be no voluntary winding-up. I am not prepared to say what is the effect of the agreement with Brown, Janson & Co., modified by reason of what took place before the Lords Justices. I am not at all prepared to say that hereafter, considering that all parties were represented before the Lords Justices, and that which was done was done with the Court, and in order to induce the Court to act and which did induce the Court to act, those who may in future claim against Brown, Janson & Co. may not say under the direction and authority of the Court, that Brown, Janson & Co., although they did not in terms in the first agreement agree to pay certain debts, had in the end agreed or must be taken to have agreed to pay, not only all existing debts or all scheduled debts, but any debts which might hereafter be proved, and that therefore they may not be bound to pay the claims of the present

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plaintiffs when those claims are by action or otherwise reduced into debts. I am not prepared to say to the contrary, and I desire to say no further than this, that I do not agree that they may not be bound.

Then with regard to Mr. Williams's objection to the application of *Oakes v. Turquand* (1), he put it thus: he alleges that *Oakes v. Turquand* (1) was not a decision as between a shareholder and the company, but was a decision as between a shareholder and the creditors of a company, and that it was put upon the ground of an estoppel as against the shareholder in favour of creditors. But in my opinion that case was not actually put upon the ground of estoppel at all. Neither do I think that it was put upon the ground that a compulsory winding-up is to be considered as in the nature of a bankruptcy, and that a voluntary winding-up is to be considered as in the nature of an administration suit. I am of opinion that the judgment in *Oakes v. Turquand* (1) cannot be said to be a decision as between a shareholder and creditors, but that it was a decision as between a shareholder and the liquidator of the company representing the company; and that the true decision was this that the existence of the creditors prevents a shareholder, who has been induced to take his shares by reason of fraud, from rescinding a contract after the commencement of a winding-up, under the Companies Act, 1862, whatever be the nature of that winding-up, if it be a winding-up under the statute. By reason of the true construction of the statute, which forbids a thing to be done, it prevents a shareholder from rescinding a contract after a winding-up has commenced, leaves him, therefore, as a person who has contracted to take the shares and who is upon the register, and then, by virtue of the Act, he is a shareholder, and of course, as he is a shareholder he can be made a contributory. If that be the true reason of *Oakes v. Turquand* (1), it seems to me to apply, not only to a compulsory winding-up, but also to a voluntary winding-up under supervision, and equally and just as much for the same reasons to a voluntary winding-up without inspection, be-

cause a voluntary winding-up without inspection is just as much a winding-up under the Companies Act, 1862, as any other proceeding under the Act. They are none of them bankruptcies: they are modes of dealing with companies in difficulties, which are to be instead of bankruptcy according to the ordinary bankrupt law; but they are all proceedings under the statute, and therefore they all come within the express decision, as they do within the very terms used of *Oakes v. Turquand* (1). I am, therefore, of opinion that neither plaintiff could recover in respect of the claims which they have made in this case.

As to the counter-claim, in the case in which it applies, I am of opinion that that claim is good for the reasons given by my Lord.

COTTON, L.J.—I think it unnecessary to add anything on the question whether leave to amend should have been given and should now be given, except this that although under ordinary circumstances I think the widest liberty of amendment should be given, so that the real question between the parties may be decided without further litigation, yet in this case, for the reasons stated by the Lords Justices, I think the learned Judge was right in refusing to amend, and that we ought not now to give liberty to amend.

Then I come to what, I have no doubt, was the question intended to be raised by these proceedings—can the plaintiffs rescind their contract with the company by which they became shareholders? That, I think, is the real substantial question intended to be raised, because the actions are to recover the sum paid for the shares, as money had been received, and that can only be on the footing of the plaintiffs being entitled to say they are not shareholders, that they are entitled to set aside the contract by which they became shareholders. Now the bar to that relief, to which I assume that otherwise they would be entitled (as apparently they would be), is the voluntary winding-up.

Now, first of all, let us consider the objections raised by the plaintiffs, that there is no such thing as a voluntary

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winding-up here. He must go to that length. Mr. Whitehorne fairly puts it in that way. He contended that the voluntary winding-up proceedings in this case might be considered a nullity. I pointed out to him the distinction between their being voidable and their being a nullity. It may possibly be (I give no opinion upon it) that the various points which were urged by him might be a very good reason for inducing the Court, on a petition for winding up, compulsorily to say, "We cannot let those proceedings for voluntary winding up stand. We must regard them as in some way tainted, and we make a compulsory order which will supersede the voluntary winding-up." That is not the point before us. It is said they are a nullity, and that I think it is impossible to maintain, because a general meeting called with no irregularity has passed what the Act requires, a resolution, with a preface which I shall refer to in another part of the case. The first resolution declares that the company shall be wound up voluntarily. That resolution is good, that is to say it cannot be treated as a nullity, whatever may be said of the separate resolutions as to handing over the assets to Messrs. Brown, Janson & Co. for the purpose of carrying out the arrangements which had been entered into. I look upon the resolutions as separate; some may be bad and others good, and the resolution to wind up the company voluntarily is a separate and independent resolution and cannot be treated as a nullity.

That being so, there being a voluntary winding-up, is that a bar to the claim to rescind the contract? I first consider it without reference to the argument of Mr. Williams, that whatever a winding-up might under ordinary circumstances be, having regard to that agreement, this voluntary winding-up cannot be a bar to his claim. Now, in order to see how far *Oakes v. Turquand* (1), which of course we must follow, is or is not a decision applicable to the present case, we must consider what the plaintiffs are seeking to do in these actions, and what, not the plaintiffs, but the person applying there, the appellant, was seeking to do. In both cases they were seeking to make out, as a

ground for the relief in this case, to get back the money, in that case to be taken off the list of contributories, that they were not members within the provisions of the Act of Parliament, a member being a person who, in the words of the Act, has agreed to take shares. The ground on which they seek to be relieved from the obligations of membership is this, "We are induced to take these shares by fraud, it is a voidable agreement, and now that we have discovered the fraud we have a right to avoid it." In this case, as in that case, there was but one contract, which the applicant or the plaintiffs seek to be relieved from, a contract with the company, no contract with anybody but the company; no contract with any shareholder; and the only contract from which the plaintiffs in this case, as the appellant in the case of *Oakes v. Turquand* (1), were seeking to be relieved, was the contract with the company. The consequences in that case, if the House of Lords had proceeded upon the argument that it should have been rescinded, would have been that the appellant must have been taken off the list of contributories; in this case it would be that he is entitled to have back his money which he paid for the shares to the company. But the relief in both cases depends upon the same principle; and if the House of Lords in that case decided that the contract should not be rescinded, we must look and see whether or no, in the present case, the voluntary winding-up comes within the same principle on which they decided that the contract with the company in that case could not be rescinded. It is very true that the ground of refusing to allow the applicant to rescind his contract with the company, was that the rights of creditors had arisen in the sense that under the provisions of the Act of Parliament proceedings were being taken to pay those creditors; but still it was to rescind the contracts with the company. In the present case surely this same objection would apply to rescinding a contract with the company. It is true there is a difference in the winding-up. It was pointed out that in compulsory winding-up, or winding-up under super-
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sion, creditors can take an active part in enforcing their rights; they can go before the Judge in Chambers, they can take proceedings actively to enforce payment of their debts, and in various other ways they can intervene. They cannot in a voluntary winding-up. It may be founded, and in this case it was founded, upon a declaration that it had been "proved to the satisfaction of the general meeting (this is section 129 of the Act) that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same." That is practically by a declaration of insolvency. What are the consequences? Section 133 clearly gives to the liquidator the duty of then immediately providing for the distribution of the assets amongst its creditors in the first instance, and, therefore, a voluntary winding-up, as much as a compulsory winding-up, does put the company in this position that it is in a state when, either by insolvency or from some other sufficient reason, there is a statutory obligation on those who have the winding-up, in the first instance to apply the assets in payment of those creditors. Of course, amongst those assets which, under the first clause of section 133, are to be distributed in the first instance in paying the debts, are to be included any unpaid calls; and I apprehend that, following the principle in *Oakes v. Turquand* (1), we do find this principle established by it that when that state of circumstances exists, the primary duty of those having the regulation and administration of the assets of the company is to pay the debts. No person who, at the time of the commencement of the winding up, is *de facto* a member, a person who has agreed by a contract which he has not avoided to become a member, can withdraw from the administration, for the benefit of creditors, any part of his assets, either by recalling money he has paid to the company, or by taking himself off the list of contributories, taking himself out of the category of a person liable to pay further calls. He can no longer, in consequence of the distribution of the assets amongst the creditors, insist upon an equity, which he might otherwise have had, to be relieved from his contract with

the company. That, I think, is the principle in *Oakes v. Turquand* (1), and is a principle which equally applies to this case. It is curious that one of the instances, or one of the authorities, which Mr. Whitehorne referred to in his argument for the purpose of shewing that this was mere administration, shewed that it was something more, because he referred to those cases (one of which was before the present Master of the Rolls) where actions had been stayed after a voluntary winding-up, where there is no statutory provision giving any such power as a stay of action; but the Master of the Rolls likened it to an administration suit, and Mr. Whitehorne argued, "Here is administration, nothing beyond that." I think he did not quite consider this, that it is not the mere existence of an administration suit which enables an executor to obtain a stay of actions at law against him; but the existence of a decree which provides for the distribution of the assets amongst all the creditors. Therefore, following the analogy of an administration suit, a voluntary winding-up is like an administration suit in which a decree has been made for the benefit of all creditors. If that is so, it very much strengthens the view I take of the position of a company when there has been a valid resolution for voluntary winding up. In my opinion, therefore, the decision of *Oakes v. Turquand* (1) gives us the principle to be applied to this case, to be applied to a case of a voluntary winding-up; and regarding this as voluntary winding-up with a good resolution, and with nothing special in consequence of an agreement which had been made with Messrs. Brown, Janson & Co., the winding-up is a bar to this action. I am treating it simply as one founded on a right to rescind the contract.

I will only say one word upon the objection arising out of the agreement, taking, of course, the objection that that makes the whole thing bad. I think, really, that it is not really looking at that agreement in its true light. That agreement is not a sale, in any reasonable sense of the word, to Messrs. Brown, Janson & Co. It was merely an agreement made with them to provide for the

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more rapid payment of the debts of the company, and in consequence of their agreeing to do that, and I presume that agreement has on their part been carried into effect, all the assets of the company which would have to be applied in payment of the debts directly are to be handed over to them to recoup them. It is not an arrangement quite unusual. One has seen something of the same sort in other instances; but that, I take it, is the real nature of the arrangement. It would, in my mind, not be doing right to say that the position of the party bringing such an action as this can be varied because the assets of the company are not in the first instance paid to the creditors, but are to be paid to persons who have paid the creditors of the company, and after the shareholders, who must have been considered as represented at the hearing of the petition before the Lords Justices, had got rid of an order for compulsory winding up, by asking the Court to let these resolutions be put before the general meeting, there being at the time the agreement with Messrs. Brown, Janson & Co. in existence. It would have been something like defeating justice if one had been bound to accede to the claims of the plaintiffs in this case, on the ground that those resolutions were bad, or that that agreement gave them rights which they would not otherwise have had if there had been a voluntary winding-up in the ordinary way.

Judgment affirmed.

Solicitors—Harper, Broad & Battcock, for both plaintiffs; Janson, Cobb & Pearson, for both defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
June 6. } *Ex parte* BRADLAUGH.

Obscene Book—Order for Destruction under Lord Campbell's Act (20 & 21 Vict. c. 83).

[For the report of the above case, see 47 Law J. Rep. M.C. 105.]

[IN THE COURT OF APPEAL.]

1878. }
Jan. 26, 28. } MULLINER v. FLORENCE.*

Innkeeper's Lien—Lien on Horses and Carriages for general Account of Guest—Waiver of Lien by Sale.

An innkeeper's lien is general, and extends to all the goods of the guest under his control, and therefore to his horses and carriages in the inn stables, in respect of his general account.

The sale of a chattel by the holder waives the lien on it, although the retention of it would put him to expense. (1)

This was an appeal from the judgment of Pollock, B., at the trial of the cause at the Warwickshire Summer Assizes, 1877.

The plaintiff was a coach-builder, and the defendant an innkeeper. One Bennett lodged at the defendant's hotel for three months, and while there bought a carriage and pair of horses, and harness of the plaintiff. These were kept by Bennett at the hotel, and were constantly used by him, but were never paid for. Bennett subsequently absconded, leaving his hotel bill unpaid; he was tried, and sentenced to seven years' penal servitude. While in prison, and before trial, he assigned the goods to the plaintiff, on condition of being relieved from the price.

The plaintiff then demanded the return of the goods from the defendant; offering to pay for the keep of the horses. The defendant refused to give up anything, unless the whole of Bennett's bill was paid, and subsequently sold the horses. The plaintiff then sued the defendant for the detention and conversion of the horses, carriage and harness.

The learned Judge directed judgment to be entered for the defendant.

Sir James Stephen and Dugdale, for the plaintiff.—First, the defendant's lien on the goods was a particular one, and was only for expenses incurred in or

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) See now as to innkeeper's right to sell, 41 & 42 Vict. c. 38.

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about them, and not for the guest's personal account—*Moss v. Townsend* (2).

[BRETT, L.J.—That case seems to turn on the custom of London.]

They also cited *Rosse v. Bramstead* (3); *Stirt v. Drungold* (4); *Robinson v. Walter* (5); *Jones v. Pearle* (6). The modern cases of *Threlfall v. Borwick* (7); *Turrell v. Crawley* (8), and *Broadwood v. Granara* (9) are not in point. Secondly, the sale of the horses waived the lien, and was an act of conversion—*Coggs v. Bernard* (10); *Jones v. Pearse* (6); *Jones v. Thurloe* (11); *Legg v. Evans* (12); *Olark v. Gilbert* (13); *Jacobs v. Latour* (14); *Hartley v. Hitchcock* (15); and it is immaterial that the retention of these caused expense—*The Thames Ironwork Company v. The Patent Derrick Company* (16).

Mellor and Graham, for the defendant.—The first question is not one of general or particular lien, but whether the account can be divided. In the case of *Threlfall v. Borwick* (7), the piano was detained in respect, not only of the plaintiff's account, but of his wife's and sister's. To carry the plaintiff's argument to its full extent, if a guest brought a lap-dog with him, the innkeeper's lien would be on the dog only for what it had had. Secondly, as to the sale of the horses; even if that were wrongful, still the plaintiff ought to have tendered the full amount of Bennett's bill, and the damages would, in any event, be nominal—*Halli-*

day v. Holgate (17); *Ohinnery v. Viall* (18); *Johnson v. Stear* (19); *Donald v. Suckling* (20); *Brierly v. Kendall* (21); *Jones v. Tarlton* (22).

Sir James Stephen in reply.

BRAMWELL, L.J.—Several questions are raised in this case. The first is, What is the innkeeper's lien? Is it a lien on horses for the expenses incurred about those horses, and on carriages, for the care of the carriages, and no lien on either in respect of the guest's personal expenses; or is it a lien on all the guest's chattels, in respect of the whole claim against him? I am of opinion that the latter is the lien, and for this reason, that the debt is all one debt, although made up of various items. The innkeeper is not bound to trust his guest, for he may demand reasonable compensation before he receives him; but if he does receive him, and finds him in things he wants for himself, his horses, and carriages, the lien is for the due performance of the guest's contract—to pay his account; otherwise the ludicrous consequence might arise that the lien would be on the wife's luggage for her food and expenses, and on the daughter's for her's. That cannot be. Suppose it were agreed that the guest should be charged so much a day for himself, his horses, and carriages, so that you could not separate the items, how would you impose the lien then? I do not think that case differs from the present; you cannot here investigate the separate items, it is all one contract. It is true that the policy of the law is against general liens, so that if parcels of stuffs are sent to a dyer at different times he has only a lien on each parcel for the cost of dyeing it, and not for dyeing the others. But if the doctrine

- (2) 1 Bulst. 207.
- (3) 2 Rolle Rep. 438.
- (4) 3 Bulst. 289.
- (5) Ibid. 269.
- (6) 1 Str. 557.
- (7) 44 Law J. Rep. Q.B. 87; s. c. Law Rep. 10 Q.B. 210.
- (8) 13 Q.B. Rep. 197; s. c. 18 Law J. Rep. Q.B. 153.
- (9) 10 Exch. Rep. 417; s. c. 24 Law J. Rep. Exch. 1.
- (10) 1 Sm. L. C. p. 217 (7th Ed.).
- (11) 8 Mod. 172.
- (12) 6 Mee. & W. 36; s. c. 9 Law J. Rep. Exch. 102.
- (13) 2 Bing. (N.C.) 343; s. c. 5 Law J. Rep. C.P. 61.
- (14) 5 Bing. 130.
- (15) 1 Stark. 408.
- (16) 1 Jo. & H. 93; s. c. 29 Law J. Rep. Chanc. 714.

- (17) 37 Law J. Rep. Exch. 174; s. c. Law Rep. 3 Exch. 299.
- (18) 5 Hurl. & N. 288; s. c. 29 Law J. Rep. Exch. 180.
- (19) 15 Com. B. Rep. N.S. 330; s. c. 33 Law J. Rep. C.P. 130.
- (20) 35 Law J. Rep. Q.B. 232; s. c. Law Rep. 1 Q.B. 585.
- (21) 17 Q.B. Rep. 937; s. c. 21 Law J. Rep. Q.B. 161.
- (22) 9 Mee. & W. 675; s. c. 11 Law J. Rep. Exch. 267.

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contended for by the defendant be correct, and fifty pieces were sent at the same time to be dyed, the dyer would only have a lien on each separate piece for the cost of dyeing it individually. That is not so, there is but one contract. So it is here. So far, therefore, I am for the defendant.

But, on the other hand, I cannot agree with my brother Pollock as to the sale. It is clear, on the authorities, that the defendant was not justified in selling. The very notion of a lien supposes that if you part with the thing on which you have the lien the lien is gone. Thus, the sale of the thing to another is a mere tortious act of conversion. I, of course, do not mean that the holder is bound to keep the thing on his premises, but he must do nothing inconsistent with the nature of his holding, such as riding or driving the horses would be in the present case. None of the cases cited are inconsistent with this view. *Donald v. Suckling* (20), *Johnson v. Stear* (19), and *Halliday v. Holgate* (17), were said to be so, and it was contended that they established the position that the goods could not be demanded back, whether transferred or not, without tendering the amount of the whole bill. But those cases were cases of pledges with an assignable interest, which does not exist in cases of lien. In *Johnson v. Stear* (19) the Court held that the action was maintainable, though the damages were only nominal; but I see that Blackburn, J., in *Donald v. Suckling* (20), doubts whether that is quite right.

Then comes the question of damages. The general rule is, that where there is a tortious conversion, the damages are the value to the owner of the article converted. One case cited to the contrary was *Chinnery v. Viall* (18), which is I hope, law, but it is distinguishable on the ground of special circumstances. There there was an unpaid vendor with no right of lien. Then as the vendor could maintain no action against the first vendee after selling it to another, it follows that the second sale relieved the first vendee altogether from paying for the goods, and the plaintiff really lost only the difference between the value of the article to him,

and the price. But we have not got to consider that case. Then there was *Brierly v. Kendall* (21). That was an action of trespass to goods, and Wightman, J., says, during the argument, "In the case of a demise of chattels for one month, could the tenant in bringing trover for the conversion of them, lay the damages at the full value of the goods?" In *Johnson v. Stear* (19), I have already pointed out it is doubtful whether the action could be maintained at all, at any rate it is clear that the damages would only be nominal. The Common Pleas expressly said, that though the defendant could not sell, he had a sort of right which must be taken into account in assessing damages. That is not applicable here. But I think that what is said by Williams, J., is applicable. He says, "The true doctrine, as it seems to me, is that whenever the plaintiff could have removed the property, if he could lay hands on it, and could have rightfully held it, when recovered, as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption." Here if the plaintiff, Mr. Mulliner, after the sale by the defendant, had thought fit to go to the purchaser and say: "Those are my horses, you have bought them of a person who had no right to sell them to you," and on a refusal to give them up had brought an action for the full price, it is clear he could have recovered it from the vendee. He has, however, treated the matter as a conversion, and cannot be worse off on that account. It is true the plaintiff is better off than he would have been if the defendant had not broken the lien, but that is not so hard on the defendant as if he had to feed the horses. The same hardship existed as to a distress, before a power of sale was given.

I think, therefore, that we ought to reverse the judgment, and give the plaintiff judgment for the value of the horses, but the defendant will retain so much of his judgment as relates to the detention of the carriage and horses, on which we have decided, he has a lien for the whole of Bennett's account.

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BRETT, L.J.—The action here was for the wrongful conversion of the plaintiff's horses, and the detention of his carriage and harness. The defence is one of lien, and the first question we have to decide is, what was the lien of the defendant, and to what did it attach? I think that it was on the horses, the carriage and the harness for the whole of Bennett's account. When an innkeeper receives a guest with his horses and carriage, he does it under one contract, and that although the stables are not within the curtilage of the inn; the business is all one and the obligation is one, namely, to receive the traveller, his horses and carriage, and the contract on the part of the guest to pay is one contract. Therefore, by the custom of England, the innkeeper has one lien over all the guest's goods for the whole contract, and one which cannot be split up. The defendant, therefore, had a lien over all the articles for the whole of Bennett's bill. Then comes the question, has the defendant lost his lien? As regards the horses he clearly has, as he has sold them. As regards the other goods he has held them on the right ground, namely, the non-payment of Bennett's general account, and he still retains his lien on that ground, and there has been no offer to pay for more than a portion of the account.

But it is said that though the horses were wrongfully sold, the plaintiff can maintain no action, as he has not tendered the amount of the lien. Cases were cited in support of that, but it is unnecessary to say whether they were rightly decided or not. I reserve my opinion as to that, as they were cases of pledge, not of lien, and the decisions were based on that. At the outside, the cases could only affect an action by Bennett.

Then as to damages. The remark I have just made applies equally to the application of *Johnson v. Stear* (19), on the point of damages, but I think that that case would, if necessary, require very careful consideration. I can see no reason for departing from the ordinary rule in cases of conversion.

COTTON, L.J.—The first question to be determined here, is the extent of the de-

fendant's lien. No doubt the law does not favour general liens, but in the case of an innkeeper there is a lien for his general account on the personal luggage of his guest. But it is said that the matter is different as to the guest's horses and carriages, and that there is only a lien on them for any special expense the innkeeper may be put to by them. I can see no reason why the fact that they are subject to such a special lien should relieve them from the general lien. The innkeeper is by the law bound to receive the guest's carriages and horses, and the fact that they are lodged in the stables, and not in the inn itself, can make no difference. The defendant, therefore, is entitled to our judgment as far as the carriage and harness are concerned.

But as to the horses the matter is different. They were sold. It has been said that that is not material, as the plaintiff could not have got possession of them without paying Bennett's account, and he has therefore sustained no damage. That argument ignores the real nature of the innkeeper's right of lien. The goods are not pledged to him, he has only a lien on them, *i.e.* a right to keep them in his possession. He has parted with the possession and thereby put an end to that right. That being so, the plaintiff, as owner of the horses, has a right to say, "You had no right to convert my horses." There is no equity between the parties; there is no debt owing from the defendant to the plaintiff. Many cases were quoted; I shall only refer to one, namely, *Johnson v. Stear* (19). There assuming the sale to have been wrongful, the vendor had a certain right over the goods, but here there was none, only a right to keep possession, which was, of course, lost when possession was given up.

Judgment will be for the plaintiff for the horses, and for the defendant for the carriage and harness.

Judgment accordingly.

Solicitors—Sharpe and Ullithorne, agents for Dewes, Son & Wilks, Coventry, for plaintiff; Pattison, Wigg & Co., agents for O. Minster, Coventry, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878.
 Feb. 26, 27. } WEIR v. BELL AND
 March 2. } OTHERS.*
 May 18. }

Company — Liability of Directors for fraudulent Prospectus issued by Agent.

The defendants were directors of an iron ore mining company, which was compelled to cease working for want of funds. Subsequently money was advanced by the defendants, with the exception of Bell, and a small quantity of ore was raised. At an annual general meeting of the company the directors were authorised to raise money on debentures, and at subsequent meetings of the directors it was agreed, in the absence of Bell and without his knowledge, that the advance should be repaid out of the proceeds of the debentures, and, with the concurrence of Bell, that the secretary should employ brokers to place the debentures. The brokers for this purpose issued a prospectus containing unauthorised fraudulent statements. The plaintiff, on the faith of these statements, purchased debentures, and the money was devoted to the repayment of the advances. The company was subsequently wound up, the plaintiff having brought an action to recover his purchase money :—

Held, by COCKBURN, L.C.J., BRAMWELL, L.J., and BRET, L.J., dissentiente COTTON, L.J., that Bell was not liable to the plaintiff.

This was an appeal by the plaintiff from the judgment of the Exchequer Division in favour of the defendant Bell. [The facts are fully stated in the head-note and judgments.]

Sir H. S. Giffard, Solicitor-General, and Charles (Barber with them) cited Udell v. Atherton (1), Mackay v. The Commercial Bank of New Brunswick (2) Twycross v.

* *Coram* Cockburn, L.C.J.; Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 7 Hurl. & N. 172; s. c. 30 Law J. Rep. Exch. 337.

(2) 43 Law J. Rep. P.C. 31; s. c. Law Rep. 5 P.C. 394.

Grant (3), and The Reese River Silver Mine Company v. Smith (4).

Digby Seymour and Lumley Smith, for Bell, cited The Mersey Docks Trustees v. Gibbs (5), Wilde v. Gibson (6), The New Brunswick and Canada Railway Company v. Conybeare (7), The National Exchange Company v. Drew (8), Davidson v. Tulloch (9), Henderson v. Lacon (10), Barwick v. The English Joint Stock Bank (11), Brady v. Tod (12), Swift v. Jewesbury (13), Cullen v. Thompson's Trustees (14), and Stone v. Cartwright (15).

Sir H. S. Giffard, in reply, cited Peek v. Gurney (16), and Betts v. Levite (17).

Cur. adv. vult.

The following judgments were delivered on the 18th of May :—

COCKBURN, L.C.J.—This is an appeal from a judgment of the Exchequer Division in an action brought by the plaintiff against several defendants, amongst others against Mr. V. G. Bell, as directors of the Knightor, Treverbyn and Resugga Hæmatite Iron Ore Mining Company, Limited, to recover a sum of 700*l.* advanced by him to the said company on debentures, on the ground that the plaintiff had been led to advance the money on the faith of statements contained in a prospectus issued by the authority of the defendants which statements were false and fraudulent. Judgment having been given in the Exchequer Division in favour of the defend-

(3) 46 Law J. Rep. C.P. 636; s. c. Law Rep. 2 C.P. Div. 540.

(4) 39 Law J. Rep. Chanc. 849; s. c. Law Rep. 4 H.L. Cas. 64.

(5) 35 Law J. Rep. Exch. 225; s. c. Law Rep. 1 H.L. Cas. 93.

(6) 1 H.L. Cas. 606.

(7) 9 H.L. Cas. 725, 740, 749.

(8) 2 Macq. H.L. Cas. 103.

(9) 3 Macq. H.L. Cas. 783.

(10) Law Rep. 5 Eq. 249.

(11) 36 Law J. Rep. Exch. 147; s. c. Law Rep. 2 Exch. 259.

(12) 9 Com. B. Rep. N.S. 592; s. c. 30 Law J. Rep. C.P. 223.

(13) 42 Law J. Rep. Q.B. 111; s. c. Law Rep. 8 Q.B. 244; on appeal 43 Law J. Rep. Q.B. 56; s. c. Law Rep. 9 Q.B. 301.

(14) 4 Macq. H.L. Cas. 424.

(15) 6 Term Rep. 411.

(16) 43 Law J. Rep. Chanc. 19; s. c. Law Rep. 6 H.L. Cas. 398.

(17) 11 Jur. N.S. 11.

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ants, this appeal is brought against that decision, so far as it relates to the defendant Bell alone; but it is impossible to dispose of Bell's case without referring to the facts, and the law as affecting the defendants generally.

We must take it, on the findings of the jury, that certain material statements contained in the prospectus, such as the amount of capital stated to have been subscribed, that the mine was in working order, that its actual yield amounted to 160 tons per week from one shaft, to which two other shafts were about to be added, that the property was worth 30,000*l.* and could be sold at any time for that amount, that the money proposed to be raised on debentures would be used in the development of the property, were false; as also that it was on the faith of these statements that the plaintiff had been led to advance his money. Under these circumstances there can be no doubt that the plaintiff would be entitled to recover back his money from the company. The question here is, first, whether he can recover it from the directors, as having authorised the issuing of the prospectus, although they were not cognisant of the false statements contained in it. Secondly, whether, independently of this general ground, the defendants, and more especially the defendant Bell, have by their individual conduct rendered themselves liable to the plaintiff.

The facts are these:—The company had been formed in 1872, but in January, 1873, it was compelled to cease working from want of funds. Between that time and the ensuing month of August money was advanced by the defendants (with the exception of the defendant Bell), then being directors of the company, and ore, but to a small extent only, was raised. At the annual general meeting of the company, held on the 29th of September, 1873, the directors were authorised to raise money on debentures; and at a subsequent meeting of the directors, held on the 8th of October, it was agreed that the defendants Baldwin and Furnival should make further advances for taking up certain bills, and that the repayment of these and of the former advances made by the defend-

ants should be made out of the proceeds of the debentures to be issued. At a meeting of the directors on the 5th of November it was resolved that the secretary be authorised to employ brokers to place debentures to produce 10,000*l.* at a discount, and a commission not exceeding 12 per cent. Acting on this authority the secretary employed Steward & Lambe, who are brokers, to place the debentures, and they, without express authority, but as it seems in the ordinary course of business adopted on such occasions, published the prospectus, which was prepared by their clerk, on what instructions or information does not appear, and which contained the misrepresentations complained of. The money raised on the debentures was paid into the company's bankers, and part of it was applied to the repayment of the advances which had been made by the defendants, with the exception of Bell. In the sequel the company was unable to go on, and in January, 1875, was wound up.

Upon these facts the Court of Exchequer Division gave judgment in favour of the defendants, on the ground that Steward & Lambe, the brokers, in issuing the prospectus, had acted as the agents, not of the defendants, but of the company; that the directors had been merely the officers and agents of the company in carrying into effect the resolution of the company that debentures should be issued, and in doing what was necessary for that purpose—*inter alia*, in directing that a prospectus should be prepared and published—had been in no sense principals. Consequently, that the rule that a principal who derives benefit from a fraud committed by his agent in the course of his employment becomes liable to a party injured by the fraud, has here no application, though upon the authority of *Barwick v. The English Joint Stock Bank* (11) it would have made the company liable, had the action been brought against them.

I concur in the view that the defendants in what they did were acting as the agents of the company and not as principals, and therefore that they would not be liable, generally speaking, for misrepresentations made without their autho-

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ality by persons employed by them on behalf of the company, and who were acting, not as their agents, but as the agents of the company. But the Court below appears to have overlooked a circumstance which seems to me to make all the difference, namely, that, with the exception of the defendant Bell, all the defendants, though not parties to the issuing of the prospectus, as fraudulently framed, yet knowing that it had been issued, and with the knowledge of its fraudulent character, which their perfect acquaintance with the affairs of the company must have given them, not only allowed the plaintiff and others to advance their money on the faith of the false representations contained in it, and by receiving the money became parties to the fraud, but on their own authority applied a considerable portion of the money so received to the discharge of their own pecuniary claims on the company, claims which the company had no other means of satisfying. Even the defendant Barnett, who left England in August, 1872, and did not return till 1874, and who was ignorant of all that was done in the interval, inclusive even of the fact of the payment of the amount due to him from the company, the money having been paid to his agent in his absence, having returned the money when the fact came to his knowledge, stands on the same footing as the rest. Now I take it to be undoubted law that if an agent in the course of his employment commits a fraud upon a third party, whereby damage ensues to the latter, he will be liable to the party wronged, though his principal would be so likewise. The case of *Henderson v. Lacon* (10) proceeded on this principle; and in *Oullen v. Thompson's Trustees* (14) Lord Westbury says, "All persons concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as the agent or servant of another." *A fortiori*, would this be so where the agent himself derives benefit from the fraud? The present case differs, it is true, in this, that here the defendants being the agents of the company, employed sub-agents to publish the pro-

spectus, but were no parties to the fraudulent statements contained in it, such statements having been published by the sub-agents without their authority or knowledge. But having, with the exception of the defendant Bell, become aware of those statements, and being also aware of their falsehood, they were parties to the issuing of the debentures, and applied a considerable portion of the proceeds to the satisfaction of their own claims on the company.

Now I apprehend, that where an agent employs a sub-agent, and the latter in the course of his employment is guilty of fraud or misrepresentation, and the agent, with knowledge of the fraud, derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent, the principle being, that he who profits by the fraud of one who is acting by his authority, though committed without his authority, adopts the act of the agent, and becomes responsible to the party who has been imposed upon and has sustained damage by reason of it.

If, therefore, the case of the defendant Bell, with which alone we have to deal, as it is only against the decision of the Court below in his favour, that the present appeal has been brought, had been undistinguishable from that of the other defendants, we should not have felt warranted in affirming the decision. But his case differs from that of the other defendants, in two most important particulars. First, though party to the receipt of the plaintiff's money, he does not appear to have been at that time acquainted with the real state of the company's affairs, and thus aware of the falsehood of the statements contained in the prospectus. Secondly, that none of the money actually came into his pocket.

It appears that Mr. Bell became a shareholder in the company at the instigation of the defendant Barnett, in June, 1872, under a belief that the concern would be a successful one. He took 100 shares and paid £1,000. He attended the general meeting on the 29th of September, 1873, at which it was resolved to raise money on debentures, and on the 31st of October he became

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a director of the company. He was therefore no party to the arrangement of the 8th of October, at which it was resolved to pay the advances made by the directors out of the money to be raised by the issue of debentures. He was present, as director, at the meeting of the 5th of November, at which the secretary was authorised to employ brokers to place the shares; and as it appears that in the ordinary course of business, it would be incidental to such employment that the brokers should issue a prospectus, the jury may have been warranted in finding that by joining in that resolution he constituted the brokers his agents to issue a prospectus. But of the prospectus as published, he knew nothing till some time after its publication. He left London for the Continent on the evening of the 5th of November, and did not return till the 25th, the prospectus having been issued, without his knowledge, in the interval. He was no party, directly or indirectly, to the statements contained in it. He, of course, became aware of the prospectus afterwards, and knowing the statements contained in it, was a party to the receipt of the plaintiff's money on the 26th of November. But it does not appear that he was then aware of the real state of the company's affairs. He swore on the trial that he had no such knowledge beyond what was afforded by the reports of the company's engineer, produced at the meeting of the 29th of September, reports which did not disclose the true state of affairs, and that, when he became aware of the statements put forth in the prospectus, he had no reason to believe them to be untrue, and there was no evidence to rebut his statement. We cannot, therefore, say that he was guilty of fraud in receiving the plaintiff's money on behalf of the company, and, as has been already stated, he derived no benefit personally from the receipt of it.

In the result, Bell has been guilty of no fraud in fact, he is not a principal deriving a benefit from a fraud committed by his agents procuring that benefit, nor, indeed, has he derived any benefit from the fraud committed by the sub-agents whom he was authorised to employ on

behalf of the company. From this state of facts we think that the appellant fails to establish the liability of the defendant Bell.

While, therefore, we are unable to adopt the grounds on which the judgment of the Exchequer Division is based, we are of opinion that, on the special grounds to which we have referred, the judgment in the case of the defendant Bell should be upheld and this appeal dismissed.

My brother Brett concurs in this judgment.

BRAMWELL, L.J.—I think the judgment for the defendant Bell should be affirmed.

I think I clearly understand the findings of the jury, and I agree with them. They acquit the defendant of actual fraud, that is to say, of knowledge of the contents of the prospectus, combined with knowledge of those facts that made it false, but they say that he, as one of the directors, having authorised the raising of money on debentures, authorised its being done in the usual way; that issuing prospectuses is usual, and so he authorised the issuing of prospectuses, and in that way of the one actually issued. On these findings the question turns. There is no motion for a new trial. Nor do I think there would be ground for one if there was. That the defendant was acting *bona fide*, cannot I think be doubted. We must therefore act on the finding of the jury. The defendant, then, is not actually guilty of this fraud. He did not commit it himself, nor procure its commission knowingly. Had he done so, he would have been liable, whether as director, manager, printer of the prospectus, or entire stranger to the company and acting merely from mischievousness, or love of roguery. But this is not the case.

I am of opinion, with an exception I will presently advert to, that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else,

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except where some duty is shewn and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty. I see no such right and duty here, nor any ground for saying they exist. But it is said they do; that there is an exception—the one above referred to—to the rule, that a man is only liable for fraud when it is actual fraud, and that though not morally fraudulent himself, he is in some cases liable for the fraud of his agent, and for this *Barwick v. The English Joint Stock Bank* (11) and the cases following thereon are cited. I am not going to say that that case is not law. In the first place we are bound by it; in the next it has been so much approved and followed that it has become part of the law; and lastly, it is undoubtedly a most useful and convenient rule that principals should be responsible for damages occasioned by the fraud of their agents, acting within the scope of their authority, at least to the extent of the gains of the principal, especially now that so much of the world's business is carried on by corporations. But with all respect be it said, the reasoning in *Barwick v. The English Joint Stock Bank* (11) is not satisfactory. Mr. Justice Willes says on the question: "Whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and any other wrong." Now with all submission there is a very obvious distinction. Fraud is always wilful, and a master, as a rule, is not liable for the wilful wrong of his servant. "The general rule," proceeds the learned Judge, "is that the master is answerable for every such wrong of the servant or agent, as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved. That principle is acted on every day in running down cases." The illustration is unfortunate, for it is certain that there is no such liability where the act of the servant

is wilful. He then cites *Esobank v. Nutting* (18), where the owner of a ship was held liable for a tortious conversion by the captain of part of the cargo by selling it. That case, however, was expressly decided, on the ground that the captain was acting for the owner within the scope of his authority. A similar remark applies to the next case cited. The principle that governs such cases as these, is not that the master is liable for the acts of his servant. It is the liability of principal for the acts of his agent. For suppose the defendants had been, not a joint stock company, but a private partnership, they would, if the decision is right, have been liable, and suppose the fraud had been committed by one of the firm, surely the other parties would have been liable. It seems to me, then, that *Barwick v. The English Joint Stock Bank* (11), cannot be supported on the reasons given. It is also remarkable that the counsel for the plaintiff in that case, in his opening, referred to cases in equity only, in supporting his proposition. There is a suspicious air of novelty in the decision. It is always prominently put forward in subsequent cases. But though doubting the reasoning on which it is founded (if one may do so without presumption) I think it may be supported on other grounds. It is important to put the case on its true ground. I think that every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract. I retain the opinion I expressed in *Udell v. Atherton* (1), and mean what I now say to be consistent with it. Has this defendant so undertaken for the absence of fraud in those who prepared and issued this prospectus? I think not. The company has. The company is subject to actions to recover back the money paid to it, or to recover damages for the frauds in question. The defendant had undertaken nothing. *Respondet superior*. The defendant is not superior. If he is, he is either joint prin-

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principal with the company, which is impossible, or he and the directors are one principal, and the company a second principal, which is equally impossible.

I need not say that I think none of the other cases founded on *Barwick v. The English Joint Stock Bank* (11) inconsistent with this; on the contrary, the principle I have ventured to suggest would support them all. I wish to add that assuming *Barwick v. The English Joint Stock Bank* (11) to be rightly decided, and on right principles, it does not, for the reasons above given, include the present case. I am of opinion that the judgment should be affirmed.

COTTON, L.J.—This is an appeal of the plaintiff from the decision of the Court of Exchequer directing judgment to be entered for the defendant Bell.

The action was brought against various directors of the Knight, Treverbyn and Resugga Hæmatite Iron Ore Company, including Mr. Bell, and by it the plaintiff sought to recover damages which he alleges he sustained by reason of his being induced by certain fraudulent mis-statements in a prospectus issued by the authority of the defendants to take from the company certain debentures.

On the 31st of October, 1873, Bell, who had for some time been a shareholder, became a director of the company. At this time the directors were driven to raise money by the issue of debentures, and they had been authorised so to do by a special resolution passed by a general meeting held on the 29th of September, 1872.

Mr. Bell attended a meeting of the Board held on the 5th of November, at which a resolution was passed authorising either the solicitor or secretary to employ brokers to place the debentures.

Under this resolution Messrs. Stewart and Lambe were employed as brokers to place the debentures, and they, acting without any express directions from Bell, prepared and issued the prospectus complained of. It set forth various statements as to the condition and prospects of the company which have been found to be false. There can be no doubt that the plaintiff took his debentures on the faith

of these statements. The defendant Bell had before the meeting of the 5th of November seen a report and balance-sheet, the statement of which, especially a statement in the report that the works had been suspended since the 1st of January, 1873, shewed the untruth of these representations in the prospectus which have been found to be false and fraudulent.

The defendant Bell went abroad shortly after the Board meeting of the 5th of November, but he returned to England before the debentures purchased by the plaintiff were allotted to him, and was present at the meeting of the Board at which debentures, including those held by the plaintiff, were allotted. The jury found that Mr. Bell was not guilty of any personal fraud, that he derived no benefit from the money raised by the debentures, and that Messrs. Stewart and Lambe, the brokers, were his agents in respect of the statement in the prospectus which, as I understand the finding, means that the brokers had authority from Mr. Bell to issue a prospectus, but no express authority to include therein the statements which are found to be fraudulent. On these findings the Court of Exchequer held that Mr. Bell was not liable to the plaintiff, and the question is whether that judgment can be maintained.

It is urged on behalf of Mr. Bell that he never saw the prospectus in question, that the brokers were servants of the company, and not of himself or of the other directors, and that in the absence of any personal knowledge on his part of the fraudulent statements, though the company as the principal of the brokers might be made liable he cannot be.

The judgment of the Court of Exchequer, so far as it expressly refers to the case of Mr. Bell, is very short. It states that the finding of the jury that the brokers were his agents in making the statements was contrary to the evidence, and therefore directed judgment to be entered for Mr. Bell, and they apparently did so on the ground, considered at much length in the previous part of their judgment, that the brokers were acting in the matter as servants or agents of the company, and that the company as principals and not the directors must be answerable

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for their mis-statements. I cannot agree with this opinion. Even if the company could in an action of deceit be held liable for the mis-statement in the prospectus, on which I express no opinion, it was part of the duty of the directors to issue the debentures, and I am of opinion that the brokers in preparing and issuing the prospectus must be considered as discharging for the directors part of the duty confided to them by the resolution authorising the issue of the debentures, that is, as acting for the directors in making the statements contained in the prospectus. This was the finding of the jury which in my opinion was not either contrary to the evidence, or without evidence to support it. When we look at the prospectus it does not purport to be the prospectus of the brokers. It states that the directors were prepared to receive applications for the debentures, and annexed to it is a form of application addressed to the directors and referring to the prospectus, and the defendant Bell, together with other directors, acted on this in allotting the debentures.

The prospectus must, in my opinion, be considered as the statement of the directors. It is true that Mr. Bell did not see the prospectus, but in November, whilst he was abroad, he learnt from an advertisement in a newspaper that a prospectus had been issued, and though that advertisement does not contain the statements of the prospectus which have been found to be fraudulent, it gives the summary of the prospectus, which, in my opinion, ought to have put Mr. Bell on enquiry, knowing as he did the actual state of the company, as to the contents of the prospectus. He certainly knew that the debentures would be applied for in reliance on the statements contained in the prospectus; and in my opinion it was, under the circumstances, his duty to ascertain what these statements were. He neglected this duty. Had he looked at the prospectus he would have seen that material statements were untrue. It is well established that in an action of deceit a defendant may be liable not only if he has made statements which he knows to be false, but if he has made statements which, in fact, are untrue,

recklessly, that is, without any reasonable grounds for believing them to be true, or under circumstances which shew that he was careless whether they were in fact true or false. On the same principle, in my opinion, if a defendant has employed an agent to issue a prospectus or other document on the statements of which persons are invited to contract, he will be liable to those who act to their prejudice in reliance on false statements made in this document if he knew facts which shewed the untruth of these statements, but was so careless as to the representations made by his agent as not to do what, in my opinion, it was his duty to do, namely, to look at the document issued by his authority. This view is supported by what was said by Lord Chelmsford in moving the judgment of the House of Lords in *Peck v. Gurney* (16) as to the case of Mr. Barclay.

In my opinion, therefore, judgment in the action ought to have been given against Mr. Bell.

Judgment affirmed.

Solicitors—H. Fox, for plaintiff; G. S. & H. Brandon, for defendant Bell.

[IN THE QUEEN'S BENCH DIVISION.]

1878. }
June 6. } *Ex parte* THOMAS BROWN.

Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 3, 51—Conviction for Selling Beer without License—Penalty—Imprisonment in Default of Payment—Habeas Corpus—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 19.

[For the report of the above case, see 47 Law J. Rep. M.C. 108.]

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878. }
 Feb. 5. } THE QUEEN v. THE OVERSEERS
 May 18. } OF WALSALL.*

Court of Appeal—Jurisdiction—Case stated by Quarter Sessions for the Opinion of the Queen's Bench Division—Poor Rate—Judicature Act, 1873, ss. 19, 45.

The Court of Appeal has no appellate jurisdiction to review a decision of the Queen's Bench Division in the matter of a poor-rate, which is a mere opinion binding on no one.—So held per COCKBURN, L.C.J., and BRETT, L.J.; dissentientibus BRAMWELL, L.J., and COTTON, L.J.

This was an appeal from the decision of the Queen's Bench Division (MELLOR, J., and LUSH, J.), affirming the order of the Quarter Sessions for the borough of Walsall, on an appeal against a poor-rate made on the appellants.

The preliminary objection was taken that there was no appeal in such cases.

Herschell and Anstie, for the appellants, cited—*The Queen v. Steel* (1); *The Queen v. Fletcher* (2); *The Queen v. London and North Western Railway Company* (3); *The Queen v. Collins* (4). The Supreme Court of Judicature Act, 1873, secs. 19, 45, 47, Order LXII.

Neville (Bosanquet with him) cited *The Queen v. Chantrell* (5); 5 Geo. 2. c. 19. ss. 2, 3.

Herschell, in reply.

Our. adv. vult.

The following judgments were delivered on the 18th of May:—

COTTON, L.J.—This is an appeal of the overseers of the poor of Walsall and of the corporation of Walsall against a rule of the Queen's Bench Division, made the 24th of November, 1877, by which that

* *Coram Cockburn, L.C.J.; Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.*

(1) 45 Law J. Rep. Q.B. 391; s. c. Law Rep. 2 Q.B. Div. 37.

(2) Law Rep. 2 Q.B. Div. 43.

(3) 43 Law J. Rep. M.C. 57; s. c. M.C. 94; s. c. Law Rep. 9 Q.B. 155.

(4) 45 Law J. Rep. Q.B. 413; s. c. Law Rep. 2 Q.B. Div. 30.

(5) 44 Law J. Rep. M.C. 94; s. c. Law Rep. 10 Q.B. 587.

Court discharged a rule *nisi*, calling upon the London and North Western Railway Company to shew cause why an order of sessions therein referred to should not be quashed, and whereby it was ordered that the order of sessions be affirmed.

The first question and the only one now to be considered is, whether this Court has any jurisdiction to entertain the appeal, and, with all respect for the judgment of those who hold the opposite opinion, I am of opinion that it has. This depends on the 19th section of the Judicature Act, 1873, taken in connection with the other provisions of that Act, and the amending Acts of 1875 and 1876. In construing the 19th section it must be remembered that under these Acts this Court, while it has transferred to it, by section 18, all the powers of the Exchequer Chamber, has a very much more extensive jurisdiction than was ever possessed by that Court. It is authorised to hear appeals from every division of the High Court, and it can and does hear appeals from orders refusing new trials, when the application for them is based on the ground of the verdict being against the weight of evidence, or of there being no evidence to support the verdict, and it can hear appeals from interlocutory orders made on matters of mere practice. Apparently it was intended by the Legislature to give this Court the largest powers of hearing appeals, or rather to give to the suitor the amplest right of appeal. What then is the 19th section? This 19th section in terms gives an appeal from every judgment or order, save as thereafter mentioned, of the High Court, and by the interpretation clause "order" includes "rule." The first point is, what are the exceptions referred to? They appear to be criminal cases, in which there is no appeal save for some error of law apparent upon the record (section 47), orders by consent or as to costs (section 49), and cases where by Act of Parliament the decision of any Court or Judge, whose jurisdiction is transferred to the High Court of Justice, is to be final (Act of 1876, section 20). This case does not come within any of these exceptions, for it is not suggested that there is anything of a criminal nature in the case, and,

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although before the Judicature Acts there was no appeal in such cases as the present from the Court of Queen's Bench, it is not suggested that there is any Act of Parliament which makes the decision of the Queen's Bench in such cases final; and the necessity for the 20th section of the Act of 1876 shews what a large power of hearing appeals had, in the opinion of the Legislature, been granted to this Court. That which is brought before us for review by the defendants is in form a rule or order of the Queen's Bench Division, discharging a rule *nisi*, and directing that the order of the sessions be affirmed. This, having regard to the interpretation clause, is an order of the Queen's Bench Division within the meaning of the 19th section, and it lies on those who contend that, though the case is not within any of the exceptions mentioned in section 19, there is no appeal, to make out their case. How is it shewn that it is not within our jurisdiction to entertain the appeal? As I understand the argument, it is that as the case is one as to the amount of rate to be charged on the railway company, the decision of the matter is under Act of Parliament given to the quarter sessions, and that they are finally to decide the matter, without appeal from their decision, and that the order of the Queen's Bench is a mere statement of opinion on which the sessions will act, and it is therefore not subject to appeal. I acquiesce in the view that the litigants as to the validity and amount of the rate cannot, as of right, appeal from the decision of the sessions, and cannot insist on the decision of the sessions being in any way reviewed. But in the present case the sessions have stated a case, and the question for us is, not whether there is an appeal from the judgment of the sessions, but whether the opinion of the Queen's Bench Division expressed by the rule appealed from is not open to review. The case of *The Queen v. Chantrell* (5) is an authority that the power of the Queen's Bench to entertain the case, even on the submission of the sessions, depends on the Court having power to issue a writ of *certiorari* to bring the case before it. In that case Field, J., delivering the judgment of the Court, consisting of himself

and Blackburn, J., says, "The question whether a case was one of difficulty or not, fit to be reserved for the Court, was to be determined by the sessions, and not by the parties. But if they found it one of difficulty, and stated a case for the opinion of the Court, then it became necessary that a *certiorari* should issue to bring that case before the Court, that being the only mode by which the order could be brought into the Court having jurisdiction to quash or confirm it." In that case the justices had convicted, subject to a case for the opinion of the Court, but as the Act under which the conviction was made expressly enacted that convictions under it should not be quashed for errors in form, or be removed by *certiorari*, the Court held that, even though a case had been stated by the justices, they could not entertain the question. In a case where the Queen's Bench Division has, without any submission of the sessions, power to issue, and has issued, a writ of *certiorari*, any order made by the Court in a matter not within the exceptions already referred to would be subject to an appeal to this Court. In my opinion there is no sufficient reason why an order, which can only be made by this Court in cases where it has power to issue a *certiorari*, should not be subject to appeal because the submission of the sessions has enabled the Court to issue the writ.

But it is argued that if the Court should differ from the Queen's Bench Division, this Court has no power to compel the sessions to obey any order made on the appeal. It does not appear that the Queen's Bench could enforce obedience to its opinion, if opinion only. All it could do would be to quash or affirm the order of sessions, and if in fact for the purpose of expressing its opinion it makes an order to quash the order of sessions, I see no reason why this Court should not do so on appeal, as it has power to make such order as the Court appealed from ought to have made. Neither, in my opinion, is it a sufficient argument against the right of appeal that the operative order as regards the rate must be that of the sessions. In many cases on appeal to the House of Lords

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from the Court of Chancery, it was the practice of the House of Lords to remit the case to the Court below, with a direction as to the rights of parties, and in cases where it was necessary to enforce an order of the House of Lords, made on appeal from the Court of Chancery, it was the practice, for the purpose of enforcing the order of the House of Lords, to make it an order of the Court of Chancery.

The case then stands thus: In some way not explained a practice now well established has grown up, under which the sessions give their judgment in these cases subject to a case for the opinion of the Queen's Bench. The writ of *certiorari* is then issued for the purpose of bringing the matter before that Court, which gives its opinion, not as was the practice on cases sent by the Court of Chancery for the opinion of common law Courts, by the certificate signed by the Judges who heard the case argued, but by a rule or order. This rule is within the express terms of the 19th section of the Act of 1873, and in my opinion there is no sufficient reason for saying that it does not come under the section subject to appeal.

I have not adverted to section 45 of the Act of 1873. It has not been shewn that in any case there is what can strictly be called an appeal from petty or quarter sessions to the High Court, though it has been suggested that there are or may be such cases. If there are not, then on the fair construction of that section, it must, in my opinion, be taken to apply to cases like the present, where, though in form there is no appeal from the sessions, there is in substance a review of their decision. In my opinion the Court is, under section 19 of the Act of 1873, bound to hear this appeal.

BRETT, L.J.—I think that we have no jurisdiction to hear this appeal. I entirely agree with the judgment of the Lord Chief Justice which he is about to deliver, and have, therefore, thought it to be unnecessary for me to deliver a judgment. I agree on the ground that what is before us is not a judgment or order of the Queen's Bench Division, and is not a binding decision on any one.

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BRAMWELL, L.J.—I am of opinion that an appeal lies in this case. The Lord Chief Justice has favoured me with his judgment, and I agree with nearly, if not all, that he has written. There is no original jurisdiction in the Queen's Bench as to poor law matters. Appeal is the creature of statute. The sessions need not state a case for the opinion of the Court. It is a case for its opinion. To my mind these considerations do not solve the question. At the outside they present considerations tending one way only. It is necessary to look at those that tend the other way. I will proceed to state them. The Judicature Act intended as a rule of all but universal application that there should be an appeal from the High Court to the Court of Appeal in every case where the High Court has given a judgment, order or decision. The one exception is of criminal matters, which were not the subject of error. This exception shews that everything else was intended to be appealable. I think an appeal would lie even without the enactment in section 45, though it would, to my mind, be more doubtful than it is with that section. For it might be said that the opinion or advice asked by the sessions and given was not a judgment or order within section 19. I think it would be. I propose, however, to examine the question in connection with that section. We start with this: that proceedings on the Crown side of the division are as a rule the subject of appeal. Then section 45 of the original Judicature Act says: "All appeals from petty or Quarter Sessions," which might have been brought to any Court or Judge, may be heard before a new Court, and the determination thereof shall be final, "unless special leave to appeal" is given by such Court, &c. This section, therefore, contemplates that there was an "appeal" from quarter sessions to one of the Courts whose jurisdiction is transferred, and that from the decision on that appeal there may be a further appeal to the Court of Appeal. Now what appeals were there from quarter sessions? I speak with reserve, because I have no familiarity with the matter. I believe that there is no appeal, strictly so called,

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nor indeed anything in the nature of an appeal from quarter sessions given by statute to the Queen's Bench; that the jurisdiction of the Queen's Bench was always, and still is, exercised by *certiorari* under powers of the common law—a jurisdiction not limited to quarter sessions, but extending to other cases where orders are made by Courts or bodies having judicial powers. On the Queen's Bench being informed that there is invalidity in the proceedings of the inferior Court on the face of them, not an error of decision, but a want of authority, or excess, a *certiorari* issues, and on the order being brought up, it is quashed if the order is not sustained; if sustained, the order remains in force, and a *procedendo* issues. This no doubt is not what a lawyer speaking strictly would call an "appeal." But practically it is an appeal; it is so called by every lawyer even when speaking gravely of the subject, and undoubtedly it would be difficult to make anyone not a lawyer understand why "appeal" was not the right word. But assuming it not to be an appeal, it is a rule of law and good sense that where you have words used which have no application in their primary or strict sense, you must, if you can, apply them in a secondary or popular sense. And, therefore, if there is nothing that can be strictly called an appeal from quarter sessions, nor anything that can in any way be so called, except proceedings by *certiorari*, which in substance are appeals, the Legislature must be taken to have meant them. Still, I admit that if the enactment is of impossible application it must be disregarded. But is it? Let us examine the matter. I repeat, I speak with reserve. But, as I understand, where an order of quarter sessions is brought up on *certiorari*, and it is proposed to quash it, a rule for that purpose is obtained, and made absolute or discharged. I refer to where there is no case stated, but where a defect on the face of the order is alleged to exist. It must be admitted that there is no difficulty in applying the statute to such a case. Is there where there is no defect on the face of the proceedings unless the special case is referred to? I see none. No doubt the origin of the matter was as

the Lord Chief Justice mentions in his judgment. No doubt it was a contrivance to get the opinion of the Queen's Bench. No doubt it was an opinion asked for, which the sessions might have disregarded, but has not this *mos pro lege* become *lex*? The procedure is the same as when a defect on the face of the proceedings is relied on, except that a rule *nisi* is taken as granted. Has not the Legislature said if the sessions want the opinion of the Queen's Bench they must seek it, subject to that opinion being revised by the Court of Appeal? If they can disregard the opinion of the Queen's Bench, so they can that of the Court of Appeal; if they do not choose to ask it subject to revision, they can still refuse to do so. Is it to be supposed that where a case is granted and stated, and there is also an alleged defect on the face of the proceedings independently of the case stated, the Court of Appeal may examine the latter and not the former matter? Or is it said that appeal lies where there is a defect on the face of the proceedings, but not where a case is stated? On the substance of the matter I cannot see why there should not be an appeal in these cases. They continually involve questions of the utmost importance. As to the expense, with all submission be it said, the Legislature, which passed a law that has given a power to make the trumpery appeals that are made, was not likely to be deterred by that consideration in these sessions cases, in which thousands are often at stake, especially as there must be leave to appeal.

I ought to mention one matter which tells against the appeal possibly, namely, that in some cases the order of sessions is neither quashed nor affirmed, but sent back with a direction or opinion. But if we look at the substance of the matter it is equally a decision, as much as a direction for a new trial, which is no judgment on the case.

I am of opinion that an appeal lies, and that the case should be considered on the merits. I am also of opinion that even if we cannot consider the question arising on the case stated, we have jurisdiction to hear the appeal, and that our judgment should be that it be dismissed, because

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the judgment below is right as far as we have power to examine it.

COCKBURN, L.C.J.—This is an appeal from the decision of the Queen's Bench Division affirming the order of the Court of Quarter Sessions for the borough of Walsall, on an appeal against a poor-rate made on the appellants. The question with which in the present stage of this appeal we are alone concerned is whether this Court has any appellate jurisdiction to review a decision of the Queen's Bench Division in the matter of a poor-rate. I am of opinion that it has not. It is true that by the nineteenth section of the original Judicature Act it is enacted that the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any "judgment or order" of the High Court of Justice, or of any Judges or Judge thereof. The fallacy in the reasoning which seeks to apply this enactment to the decision of the Queen's Bench Division in the matter of a poor-rate consists in treating such decision as a "judgment or order" within the meaning of this section. To see this it is, as it seems to me, only necessary to examine in what the jurisdiction of the Queen's Bench Division in the matter of an appeal against a poor-rate—(if it can be properly called jurisdiction)—consists, and how it arises.

It is familiar knowledge that in matters relating to the maintenance of the poor, the Court of Queen's Bench has never, from the first establishment of the poor law, had jurisdiction, either as a Court of first instance, or as a Court of Appeal, except, as regards the latter, as far as the Court of Quarter Sessions has, of its own free will and mere motion, submitted its judgment to the opinion of the Court. And the reason is plain. By the statutes by which provision is made for the maintenance of the poor the jurisdiction over matters connected with it is vested exclusively in justices of the peace in petty sessions in the first instance, and in justices in quarter sessions on appeal. Of this the language of the statutes admits of no doubt whatsoever. By the 43 Eliz. c. 2. s. 6, it is enacted, "That if

any person or persons shall find themselves grieved with any cess, or tax, or other act done by the said churchwardens and other persons, or by justices of the peace, that then it shall be lawful for the justices of the peace at their general quarter sessions, or the greater number of them, to take such order therein as to them shall be thought convenient, and the same to conclude and bind all the said parties." By a later Act, the 17 Geo. 2. c. 38. s. 4, it is enacted, "That in case any person or persons shall find him, her or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her or themselves aggrieved by any neglect, act or thing done or omitted by the churchwardens and overseers of the poor, or by any of His Majesty's justices of the peace, it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation or franchise where such parish, township or place lies; and the justices of the peace there assembled are hereby authorised and required to receive such appeal, and to hear and finally determine the same." In like manner by the Act of 13 & 14 Car. 2. c. 12, by which the law of settlement was established, the appeal given to any persons who think themselves aggrieved by orders of removal is to "the justices at Quarter Sessions, who are required to do them justice according to the merits of the case." No ulterior appeal is given to any other Court. Exclusive jurisdiction being thus given to the justices in petty sessions in the first instance, and to the quarter sessions on appeal, it has been long settled that when once this jurisdiction of the Court of Quarter Sessions on appeal has been exercised, the Court of Queen's Bench never had, and

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the Queen's Bench Division of the High Court of Justice, which has taken its place, therefore cannot have any authority whatsoever, except when put in motion by the sessions. If, indeed, the Court of Quarter Sessions refuses to exercise jurisdiction when it has it, the Court of Queen's Bench will by *mandamus* compel that Court to hear and determine, in the same manner as it will prevent all other inferior Courts from declining jurisdiction where it exists, and so refusing to do justice. But if the jurisdiction has once been exercised, however erroneous the decision, if the order of the quarter sessions be regular on the face of it, so that it appears therefrom that the order of the quarter sessions is within its jurisdiction and competency, the absence of which alone gives occasion to the interference of the Superior Court, the Court of Queen's Bench has from the earliest time declared itself incompetent to interfere, the simple reason being, as has been again and again held, that it has no appellate jurisdiction over the Court of Quarter Sessions in matters which are within the proper jurisdiction of the latter, which an appeal against a poor rate undoubtedly is. Conclusive authority for this position is to be found in the following cases: In *The King v. The Justices of Monmouthshire* (6) the sessions on an appeal against an order of removal being equally divided as to the merits of the appeal, but being of opinion that the respondents ought to have proved the forty days' residence, but had not done so, quashed the order. A *mandamus* to compel them to re-hear the case having been applied for, the rule was discharged. Abbot, C.J., said: "I think the rule for a *mandamus* ought to be discharged. It appears that in this case the sessions have given their judgment. This Court is not a Court of error from that Court. It may compel the sessions to proceed to hear and decide the appeal; but when they have so determined it this Court cannot compel them to correct their judgment, if it appear to be erroneous. It is unnecessary to say whether the judgment

pronounced by the sessions is erroneous, because we are of opinion that if it were so we have no authority to compel them to correct it." In a subsequent case of *The King v. The Justices of Monmouthshire* (7) the Court of Quarter Sessions had been equally divided, but the equality had arisen from an interested justice having taken part in the decision. The Court being thus divided, an order was entered for adjourning the appeal. A *certiorari* having been applied for to bring up the order for adjournment with a view to quash it as a nullity, inasmuch as the vote of the interested justice ought not to have had any effect, the rule was discharged. Lord Tenterden said: "It is contended that, though the justices were divided in point of fact, in point of law the vote given by the party interested was a nullity, and that the sessions ought to have quashed the order. The late decisions establish that we cannot assume to ourselves the jurisdiction of a Court of error, and review the judgment of the sessions. It is said that the sessions had not jurisdiction to make the adjournment. It is clear they had jurisdiction to make any order concerning the appeal, and, among others, the order that the hearing should be adjourned. Here a judgment has been pronounced by the sessions relating to a matter over which the Court had jurisdiction; and, assuming their judgment to be erroneous, I think we have not jurisdiction as a Court of error to review it." Even where a judgment had been entered by mistake, owing to mis-calculation of the votes, the Court of Queen's Bench refused to interfere. Lord Ellenborough, after pointing out that, on discovery of the mistake, application to correct it should have been made to the Court of Quarter Sessions itself while still sitting, said: "No step of the sort was taken, but judgment was entered, and this Court cannot, in order to supply a remedy, exercise a jurisdiction which does not belong to it." *The King v. The Justices of Leicestershire* (8). It

(6) 4 B. & C. 844.

(7) 8 B. & C. 187.

(8) 1 M. & S. 442.

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has been settled since the cases of *The King v. Oulton* (9) and *The King v. Preston-upon-the-Hill* (10) that a bill of exceptions does not lie from the judgment of a Court of Quarter Sessions. In the latter case Lord Hardwicke, C.J., said: "This is a case of great consequence, and there may be very great inconveniences on either side. It hath been much wished that a bill of exceptions would lie to the justices at their sessions, because otherwise it may sometimes happen that they may determine in an arbitrary manner, contrary to the resolutions of the Courts of law. For if the justices will not state the facts specially, though requested to do so, when the matter is doubtful, this is very blameable conduct in them, and it is to be wished that it might be avoided. On the other hand, there may be very great inconveniences arising from the abuse of bills of exceptions; and this matter for the settlement of the poor, which ought to be rendered cheap and speedy, may by such means be rendered dilatory, expensive and burdensome." The reporter adds that "after the full hearing of the arguments on both sides the Court were unanimously of opinion that a bill of exceptions doth not lie to the Quarter Sessions." Nevertheless, though it is thus clear, on reference to the statutes and the authorities, that the Court of Queen's Bench has no appellate jurisdiction, properly so called, in these matters, a practice became established, according to which the Courts of Quarter Sessions in cases of difficulty submitted their judgment to the opinion of the Court of Queen's Bench, and either affirmed or quashed the orders appealed against according to its decision. Let us see what is the legal effect of the course thus adopted. The origin of this practice is matter of history. A full account of it is to be found in the learned judgment of Field, J. in the case of *The Queen v. Chantrell* (5). In remote times the jurisdiction of justices, as given by the commission of the peace, the terms of which are set forth in *Dalton's Justice of the Peace*, was subject to this proviso: "If a case of

difficulty upon any of the premises before you, or any two of you, shall happen to arise, then let judgment in no wise be given thereupon before you, or any two of you, unless in the presence of one of our justices of either bench, or of one of our justices appointed to hold the assizes in the county." "This," observes Field, J., "not only empowers but requires the justices, in any case of difficulty, to obtain the opinion of a Judge; and, by implication, requires the Judge to give his opinion." There is, however, nothing in this provision which makes it obligatory on the justices to adopt the opinion of the Judge; still less which enables the Judge to pronounce an effective judgment independently of the justices. Accordingly, when called upon to decide an appeal as to the validity of orders made in parish matters, and in so doing to decide difficult questions of law on the construction of ill-drawn statutes, the Courts of Quarter Sessions in cases of difficulty took the course of adjourning their decision till they had sought the advice of the Judges of assize on the point or points of law which had arisen. Having obtained it they entered their judgment accordingly. This practice being, however, attended with some inconvenience, as the Judges of assize would not, generally speaking, have time to attend to such matters, so as to afford them sufficient consideration, a practice by degrees arose, suggested in all probability in the first instance by the Judges of assize themselves, of resorting to the Court of King's Bench for its advice on the law as applicable to the facts—these being stated as found by the sessions, in the form of a special case. This practice is, however, comparatively of modern origin. As late as the 11th Will. 3, Lord Holt and the Court of King's Bench refused to hear a case which had been reserved for their opinion by a Court of Quarter Sessions, and remitted it to the Judge of assize (11). In the time of Lord Hardwicke the modern practice prevailed, but had not entirely superseded the old—*The King v. Tedford* (12). The order of sessions as

(9) 1 Burr. S.C. 64.

(10) Ibid. 77.

(11) Anon. 2 Salk. 486.

(12) 1 Burr. S.C. 57.

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there stated recites that a case had been stated for the Judges of assize, but that the Judges of assize had not had time to hear and determine it. At a later period all traces of the old practice had disappeared, no doubt owing to the greater convenience of the modern. In the practice which thus became established, two singular anomalies arose. In the first place the justices, though bound in all cases of difficulty to consult judicial authority, constituted themselves the sole judges of the cases in which such difficulty occurred; while, as there was under the statutes no appeal from their decision to the Court of King's Bench, there was no power in the latter Court to compel them to state a case for its opinion. It is true that there is inherent in the jurisdiction of the Court of Queen's Bench authority to bring before it by writ of *certiorari*, save where the writ is taken away by statutory enactment or charter, the proceedings of any Court of inferior jurisdiction, with a view to quash such proceedings. But this applies only where there is some defect of jurisdiction or informality, or defect apparent on the face of the proceedings. The Court cannot—(and this must be carefully borne in mind)—give itself appellate jurisdiction through the writ of *certiorari* where it otherwise possesses none. "The writ of *certiorari*," say the Court of Queen's Bench in *The Queen v. Moreley* (13), "does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds." It would be a mistake to suppose that, because the order of sessions is brought before the Court by *certiorari*, the Court thereby acquires appellate jurisdiction. This plainly appears from the undoubted fact that a party complaining of a wrongful decision of the sessions in respect of law or fact—so long as the proceedings have been regular and formal—could not on application to the Court of Queen's Bench obtain a writ of *certiorari* to bring up the order of quarter sessions for the purpose of its being considered on the merits. The case is in truth altogether an anomaly. In every other case the

writ of *certiorari* is issued at the instance of the party aggrieved, and on a *prima facie* case being shewn of some ground why the proceeding in the inferior Court should be set aside. Here, without any ground being shewn or alleged, and not at the instance of the parties, save as matter of form, but in reality at the instance of the sessions with a view to obtain the opinion of the Court, the writ issues solely for the purpose of bringing the proceedings before the Court, such being the only means of doing so, there being no power of appeal. The law is correctly stated in *Cornier's Crown Practice*, p. 66, and is fully borne out by the authorities there referred to:—"Upon an order of quarter sessions made subject to the opinion of the Court of Queen's Bench on a case stated, and removed by *certiorari*, the Court will consider and determine any matter of law arising upon the facts found by the sessions, and stated in the case upon which their opinion may be asked; but if no case be stated for their opinion, the Court will not upon *certiorari* inquire further than whether the justices have acted within their jurisdiction, and whether their proceedings are regular upon the face of them, although their judgment on the facts of the case may appear to have been erroneous." In the second place, though the justices were directed to have recourse to judicial assistance before pronouncing judgment, they here took, and were allowed to take, the opposite course, namely of first pronouncing their judgment, and then applying to the Court for its opinion. But here, inasmuch as there being no appeal from the judgment of the quarter sessions, or controlling power in the Court of King's Bench, the judgment of the quarter sessions, if once unconditionally pronounced, would have been final and conclusive, in order to avoid this consequence, and at the same time to prevent the necessity of the case being sent back to the sessions when the Court of King's Bench had pronounced its opinion, the practice became established for the Court of Quarter Sessions to pronounce its judgment conditionally, making it subject to the opinion of the Court of King's Bench,

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according to which the judgment of the sessions was to be affirmed or quashed, as the case might be. In furtherance of this course of proceeding, the order of sessions not being before it, and there being, as I have said, no other way by which the case stated by the sessions could be brought before it, the Court of King's Bench lent the assistance of its process of *certiorari* to bring up the order and case, that the Court might deal with it. Nothing can be better settled than that it is entirely at the discretion of the sessions whether to grant a case, and so to submit their judgment to the opinion of the Court of Queen's Bench or not. Even though the appeal should be one in which in the proper exercise of their discretion they ought undoubtedly to grant a case in order that their judgment may be reviewed, if they refuse to do so there are no means of compelling them. The decision of Lord Hardwicke and the Court of King's Bench in the cases of *The King v. Oulton* (9) and *The King v. Preston-upon-the-Hill* (10), has never been questioned, and is undoubted law. And the reason is obvious. A poor-rate, like an order of removal, is made under a statutory power. As has been shewn, the right of appeal given by the statutes to a party aggrieved is to the quarter sessions; and jurisdiction is given to that Court to entertain and give judgment on such appeals, either by affirming or quashing the order appealed against; but no ulterior right of appeal is given. The appeal lies to the Court of Quarter Sessions alone. The jurisdiction of the latter is absolute and final, and independent of that of any other Court. No other Court, not even the highest in the realm, has, under the statutes just referred to, any power to reverse or to interfere with the judgments of a Court of Quarter Sessions when once pronounced.

One more observation remains to be made with reference to the jurisdiction of the quarter sessions, but it is a most important one. A Court upon which is imposed by Act of Parliament the duty of adjudicating in a particular matter between litigant parties cannot, unless authorised so to do as part of its statutory power, transfer or delegate to another

the whole or any portion of its jurisdiction, or give to the decisions of such other Court any binding force in law. In this exceptional and analogous instance a practice—a sort of *mos pro lege*—has grown up of the Court of Quarter Sessions making its judgment depend upon the opinion to be pronounced by the Court of Queen's Bench. But the ultimate judgment must still be considered as that of the sessions, whatever may be the form it assumes. For the right of appeal, which is the creation of the statute, is to the sessions alone; the jurisdiction is given to the sessions alone, without any ulterior appellate power being conferred on the Queen's Bench Division, or being capable of being transferred to it by the Court of Quarter Sessions. If, therefore, the decision in such a case as the present were to be taken to be in point of law the judgment of the Queen's Bench Division, it would manifestly involve a usurpation of authority in the latter directly in the teeth of statutes which have in express terms enacted that the decision of the Court of Quarter Sessions shall be final. What takes place on the hearing in the Divisional Court is quite consistent with this view. All that is done on the decision of the Court being pronounced is, that an entry is made in the Master's book that the rule has been made absolute to affirm or quash the order of quarter sessions as the case may be, and a rule is drawn up accordingly, and a copy of it sent to the clerk of the peace for the information of the quarter sessions, and is copied by him into the minute-book of their proceedings. No instance has occurred in which the parties to the original order have failed to act on the decision of the Court of Queen's Bench, nor does it appear clear what means could be resorted to to compel obedience if necessary, the Court not having by the statute either original or appellate jurisdiction over the subject-matter. It thus appearing that in the matter of a poor-rate, or of any order of removal, the ancient Court of Queen's Bench had not, and consequently the present Queen's Bench Division has not, any original or any appellate jurisdiction, what then is the jurisdiction which it now exercises in these matters? I answer,

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consultative only. It directs the Court of Quarter Sessions as to the law applicable to the facts stated in the special case. It supplies the conditions according to which the judgment of the quarter sessions is to stand or fall—that judgment being that the order appealed against shall be affirmed or quashed as the case may be, according to what shall be the opinion of the Queen's Bench Division. The intermediate decision is that of the Queen's Bench Division. The ultimate judgment is that of the Court in whom the jurisdiction is alone vested by the statute which creates the appeal, and by which Court alone in legal theory it can be exercised. The Divisional Court has no authority whatever to pronounce any judgment whatsoever, the authority so to do being vested by the statutes in the Court of Quarter Sessions alone; and the judgment is therefore of necessity that of the Court to which alone the appellate jurisdiction belongs. Hence arises the form in which the matter is submitted to the Court—not in that of a judgment of the quarter sessions, to be affirmed or reversed by a judgment of the Court of Queen's Bench, but in that of a judgment which shall be capable of being moulded into an affirmative or negative one according to the "opinion" which the Court shall pronounce to be the right one. And the form is not unimportant; it is that the judgment shall be affirmed or reversed according to—not the judgment or decision, but—the "opinion" of the Queen's Bench Division. Nor could it be otherwise. For, the ultimate appeal being by the express provision of the statute in the Court of Quarter Sessions, and the latter having no statutory authority to delegate any part of its jurisdiction, the Court of Queen's Bench could not possibly have or exercise an appellate jurisdiction which should have *proprio vigore* the force of law. It would be, as has been pointed out, a manifest usurpation on its part to assume it.

In cases stated under the 20 & 21 Vict. c. 43 the law is altogether different. There the magistrate is under certain circumstances bound to state a case; and by the 6th section of the Act authority is expressly given to the Court, on a case sub-

mitted to it by a magistrate, to "reverse affirm or amend" the conviction appealed against. Nothing of the kind exists where a case is stated by the quarter sessions for the opinion of the Court on an appeal against a poor-rate or an order of removal.

But although no appellate jurisdiction is given directly or indirectly by the statute to the Court of Queen's Bench, and no authority is given to the Court of quarter sessions to delegate its appellate authority to the former, beyond that of submitting to its opinion as to what the judgment of the Court of Quarter Sessions should be, let us for the sake of argument suppose that the sessions can and do delegate their appellate jurisdiction to the Superior Court by submitting the facts for its judgment as to the law. How can this operate so as to have the effect of involving a further submission to the decision of a third Court, which is not the Divisional Court, because such Court may have in general appellate jurisdiction over orders and judgments of the Queen's Bench Division, and thus have the effect of extending the submission without the assent of the Court of Quarter Sessions? To grant or refuse a case is, as we have seen, in the uncontrolled discretion of the quarter sessions. They have given their judgment subject to the opinion of the Divisional Court on the case which they have thought proper to submit. By that opinion their judgment is to stand or fall. But how will it do so if the opinion of the Queen's Bench Division should be reversed by the decision of this Court in the exercise of its appellate jurisdiction, a jurisdiction in respect of this class of cases hitherto unknown and unheard of? How in that event could it be said that the order, which was to be affirmed or quashed (as the case might be), according as the opinion of the Queen's Bench Division might be one way or the other, was rendered valid or invalid in conformity to the opinion of that Court, if its decision is reversed? A decision reversed becomes a nullity. The judgment of a Court of Appeal, reversing that of a Court appealed from, is not the judgment of the latter Court, but of the former. How, then, will the judgment of this Court, should it differ from that

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of the Divisional Court, satisfy the condition on which the judgment of the quarter sessions—who have plenary and exclusive jurisdiction over the subject-matter, and can make their submission to the Queen's Bench Division subject to such conditions as they think proper, and who have here submitted their judgment to the Queen's Bench Division, and not to any other Court, is—by the express terms of the submission, to depend? Can the terms of the submission be thus, without any assent on the part of the Court of Quarter Sessions, enlarged, so as to give authority to this Court, which assuredly is not that of the Queen's Bench Division? And this brings me to the consideration of the question on still broader grounds. The primary purpose and intention of the Legislature in creating the present Court of Appeal was, I apprehend, to transfer to it the appellate jurisdiction heretofore vested in the Court of Exchequer Chamber. In doing so, however, it has, it is true, used terms so large as to embrace, according to the decision of this Court, judgments and orders in matters of mere procedure, as to which no appeal from the Divisional Court previously existed. But I cannot think it can have been the intention that the terms used should apply to cases in which there was no inherent jurisdiction in a Divisional Court, and which were not involved in the advance to some final judgment from which an appeal lay. It cannot have been intended, however general may be the terms of the section, to make, as it were by a side-wind, parochial rates and orders of removal matters which before were not the subjects of appeal, and could not be taken beyond the Divisional Court, liable to be brought before this Court, and consequently to be taken on a further appeal to the House of Lords, with all the expense attending on such an ultimate appeal, thus involving the inconvenience which, as was pointed out by Lord Hardwicke in *The Queen v. Preston-upon-the-Hill* (10), would result from rendering "dilatatory, expensive and burdensome" matters relating to the maintenance of the poor, which, as he observed, "should be cheap and speedy." The spirit of the present legislation is, I think, apparent

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from the provision introduced into the Act of 1876, by the 20th section of which, lest the general words of the 19th section of the Act of 1873 should have too extensive an operation, it is expressly provided that, "where, by Act of Parliament, it is provided that the decision of any Court or Judge, the jurisdiction of which Court or Judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any Judge thereof, to the Court of Appeal." It is true that this case is not within the precise terms of this enactment, inasmuch as this decision, from which the right of appeal is here claimed, is not one which is made final by Act of Parliament. But I apprehend that the only reason for not making the terms of the enactment sufficiently comprehensive to include such a case as the present was simply that, as it had never occurred to any one to suppose that there could be an appeal from the decision of the Court of Queen's Bench in such a case, it was not deemed necessary to make the language apply to it in terms. That the case is within the spirit of the enactment cannot, I think, be doubted.

Whether, therefore, I look to the nature of the jurisdiction heretofore exercised by the Court of Queen's Bench, or to the object and intention of the recent legislation, I can arrive at no other conclusion than that a decision of the Divisional Court on an appeal against a rate is not a judgment or order within the 19th section of the Judicature Act of 1873. I am therefore of opinion that this Court has not jurisdiction to entertain this appeal. The Court being equally divided the appeal will be dismissed.

Appeal dismissed.

Solicitors—Sharpe, Parkers & Co., agents for Wilkinson & Gillespie, Walsall, for appellants; R. F. Roberts, for respondents.

[IN THE COURT OF APPEAL]

1878. }
 Jan. 28, 29. } BRICE v. BANNISTER.*
 May 18. }

Assignment of Chose in Action—Judicature Act, 1873, section 25, sub-section 6—Assignment of Money to become due under Contract—Subsequent Advances by Debtor to Assignor to enable Contract to be completed.

One Gough contracted with the defendant to build him a ship, to be paid for in instalments. Gough being in difficulties, the defendant, in order that the ship might be finished, advanced him the whole contract price before it became due. Before the last 100*l.* was advanced, Gough borrowed a like sum from the plaintiff, and assigned to him the 100*l.* "to become due" from the defendant. The defendant had due notice of this, but notwithstanding advanced the remaining 100*l.* to Gough:—Held (by BRAMWELL, L.J., and COTTON L.J., dissentiente BRETT, L.J.), that he was liable to pay the 100*l.* to the plaintiff, the assignment being a good one under the Judicature Act 1873, section 25, sub-section 6.

This was the defendant's appeal from the judgment of Lord Coleridge, C.J., at the trial of the case before him without a jury at the Somersetshire Summer Assizes, when judgment was given for the plaintiff.

The facts are sufficiently stated in the head note. The assignment and notice were as follows:—

I do hereby order, authorise and request you to pay to Mr. William Brice, solicitor, Bridgwater, the sum of 100*l.*, out of moneys due, or to become due, from you to me; and his receipt for the same shall be a good discharge.

John Gough.

October 27, 1876.

To Mr. Hugh Bannister, shipowner, Barrow-in-Furness.

To Mr. Hugh Bannister, shipowner, Barrow-in-Furness.

I hereby give you notice that, by a

* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

memorandum in writing, dated October the 27th, 1876, John Gough, of this place, shipbuilder, authorised and requested you to pay me the sum of 100*l.*, out of moneys due, or to become due, from you to him, and my receipt for the same shall be a good discharge.

William Brice,
Bridgwater.

October 27, 1876.

Cole and Bullen, for the defendant, cited—*Schroeder v. The Central Bank of London* (1), *Hopkinson v. Foster* (2), *Rodick v. Gandell* (3), *Lett v. Morris* (4).

Charles and Herbert Reed, for the plaintiff, cited—*McGowan v. Smith* (5), *Yeates v. Groves* (6).

Bullen, in reply.

Cur. adv. vult.

The following judgments were delivered on the 18th of May:—

COTTON, L.J., having stated the facts, proceeded.—The letter of the 27th of October is a good equitable assignment by Gough to the plaintiff, of moneys to the extent of 100*l.*, which might become due under his contract with the defendant. To this extent he thereby anticipated the moneys payable from the defendant to him, and Gough became incompetent to deal with these moneys to the plaintiff Brice's prejudice, and the defendant, after notice of the letter, could not come to any agreement with Gough dealing with or anticipating these moneys to the prejudice of the plaintiff. At the time when notice of the letter of the 27th of October was given to the defendant, the balance remaining unpaid exceeded 100*l.*, and the ship has been completed under the contract. The question is, whether in substance, what has been done by Bannister and Gough was not a dealing with the moneys payable under the contract? I think it was. The contention of the defendant was, that though, after notice of the assignment to the plaintiff, he had paid moneys exceeding 100*l.* to Gough,

(1) 34 Law Times, N.S. 735.

(2) Law Rep. 19 Eq. 74.

(3) 1 De Gex, M. & G. 763.

(4) 4 Sim. 607; s.c. 1 Law J. Rep. Chanc. 17.

(5) 26 Law J. Rep. Chanc. 8.

(6) 1 Ves. jun. 280.

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he did so, not in payment of the price or under the contract, but that advances were necessary in order to secure the completion of the ship. But this is not a case where the builder having failed in his contract, the person for whom he was building put an end to the contract, and completed the work. In such a case the builder, if he, in fact, completed the work, would be employed as agent or servant, doing the work for the owner of the vessel. Here the builder completed the work as contractor, building under a contract with the defendant; and this is the distinction between this case and *Tooth v. Hallett* (?) where the work was completed, after the bankruptcy of the builder, by his trustee out of his own moneys, and the person for whom the work was done had power to take possession, and employ anyone to complete the building, and in effect he did so, and the Court allowed the expenditure against the equitable assignee. It is probable that Gough would not, unless he had obtained the advances made by the defendant, either from him or some other person, have been able to complete the vessel. But a charge for the money lent after the 27th of October by any other person for the purpose of paying wages, or buying material necessary for the completion of the ship, and in that sense necessary to enable the money to become due to Gough, could not be preferred to the plaintiff's claim. Moneys paid for the same purpose to Gough by the defendant cannot, in my opinion, stand in any better position. It was urged that the assignee of a *chose in action* takes, subject to all equities. But these must be equities existing, or arising out of circumstances existing, before notice is given of the assignment. The advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant, existing, or arising from circumstances existing, at the date of notice to the defendant of the assignment to the plaintiff. The plaintiff was assignee for value of the moneys payable under the contract, with-

out any deduction for cost of materials or other costs of construction. The defendant, for his own purposes, determined not to complete the ship himself, but to let Gough do so under the contract. To enable him to do so he, after notice of the assignment to plaintiff, paid money to Gough, so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right, and the judgment appealed against ought to be affirmed.

BRETT, L.J.—I regret that I am obliged to differ from the rest of the Court. The principle involved is one of the highest importance. Two parties contract for the building of a ship, the price to be paid by instalments, and the ship to become the purchaser's property as the instalments are paid. It is a business transaction of the most ordinary kind. Before the ship is finished, the builder was unable to go on with the work. There is no finding that the purchaser was compelled to make advances, but practically if he did not he would have the ship thrown on his hands, and he would be obliged to complete it himself, naturally a most onerous charge. If no equitable doctrine comes into operation it is an ordinary mode of dealing that the purchaser takes the ship and goes on with it himself, or agrees with the builder to modify the contract, so that he advances money on the terms that he is to repay himself out of future instalments when they become due. It is said here that the builder, before he was entitled to payment, being unable to procure money to proceed with the work, made an equitable assignment of the money about to become payable to him. He also procured an advance from the defendant, to enable him to complete the ship. It is true that the defendant had notice of the equitable assignment, but the question is, whether we are to allow this so-called equitable proceeding, over which the defendant has no control, to hamper an ordinary business transaction. If it be so, the doctrine on which it depends seems to me to be one of the utmost importance, and I cannot bring myself to agree that business transactions are to be so ham-

(7) 38 Law J. Rep. Chanc. 396; s. c. Law Rep. 4 Chanc. 242.

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pered, either by the Judicature Act or otherwise. I would confine this remedy for recovering *choses in action* assigned, to cases where, when the action is brought and the case heard, there is a debt due from the defendant to the assignor, where nothing is to be done by the assignor but to receive money. I cannot bring my mind to think that we are not to allow parties to contracts to cancel them then or alter them in an ordinary business manner, if it is done *bona fide*. It seems to me that the contract here might have been cancelled, why then not modified? If no modification is to be allowed it is a state of slavery in business. It seems that no money was ever due to the assignor of the plaintiff; before it was due it was met by an advance. The assignor never could have sued the defendant as for money due, and yet it is said the plaintiff can. Does this doctrine apply in other cases? Has it ever been, or could it be held to apply to notes payable on demand, not to bearer or order, and so not assignable? If it did, an equitable assignment could make a non-transferable document transferable; that shews that it is not to be brought in to hamper business transactions. I therefore think that our judgment should be for the defendant.

BRAMWELL, L.J.—I have reluctantly come to the conclusion that this judgment should be affirmed. I say reluctantly, because I feel the great force of my brother Brett's observations; it does seem to me a strange thing, and hard on a man, that he should enter into a contract with another, and then find that because the other has entered into some contract with a third, he, the first man, is unable to do that which is reasonable and just he should do for his own good. But the law seems to be so; and anyone who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided I know not; may be, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be. But as there is no

such clause in the contract here, the plaintiff has undoubtedly certain rights, to what? If it were only to money payable according to the terms of the contract, the plaintiff would fail, for no money ever became due according to the terms of the contract. It was paid in advance before the work was finished; so that an amendment of the statement of claim is necessary; and in strictness the plaintiff's case is this, "You, the defendant, had no right to pay in advance; you were bound to wait till the work was finished; you would then owe Gough money, and would then be bound to pay me." This seems to be the law, and certainly if Gough and the defendant had agreed to anticipate the time of payment to defeat the plaintiff, such a scheme ought not to succeed. On the other hand, if Gough had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and *bona fide*, not to defeat the plaintiff, but to protect himself, advanced money to Gough before it was due, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But in reading the correspondence I cannot see that this was the case. That the defendant acted *bona fide*, I doubt not, but I think his advancing the money as he did, was quite voluntary, and in no sense compulsory. I concur, therefore, in affirming the judgment.

Judgment affirmed.

Solicitors—Reed & Lovell, agents for Reed & Cook, Bridgwater, for plaintiffs; Chester Urquhart, Mayhew & Holden, agents for Bradshaw, Barrow in Furness, for defendant.

[IN THE COURT OF APPEAL.]

1878. }
 June 18, 19. } OTTAWAY v. HAMILTON.*

Husband and Wife—Costs incurred by Wife in instituting Divorce Proceedings—Necessaries—Wife's Power to pledge Credit of her Husband—Divorce Acts, 1857 & 1858 (20 & 21 Vict. c. 85. s. 51, and 21 & 22 Vict. c. 108. s. 13).

A wife is entitled to pledge her husband's credit for the reasonable costs incurred by her in instituting and prosecuting divorce proceedings against him.

This was an appeal of the defendant from the judgment of Denman, J. (reported *ante*, p. 424), after the trial of the case before him.

The action was brought by a solicitor to recover the amount of a bill of costs incurred by the defendant's former wife in instituting and prosecuting divorce proceedings against the defendant which resulted in a divorce being obtained.

The decree *nisi* was pronounced on the 30th of June, 1876, and was made absolute on the 23rd of January, 1877.

On the 6th of February, 1877, an order was made on the wife's petition varying the trusts of the marriage settlement. The plaintiff filed bills of costs in the case, in the registry of the Divorce Court, which were taxed, and the taxed bills were paid by the defendant. The plaintiff then sent in a bill of costs to the defendant, including the costs taxed off in the Divorce Court, the items of which were divisible into three heads—

1. Preliminary expenses incurred before the commencement of legal proceedings, and not included in the taxed bills.

2. Costs between solicitor and client, including the fees paid to a detective to obtain evidence.

3. Costs between solicitor and client incurred in the rectification of the settlement.

The last item in the bill of costs was dated 6th of January, 1877.*

At the trial the facts were undisputed and the case was reserved for further con-

sideration, and the learned Judge then decided that the plaintiff was entitled to all the costs which should appear to a referee reasonable under the circumstances.

The defendant appealed.

J. O. Mathew, for the defendant.—The wife has no authority to pledge her husband's credit for the purpose of obtaining a divorce, which is a luxury. The old cases, such as *Brown v. Ackroyd* (1), were decided before the Divorce Acts and shewed, what is no doubt true, that a separation for cruelty was a necessary. In *Rice v. Shepherd* (2) the attention of the Court was not called to the new remedy for costs given by the Divorce Acts. *Re Hooper* (3) shews that the test is from what point of view the Divorce Court would regard the case, not how it presented itself to the mind of the solicitor, who cannot be the judge of whether what he did was necessary or not—*Wilson v. Ford* (4).

[*BRAMWELL, L.J.*—It is the same with ordinary necessities, the point is not whether the tradesman believed them to be necessary, but whether they were in fact so.]

The case of *Stocken v. Patrick* (5) is the strongest case against the defendant, but no reasons appear for the decision. There being full provision for the taxation of costs by the Divorce Court which has a very wide discretion in the matter—20 & 21 Vict. c. 85. s. 51, and 21 & 22 Vict. c. 108. s. 13, and rules 151–159—*Jones v. Jones* (6), *Flower v. Flower* (7), *Allen v. Allen* (8)—it would be monstrous to allow the discretion of the Court to be reviewed by a jury. At any rate the

(1) 5 E. & B. 819; s. c. 25 Law J. Rep. Q.B. 193.

(2) 12 Com. B. Rep. N.S. 332.

(3) 33 Law J. Rep. Chanc. 300.

(4) 37 Law J. Rep. Exch. 60; s. c. Law Rep. 3 Exch. 62.

(5) 29 Law Times, N.S. 670.

(6) 41 Law J. Rep. Prob. & M. 53; s. c. Law Rep. 2 Prob. & D. 333.

(7) 42 Law J. Rep. P. & A. 45; s. c. Law Rep. 3 Prob. & D. 132.

(8) 2 Sw. & Tr. 107; s. c. 30 Law J. Rep. P. & D. 9.

* *Coram* Baggallay, L.J.; Bramwell, L.J.; and Thesiger, L.J.

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costs of the rectification of the settlement after the decree *nisi* must have been incurred on the wife's own credit, as she was a *feme sole*.

Wilberforce, contra (Waddy with him), was stopped after a short argument.

BRAMWELL, L.J.—This appeal must be dismissed. It seems to me that a suit for divorce is in the same position as the old suit for separation *a mensa et thoro*, and that there is the same power of pledging her husband's credit given to the wife in the latter case as in the former. Mr. Mathew admits that if that be so the primary liability is on the husband, but he says that the Divorce Acts afford him a conclusive answer, as they give a provision for costs which must be in lieu of the old power of pledging credit. I cannot see why that should be so. I think an illustration may be put decisive on the point. Suppose the husband kept out of the way, and died before a decree was pronounced against him, the provisions of the Divorce Act would not apply, and the common law liability would continue. I think, therefore, that a suit for divorce is a necessary as much as the old suit on separation was; and, secondly, that the Divorce Act has not taken away the old power to pledge the husband's credit; and thirdly, that if the remedies are concurrent, and recourse has been had to one, that there is no reason, certainly none in the Acts, why recourse should not be had to the other also. The claim for extra costs is precisely in the same position as it would be in an ordinary action. As to that for the costs incurred in preliminary matters before suit, I think it would be unreasonable if a wife had power to pledge her husband's credit for the costs of suit and not for preliminary costs, if there was good ground for her consulting a solicitor with a view to a suit. I cannot think that there is not power to pledge credit as to the item for the costs of rectifying the settlement. I have no doubt that they were costs of suit. The only doubt which I felt was whether the wife after the decree *nisi* was not a *feme sole* with power to pledge her own credit, unless the decree was not made absolute, but that has been decided not

to be so, and it is clear that she is not a *feme sole* until after the decree has been made absolute.

I think, therefore, that the husband is liable on all heads.

BAGGALLAY, L.J.—I am of the same opinion. The fact that a divorce has been pronounced in this case shews that the wife was justified in the course she took in taking proceedings. That being so the case of *Re Hooper* (3) is no authority against the plaintiff. Had it not been for the Divorce Act there could be no doubt as to the plaintiff's right to succeed in this action. Has the Divorce Act deprived him of that right? and secondly, has he deprived himself of the right by his election to proceed in the Divorce Court? I think, for the reasons which have been given by my brother Bramwell, that both these questions must be answered in the negative, and if that is so it is obvious that the costs under all the three heads are recoverable.

THESIGER, L.J.—I am entirely of the same opinion. All the reasoning which applies to a separation *a mensa et thoro*, applies to a divorce which by our law is a necessary. But the question arises—do the Divorce Acts give the only remedy for costs, or does the common law right still remain? If it could be shewn that the Acts provided for the case of costs between attorney and client, the argument would be a strong one that that was the only remedy, and the recourse must be had to the Divorce Court to recover such costs; but 20 & 21 Vict. c. 85. s. 51 clearly contemplates the taxing of costs between party and party, and it is necessary that it should be so, for the Court has not only to deal with husband and wife, but in some cases with a co-respondent. The rules cannot go beyond the Act. The case of *Allen v. Allen* (8) clearly shews that a divorce suit follows the old practice of the ecclesiastical Courts, and that the question of costs in the Divorce Court is only as between party and party. If that be so, it is clear that the attorney is entitled to recover here the costs between him and his client, setting off of course

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any sums he has recovered from the opposite party, and has also the right to treat the husband as his client in respect of all costs reasonably incurred. I think that the cases of *Re Hooper* (3) and *Stocken v. Patrick* (5) are distinct authorities on the point.

I have nothing to add to what has already been said as to the items.

Judgment affirmed.

Solicitors—G. J. Ottaway, in person; Meade & Daubeney, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. { THE GUARDIANS OF THE POOR
June 28. { OF ST. LEONARD'S, SHORE-
DITCH, v. FRANKLIN.

*Corporation — Common Informer —
"Person or Persons"—Action for Penalties.*

A corporation cannot sue for penalties as a common informer unless expressly authorised by statute.

Where, therefore, by a private Act penalties were imposed for selling one sort of coal for another within twenty-five miles of the General Post Office, and the penalty was recoverable by the "person or persons who shall inform or sue for the same,"—it was held, that the plaintiffs, who were a corporation, could not sue for the penalty.

The statement of claim alleged a breach of contract for the sale of coal to the plaintiffs by the defendant, by the delivery on certain occasions of coal which were not of the quality or description ordered and contracted for; and further stated that on the occasion aforesaid, the defendant being a seller of coals and dealer in coals, did knowingly sell one sort of coals for and as a sort which they really were not, within the distance of twenty-five miles of the General Post Office, contrary to the form of the statutes in that behalf, and became liable to pay for every such offence the sum of 10*l.* for every ton of coals so sold.

The plaintiffs claimed, first, 300*l.* damages for breach of contract; and, suing as well for the Queen as for themselves, they also claimed 1,780*l.* for penalties.

Demurrer to that part of the statement of claim on which the claim for penalties was based, on the grounds that the plaintiffs, being a corporation, could not be "a common informer or common informers," and that the plaintiffs were not empowered to sue for penalties by the Act under which the claim was made (1).

Raymond, for the defendant, in support of the demurrer.—A corporation cannot sue as a common informer—2 *Chitty's Archbold Practice*, 11th ed. p. 1135, referring to *Weavers' Company v. Forrest* (2), where, in the marginal note, it is stated by the reporter, "It was held in C.B. (where other like actions were brought) that the words of 7 Geo. 2. being, *any person or persons*, a corporation could not sue as a common informer."

(1) 1 & 2 Will. 4. c. lxxvi.: "An Act for regulating the Vend and Delivery of Coal in the Cities of London and Westminster," &c.

By section xlv. enacts, "That if any seller or dealer in coals shall knowingly sell one sort of coals for and as a sort which they really are not, within the port of London, . . . or within the distance of twenty-five miles from the General Post Office, every such seller or dealer shall forfeit and pay for every such offence 10*l.* per ton for every ton of coals so sold."

By section lxxxv.: "That all fines, penalties or forfeitures exceeding the sum of 25*l.* by this Act imposed for any offence or offences committed against this Act, shall and may be recovered by action of debt, bill or plaint or information in any of His Majesty's Courts of Record at Westminster, . . . by the person or persons who shall so in form or sue for the same within three calendar months after the offence or offences shall have been committed; and one moiety of all such fines, penalties or forfeitures shall be to and for the use of our Sovereign Lord the King, his heirs and successors, and the other moiety thereof (together with double costs of suit) shall be to and for the use of the person or persons who shall inform or sue for the same."

(2) 2 Str. 1241.

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In *Walker v. Richardson* (3), an ecclesiastical corporation was held not to be within the words, "any person or persons" of the Mortmain Act—9 Geo. 2. c. 36. s. 1, and Parke, B., at p. 890, says that those words only extended to grants by natural persons. There is only one instance where corporations are empowered to sue for penalties, viz. by the Apothecaries Act, 55 Geo. 3. c. 194. s. 26, by which the master and wardens are entitled to sue for penalties imposed by that Act—see *Bullen & Leake's Precedents in Pleading*, 3rd ed. p. 233.

J. V. Austin, for the plaintiffs, against the demurrer.—The decision in *Weaver's Company v. Forrest* (2) is not in point, and the marginal note relied on as an authority was merely the addition on the part of the reporter. *Walker v. Richardson* (3) turned on the Mortmain Act, which was expressly framed to prevent the mischief arising from dispositions made by "linguishing or dying persons" to (amongst others) corporate bodies; the Act was therefore framed against corporate bodies, and a lease by a corporation could not come within "the spirit or the letter of the Act," per Parke, B., at p. 892. In 2 *Coke's Inst.*, 722, "Exposition of the statutes 39 Eliz. c. 5, and 21 Jac. c. 1, concerning the erection of hospitals and houses of correction,"—statutes which authorised their erection by all and every person or persons seised of an estate in fee simple—Lord Coke says that the words, "all and every person or persons," regularly extend to any body politick or corporate.

[LORD COLERIDGE, C.J.—A corporation could not be the subject of a writ of *capias ad satisfaciendum*, and this Court has held that a corporation could not on that ground be liable to foreign attachment (4). Under old penal statutes the information had to be made by corporal oath.]

That would be no reason why a corporation may not sue for a penalty. In *Grant on Corporations*, p. 66, note 2, it is

(3) 2 Mee. & W. 882; s.c. 6 Law J. Rep. Exch. 229.

(4) See *The London Joint Stock Bank v. The Mayor of London*, 45 Law J. Rep. C.P. 213; s.c. Law Rep. 1 C.P. Div. 1.

said, "person, in a statute relative to forgery, was held not to be applicable to the aggregate body of a corporation, *Harrison's Case* (5);" but since 1 Will. 4. c. 66. s. 28, the case is otherwise. In 7 & 8 Geo. 4. c. 28, "an Act for further improving the administration of justice in criminal cases in England," it is enacted in sec. 14, that in all criminal statutes the statute shall be understood to include several persons as one person, bodies corporate as well as individuals unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction. These authorities shew that the current of legislation is setting towards the including of corporations in the words "person or persons."

Raymond replied.

LORD COLERIDGE, C.J.—As far as I know this is a case *prima impressionis*, but yet not outside the range of authority. The plaintiffs, who are a corporation, sue not only for breach of contract for delivering coal not according to contract, but also for recovery of a penalty of 10*l.* per ton to which the defendant had subjected himself under sec. xiv. of 1 & 2 Will. 4. c. lxxvi. (1). It seems, at first sight, a strong position to bring the defendant within this section, but that question would be for a jury and is not before me. Section lxxxv. (1) enacts that this penalty may be recovered by action of debt by the "person or persons" who shall inform and sue for the same; the plaintiffs' counsel has contended that the corporation is within those words, and the demurrer raises this point for decision.

There is no doubt but that a corporation is literally within the words "person or persons," but these Acts must be construed *secundum subjectam materiam*, and one must see whether it would be reasonable to hold a corporation to be within those words. If the case had arisen under one of the old penal statutes the point would have been too clear for argument, because there would have been many conditions precedent to maintaining the action which a corporation could not, from its nature, perform, and therefore in such cases to hold a

(5) 1 Leach, 215.

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corporation to be within the words "person or persons" would have made nonsense of the statutes. I admit, however, that in the present case, to include corporations would not make nonsense of the statute. But the general current of authority is against a corporation suing as a common informer. The argument that in numerous statutes a corporation is empowered to sue as a common informer, has a bearing against the plaintiffs, for the fact that it has been thought prudent in recent statutes to include corporations by special enactment, tends to shew that they would have been excluded from Acts where there was no such special provision.

In late years various powers have been extended to corporations, such as the power of discovery, inspection, administering interrogatories, &c., not, by enabling corporations to do acts beyond their nature, but by enacting that such acts if done by certain persons on their behalf are to be regarded as if done by the corporation, tending to shew that corporations are by their nature excluded from doing such acts.

I am of opinion, on the whole, that corporations, unless expressly authorised, are not intended to sue as common informers; the text books and the general current of authority is against them. Under the earlier statutes they certainly could not have been common informers, I do not think they can be so under the present, and therefore give judgment for the demurrer.

Judgment for the defendant.

Solicitors—Carey, Warburton & De Paula, for plaintiff; Ley & Mould, agents for Mitchell & Webb, Bedford, for defendant.

[IN THE HOUSE OF LORDS.]

1878.

March 28, 29.

April 1.

BRESLAUER (appellant);
BROWN (respondent).

Debtor and Creditor—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)—Composition—Contingent Debt omitted from Debtor's Statement—Creditor's Right of Action.

The respondent entered into a bailbond jointly with another on behalf of the appellant for the payment of any damages and costs which might be awarded in a suit then pending in the Admiralty Court. The appellant having become insolvent, presented a petition under the Bankruptcy Act, 1869, for liquidation by arrangement or composition. He inserted in his statement the name and address of the respondent as creditor in respect of a certain sum not connected with the bailbond, but the statement did not contain any mention of the contingent liability on the bailbond. The respondent claimed a larger sum in respect of the inserted debt, and the statement was amended accordingly. The respondent proved for and received a composition on this debt, but no composition was paid to him in respect of the liability on the bailbond. Subsequently the suit in the Admiralty Court was decided against the appellant, and, on his default, the respondent had to pay the amount secured by the bailbond:—

Held (affirming the decision of the Court of Appeal, dubitante LORD GORDON), that the respondent was not bound by the composition proceedings in respect of the contingent debt, and that he was entitled to recover what he had paid under the bailbond.

This was an appeal from an order of the Court of Appeal reversing the decision of the Court of Common Pleas.

The proceedings in the Courts below are reported in 46 Law J. Rep. C.P. 593; s. c. Law Rep. 2 C.P. Div. 314.

Breslauer, the appellant, was the owner of the steamship *Ringdove*. In November, 1874, a collision took place between the *Ringdove* and the brigantine *W. H. B.*, the owners of which instituted a suit in the Court of Admiralty against Breslauer to recover damages for the collision. In

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order to prevent the arrest of the *Ringdove*, Brown, the respondent, and one Wilson, at Breslauer's request, signed in January, 1875, the usual bailbond for a sum not exceeding 2,300*l.* Before the suit came to a hearing, Breslauer presented a petition under the Bankruptcy Act, 1869, for liquidation of his affairs by arrangement or composition with his creditors, and at a general meeting of the creditors a statement of debts was produced, in which Brown's name was inserted, under his trading designation of A. Brown & Co., as a creditor for 586*l.* 6*s.* 1*d.* Brown claimed to prove for a larger amount, namely, 942*l.* 11*s.* 1*d.*, and the statement was amended accordingly. Wilson's name also appeared, as Wilson & Co., in the statement as a creditor for a considerable amount. The statement did not, however, contain any mention of any contingent claim which Brown or Wilson might have in respect of their liability under the bail-bond. Brown and Wilson attended the meetings of creditors, and signed the resolution which was passed for a composition and received their compositions on their claims as mentioned in the debtor's statement.

In December, 1875, the suit in the Court of Admiralty was decided against Breslauer. The sum adjudged against him, together with taxed costs, amounted to 1,487*l.* 8*s.* 4*d.* Breslauer neglected to pay the sum adjudged against him, and consequently Brown and Wilson were obliged to pay the same, with interest, amounting altogether to 1,509*l.* 12*s.* 9*d.* This sum was reduced by moneys recovered under certain policies of insurance on the *Ringdove*. Brown and Wilson accordingly brought an action against Breslauer for the balance still remaining due to them, and amounting to 821*l.* 13*s.* 4*d.*

The action was tried before Cockburn, L.C.J., at the Hertford Summer Assizes, 1876. The defence was that the claim was barred by the composition agreed to by the defendants' creditors and duly registered. A further defence was set up as against Wilson's claim, by which it was shewn there had been a settlement of accounts between him and the defend-

The jury found for the defendant as against Wilson, but a verdict and judgment was entered for the plaintiff Brown, subject to leave for the defendant to move to set the verdict aside and to enter judgment for him, on the ground that the debt was barred by the composition proceedings.

In Michaelmas Term, 1876, the Common Pleas Division ordered judgment to be so entered. The Court of Appeal reversed this judgment (BRETT, L.J., dissenting), and ordered that judgment should be entered for Brown.

This appeal was then brought.

Mr. Horton Smith and *Mr. Lumley Smith*, for the appellant.—The registration of resolutions is conclusive on all parties to a composition that the debtor has given a correct statement of all his assets and debts which are then capable of being ascertained. The contingent liability on the bond, though not at that time enforceable, was then an actual liability of the debtor, and capable of being estimated, and as such within the purview of the Bankruptcy Act, 1869. That Act provides a machinery whereby any error in the debtor's statement may be set right before registration by the debtor or any of the creditors, or in case of dispute as to the amount, by the trustee. In *Ex parte Peacock* (1) the debtor set down in his statement a sum as representing certain untaxed costs, and it was held that, although as yet unascertained, they were properly included and provable in the composition under the 126th section of the Bankruptcy Act, 1869. If the amount set down by the debtor is disputed by the creditor as insufficient, the trustee may ascertain and determine what the amount ought to be—*Ex parte Botting* (2). In *Campbell v. Im Thurn* (3) it was held that creditors who assented to a composition were bound by the amount of their debts as stated, even

(1) 42 Law J. Rep. Bankr. 78; s. c. Law Rep. 8 Chanc. App. 682.

(2) 44 Law J. Rep. Bankr. 47; s. c. Law Rep. 19 Eq. 261.

(3) 45 Law J. Rep. C.P. 482; s. c. Law Rep. 1 C.P. Div. 267.

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though their names did not appear in the debtor's statement, and that the provision at the end of the 126th section as to the insertion of names and addresses of creditors applies only to non-assentient creditors. In the present case Brown's name and address and the amount of his claim were inserted. He attended the meetings, voted for the composition, signed the composition deed and received the amount which was due to him upon his claim according to the rate agreed upon. If he wished to make any further claim in respect of this contingent liability he ought to have required that the debtor's statement be amended so as to include it. But having allowed it to be omitted, and assented to the composition on that footing, it is not now open, to him to say that he is not bound by the composition and to sue for the omitted debt. Under the 127th section of the Act the registration is made conclusive proof that the resolutions have been duly passed, and that all the preliminary requirements of the Act have been observed. The decision of Mellish, L.J., in *Ex parte Härtel*; *Re Thorpe* (4), affirming the decision of Bacon, C.J., expressly laid down that after registration of resolutions for a composition a creditor will be restrained from proceeding at law to contest their validity. The objects of the provisions of the Act with regard to composition are not to benefit any individual creditor. Those objects are twofold: first, to enable the creditors to ascertain what is the greatest amount they can reasonably expect to obtain; and secondly, to enable the debtor who has laid before his creditors a fair statement of his assets and debts, and has complied with the conditions imposed upon him, shall, upon his discharge, become a free man, and have the opportunity of a fresh start in life. The reason for requiring a statement to be made by the debtor is that the creditors may have the fullest and most complete materials to guide them to a decision. They are entitled to know exactly how the debtor's affairs stand. In resolving on the rate of

composition to be accepted, creditors are often influenced by calculations as to how far the debtor, if not too hardly dealt with, may, after his discharge, continue his business so as to be profitable to them and to himself. The greatest confusion and detriment to the general body of the creditors and to the debtor would ensue if it was to be established that after the creditors had, upon examination of what they believed to be a complete statement of the debtor's affairs, assented to a composition, one of the creditors who had assented to the composition might lie by and afterwards come forward and say that the claim which he had allowed to appear in the statement was not his whole claim, but that he had at the date of the composition a further claim which he had kept back from the knowledge of the creditors. They also referred to the cases of *Megrath v. Gray* (5), *Ex parte Jacobs*; *re Jacobs* (6), *Ex parte Oarew* (7) and *Melhado v. Watson* (8).

Mr. Grantham and Mr. V. Williams, for the respondent.—There is a material distinction in the provisions of law with regard to bankruptcy or liquidation on the one hand and composition on the other. In the case of the former, there is a complete *cessio bonorum*, and the debtor's property is placed absolutely out of his control by being vested in the trustee for the benefit of the creditors. The assets having been realised by the trustee and applied towards payment of the debts, the debtor obtains his discharge by order of the Court or by resolution of the creditors. But in composition the trustee is merely a trustee for distribution, the debtor's property remains vested in him, and the responsibility is thrown upon him of inserting in his statement a complete list of his liabilities from which he wishes to be freed. If he omits to state any of his liabilities, he is not freed

(5) 43 Law J. Rep. C.P. 63; s. c. Law Rep. 9 C.P. 216.

(6) 44 Law J. Rep. Bankr. 34; s. c. Law Rep. 8 Chanc. 211.

(7) 44 Law J. Rep. Bankr. 67; s. c. Law Rep. 10 Chanc. 308.

(8) 46 Law J. Rep. C.P. 502; s. c. Law Rep. 2 C.P. Div. 281.

(4) 42 Law J. Rep. Bankr. 34; s. c. Law Rep. 8 Chanc. 743.

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therefrom. There is no discharge by order or resolution in composition, the debtor is released by the satisfaction of the composition agreed upon. The Legislature has made composition the mere creature of agreement, and only binding on creditors whose debts are shewn in the debtor's statement: the 126th section expressly provides that it "shall not affect or prejudice the rights of any other creditors." The debtor, is, therefore, in this case precluded by his omission to insert this debt, from claiming to be released from it by the composition. It is said that to allow Brown to bring this action would be against public policy, but it is established that a creditor who is altogether omitted from the statement may bring an action in respect of his claim. And there is no difference as regards public policy between such a case and that of a creditor who is, as in the present case, partially omitted. It is clear that neither Brown nor Breslauer ever intended that this liability on the bailbond should be, or supposed that it was, included in the statement. It was incapable of being estimated, inasmuch as it might never become an actual liability at all. The cases cited on the other side are all cases where an actual liability existed at the time of the composition, though the precise amount could not then be precisely ascertained. In *Ex parte Peacock* (1) the unpaid costs were an existing debt, though, until taxation, it could not be said what the exact amount due in respect of them would be; they could be stated approximately, and were properly included in the debtor's statement. So in *Melhado v. Watson* (8) it was established that a sum was due to the creditor, though the amount claimed by him was resisted, and submitted to arbitration; the amount was unascertained till after the award, but there was an actual existing liability at the time of the composition, and it was therefore provable under section 31 of the Bankruptcy Act, 1869. Here, however, no liability, under the bailbond, might ever have come into existence, inasmuch as the Admiralty Court might have given judgment in favour of the *Ringdove*. There was at the time of the composition no existing

claim, or right to demand any sum in respect of this possible liability, and the claim which came into existence subsequently cannot be barred by the composition. In *Campbell v. Im Thurn* (3), the creditor's conduct shewed that he assented to the assessment of his claim, and it was in consequence of such assent that his claim was held to have been barred by the composition. Brown never assented to any assessment of this particular claim, nor was it capable of assessment. Therefore his right of action in respect of this claim was not taken away by the composition.

Mr. Horton Smith replied.

LORD HATHERLEY.—In this case the respondent Brown, together with one Wilson, was plaintiff in an action against the appellant, Breslauer, in which action (Wilson having been dealt with separately), Brown sought to recover the amount of certain moneys paid by him on account of Breslauer, in respect of a joint and several bailbond, dated the 1st of February, 1875, which was given by Brown and Wilson in the Admiralty Court in order to release a ship of Breslauer's, called the *Ringdove*. That ship had been attached in a suit in the Admiralty Court, relating to the running down of another vessel called the *W. H. B.*, and proceedings were pending in that Court which resulted finally in a judgment of 1,500*l.* and upwards, with costs, against the *Ringdove*, and that judgment was satisfied by Brown and Wilson paying the amount of the debt in moieties.

In the meantime, however, after the giving of the bailbond, but before the decision in the Court of Admiralty, Breslauer had found it necessary to take proceedings under the Bankruptcy Act, by which he might come to a composition with his creditors. At the time of Breslauer's so taking proceedings he was indebted to Brown (in respect of dealings with Brown other than this question of bailbond) in two several sums, amounting together to 942*l.* 11*s.* 1*d.* of liquidated debt. In this state of things Breslauer, on the 24th of May, 1875, presented a petition in bankruptcy pursuant to the Bankruptcy Act of 1869, and he

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proceeded to take steps with the view of obtaining a composition with his creditors under the 126th section of that Act. In doing so, he was bound, under the 126th section, to bring in a statement of his affairs, and in that statement of his affairs he inserted the name of Brown under the firm or style by which Brown traded. Breslauer there stated the amount of the debt due to Brown as 586*l.* 6*s.* 1*d.*, and he valued certain securities held by Brown in respect of that debt at 124*l.*

On the 3rd of July, 1875, Brown made an affidavit in the matter of the insolvency, and in that affidavit he stated the debt due to him to be 942*l.* 11*s.* 1*d.*, and not 586*l.* 6*s.* 1*d.* only. This statement was acceded to by the debtor, and not disputed in the proceeding by any of the other creditors, and Brown's claim was accordingly entered as for 942*l.* 11*s.* 1*d.* in the same form as it had been entered before, as that of A. Brown & Co. Thereupon a meeting was held, as is directed by the 126th section; and on the 5th of July, 1875, an offer to the creditors of a composition of 2*s.* in the pound was agreed to be taken by the statutory majority of Breslauer's creditors, in satisfaction of the debts due to them. It was to be paid within one month after the registration of the resolutions of the second meeting, and a trustee was appointed in the usual form, solely for the receipt of the assets and the distribution of the composition. Brown signed this resolution under the style of the firm of A. Brown & Co., and the sum of 2*s.* in the pound was duly paid upon the debt of 942*l.* 11*s.* 1*d.*, which he had claimed. But, as I said before, nothing was done upon the question that was pending in respect of the bailbond, and indeed the decision of the Admiralty Court had not at that time been come to.

After all this had been done, and the 2*s.* in the pound had been arranged as the composition upon the debts, including that debt of 942*l.* 11*s.* 1*d.* due to Brown, a decision was come to by the Court of Admiralty in the month of February, 1876, and on the 19th of February, 1876, the bailbond was satisfied by payment, by Wilson and Brown, of the sum which had

to be paid, and in respect of a moiety of which payment, subject to a deduction, the present claim is made. I do not think it necessary to enter into certain policies of insurance which Brown held, and which were partly security for the debt; after deducting which, it amounted to a considerable sum, which is now claimed in this action.

Brown having brought this action for what he had paid in respect of the bail bond, after deducting the value of his securities, that action was tried before the Lord Chief Justice of England originally. No dispute as to the amount that was originally due to Brown, 942*l.* 11*s.* 1*d.*, arose at the trial at all. I should have said that neither the 586*l.* 8*s.* 1*d.*, nor even that sum, together with the additional sum that made up the 942*l.* 11*s.* 1*d.*, included the liability under the bailbond; in other words it had not been satisfied in substance by the proceedings which had taken place in the insolvency; whether it had been satisfied in point of law is a question we have now to consider.

Leave, however, was given in the Common Pleas Division to enter judgment for the defendant on the grounds which I will presently state. A motion was made before that Court to enter judgment for the defendant accordingly, and the learned Judges, Lord Coleridge, Chief Justice; Mr. Justice Grove, and Mr. Justice Denman, were unanimously of opinion in favour of the defendant, and ordered accordingly. The plaintiff in the action, who is the present respondent, appealed from that decision to the High Court of Appeal, and in that Court, by a majority, consisting of Lord Justice James, Lord Justice Baggallay and Lord Justice Bramwell (Lord Justice Brett being of a different opinion), the decision of the Common Pleas Division was reversed, and judgment was directed to be entered for the plaintiff. It is from that decision of the Court of Appeal that Mr. Breslauer, the defendant in the action, has brought the present appeal to your Lordships' House.

Now this question lies in a very narrow compass indeed, and it appears to me that the decisions which have been already come to with reference to the 126th sec-

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tion of the Bankruptcy Act of 1869 lead directly to a reasonable and proper solution of the present question. The point in question is this: The 126th section of the Bankruptcy Act enables a debtor who finds himself to be insolvent to, present, if he be so minded, a petition to the Court praying that his affairs may be wound up by liquidation, instead of being wound up in bankruptcy; and then steps are pointed out in the 126th section as to the proceedings which shall be taken, and as to how the composition which he is willing to offer to his creditors may be dealt with in case it should be accepted by those creditors. The 31st section of the Bankruptcy Act, 1869, allows a good many contingent debts to be proved; indeed, I may say almost any contingent debt that can well be conceived, supposing it to be capable of estimation, and capable in that sense of being established, with the exception of debts which have accrued by way of damages for torts.

That being the case with regard to bankruptcy generally, if we take the 126th section coupled with the 270th rule in bankruptcy, which declares that any debt provable in bankruptcy may be provable also under a liquidation, or under an arrangement by composition with creditors, it would appear that a debt although contingent might—(it is not necessary for the present case at all to decide that question, but I only say it might be so, and I assume it for the purpose of this question)—if proper steps were taken, be proved under an arrangement for a composition, provided the proof given were assented to by the creditors.

But the proceedings under the 126th section differ entirely from the proceedings by way of bankruptcy proper, or the proceedings by way of liquidation, otherwise than by composition, in this respect: The legislature has laid down in very plain terms what is the duty of a debtor who seeks to settle his debts by composition with his creditors. The provisions of the Act are these: By the 4th sub-section of section 126, the debtor is to produce to the meetings of his creditors "a statement shewing the

whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due." That is his duty, and I say it is his duty advisedly, having regard to the course of decision which has taken place in reference to this subject matter.

The decision in the case of *ex parte Oarew* (7) was one of the first which I think very distinctly and clearly stated what I consider the true doctrine ought to be, with reference to the debtor's making this full statement. It is contained in the judgment of Lord Justice Mellish, given in that case. In that case the debtor had set forth a certain amount of debts due to his creditors, but there was a Chancery suit pending with regard to a breach of trust on the part of the debtor, as to which he was not minded to make any admission whatsoever with regard to the claim or its amount. As regarded the other creditors, he proposed to pay 19s. 11d. in the pound upon the debts, but he declined, apparently purposely, admitting in any sense his responsibility with reference to the debt which was said to be due with regard to an alleged breach of trust. He consequently left the creditor, who claimed upon that, in the condition of taking any such steps as he might be advised in the matter, but he did not include, and shewed no intention to include that debt within his composition. But in making provision for the payment of his debts, it turned out that notice had been given, by those who were suing him in respect of this breach of trust, of their existing claim; and the directors of an insurance office, from which the debtor had procured a sum of money in order to meet the sums due by way of composition at the rate of 19s. 11d. in the pound upon the debts he was willing to pay, having heard of this notice, said that they should not make this advance unless some sort of provision was previously made with respect to this debt which had also been claimed with regard to the breach of trust. Accordingly a sum of money was put into the hands of the trustees to be ready to meet any such claim if it could be established; but the debtor questioned the right of these par-

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ties who were so suing him, to have any payment made to them, or to be regarded as his creditors. It turned out that a considerable sum was established as due in respect of that trust. The debtor then applied to the trustees to hand him over the balance of the fund which was in their hands for the payment of the composition on his debts, but they refused to do so. The debtor said, "I have never agreed to that debt, and you have nothing to do with that debt as my trustees, and I have nothing to do with it in any arrangement or composition I have made with my creditors." Then the creditor came in and said, "I find this sum of 19s. 11d. in the pound for my debt in the hands of one who has received it from my debtor; it is for the payment of the debts due under his composition, and I now elect to come in under the composition and claim 19s. 11d. in the pound upon my debt."

The question was whether or not it was competent for him so to do, and Lord Justice Mellish held distinctly that the provision in question with regard to a debtor's making a full statement of his debts with reference to the distribution of the money to the creditors who were willing to come in and accept that composition, a statement of the names of the creditors and their addresses and the amount due to each of them—that the statement of all these particulars was a statement which was directed by the Legislature to be given for the benefit of the creditors and not for the benefit of the debtor, and inasmuch as any man may waive, for a time, a condition which is only provided for his benefit, Lord Justice Mellish held that the creditor in that case might, as against the debtor, come in at any time before the actual distribution of the fund had been completed, and say that he waived all those conditions as to his name and address and the amount due to him being stated in the schedule, and that now he elected to have the benefit of the composition, and that benefit was given to him accordingly.

That case goes a long way towards shewing whose duty it is to make this statement and for whose benefit it is that this

statement is required to be made. What the Legislature, in fact, has done is this: It has said, "If you wish to have a clearance of your liability by means of this procedure of composition instead of by means of the compulsory process in bankruptcy, then you must make a full and clear statement, and the only discharge, or rather it is not a discharge, but the only relief, you can get in respect of your debts will be a relief given you in respect of those debts which you owe to creditors whose names you have scheduled, and whose addresses you have set forth, and the amount of whose debts you have stated,—it shall not be a relief to you in respect of any other debts whatever." But the decision shews that a creditor may waive those conditions, and, waiving them, may take the benefit of a payment made by way of composition. That is one case.

Another case which touches almost the same point, is the case of *Melhado v. Watson* (8), but in that case a different state of things existed. It appears that the debtor, who was seeking the benefit of the composition, had stated that a very large debt was claimed; he stated the names and addresses of the claimants, and he stated the debt in this way—in the column for "Names of creditors claiming to hold security," he puts first "Alfred Melhado," then "David Lloyd," then "Nathaniel Plant," and against the name of "Nathaniel Plant," he puts in the column for "Amount of claim," "94,000l.;" but he puts this note, "acting under legal advice, this claim was resisted, and became the object of an action and reference to J. H. Lloyd, Esq., which reference is now pending," and he put it down then "from folio 22," 3,360l., that is a little addition for interest, making altogether 97,360l.; but he stated it in the manner I have just read, as a claim which was made but was not acquiesced in, but, on the contrary, disputed, and at that moment under arbitration. The case was decided afterwards in this way. The claimants obtained an award from the arbitrator in their favour, and having obtained that award they proceeded to sue the debtor for the full amount of their debt. The debtor there, as here,

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said, "A composition has been made, you are bound by that composition, and in consequence of that composition this debt is no longer payable. I have obtained a statutory release." And Mr. Justice Denman appears to have been of that opinion in the Court below. But there was an appeal to the High Court of Appeal whereupon that decision was reversed, and the reason given by Lord Justice James is this: "I am of opinion that section 126 has no application to the present case. A composition under that section is a matter between a debtor and his admitted creditors. A debtor cannot be permitted to dispute a creditor's debt and at the same time to compound for it; he cannot force the creditor to an arbitration and claim to pay him a composition as the result of that arbitration. Section 126, which provides that a non-assenting creditor shall be bound by the votes of other creditors, says that he is to be bound in certain events. These events must be shewn to have happened before he is bound. The section provides that the composition accepted in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of debts due to whom are shewn in the statement of the debtor produced at the meeting" "but shall not affect or prejudice the rights of any other creditor."

Now, in that case the debtor seemed to think—and it is a very strange contention when you come to consider the substantial justice of the case—that if he put down the name of the creditor, and if he put down the amount of his debt, he complied formally—so far as such a description can be applied to such a mode of procedure—with all the provisions of the 126th section with regard to the information to be given as to the creditors, and he said that he had discharged that duty by stating the amounts claimed by the several creditors and the names and addresses of those creditors. Thereupon he says, "I do not admit the debt at all, I only state it because they have made the claim." And then, when the award is made, he seeks to set up the composition as a statutory discharge which he has received in consequence of

his having, as he contends, fulfilled all the requirements and forms of the section. That, again, proves that it is a duty incumbent upon the debtor to set down the name and address of each creditor and to set down the amount of the debt which he is prepared to offer a composition upon, that being the sole meaning of the necessity of inserting the amount of the debt at all.

These two cases go a long way towards settling the true meaning of this section of the Act of Parliament. There is another, namely, *Ex parte Peacock* (1), which is not altogether unimportant. There certain costs had to be taxed which were not taxed at the time of the debtor availing himself of the 126th section of the Bankruptcy Act. These costs came to be taxed afterwards, but in that case the debtor did not act exactly as the debtor had acted in the case I have just cited of *Melhado v. Watson* (8), because the probable amount of the taxed costs was put down as an estimated amount, and that estimated amount was spoken of. But there, again, the sum was not admitted, neither did the creditor claim a composition upon this estimated amount at the time appointed by the deed, and there the Court held that he could enforce his claim because the debtor had not complied with the provisions of the deed, and that if the debtor takes the right step (and it is the right step) of putting down the estimated amount, he must go and act upon it, after bringing the creditor into the arrangement, by paying, or offering to pay, to the creditor the amount under the composition. That was not done in *Ex parte Peacock* (1) and therefore the debtor was not released.

All these decisions appear to me to shew what the true construction of the section should be. I do not stop to enquire as to the question which is discussed in some of the reasons given by the learned Judges in the Court below. I do not stop to enquire whether or not, this being a contingent debt, it could have been proved or not. I assume that it could have been proved if the parties had been so minded; but neither party did so prove or estimate it, or take any steps at all about it. If it had been

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proved at all (and it is possible that there may be cases which admit of that method of procedure under the 270th rule and the 31st and 126th sections), it could only have been proved by way of estimate. An estimate must be made of the amount of the moneys due; and when you have made that estimate, you must get your creditor's assent to it, or, according to the mode which is provided by the Act, you must get an estimate by the Court. When such steps as these have been taken, it is possible—I say no more than that it is possible—that such a contingent debt might have found its way into the list by way of arrangement and agreement between the parties.

A composition under the 126th section proceeds, necessarily, not upon the compulsory power of the Bankruptcy Act, but upon an arrangement and agreement come to with the creditors, differing from a voluntary arrangement with all the creditors in no other respect than this: that under the 126th section power is given, when all proper formalities have been complied with, of binding the minority of the creditors by a decision come to by the majority. But still in that case the debtor must state the name and addresses of his creditors, and the amounts of the debts due to each of them. If it be a contingent debt, the amount of that debt may be estimated, and the estimate agreed to; if it is not agreed to, the amount must be settled by the Court. When all that is done, and not before, the debtor obtains a release, according to the Act, for all debts with respect to which the names, the addresses and the sums have been inserted in his statement, and the resolution has been duly certified to the Registrar of what the arrangement of composition shall be.

Now in this case, what has happened? Here is a debt of a very contingent nature indeed. At the time of the debtor presenting his petition under the 126th section, he was in this position—he who afterwards became his creditor had already entered into that contract by which he so became a creditor, but the debt had not, at the time of the petition being presented, or at the time of

the composition being accepted, been even established, much less ascertained. It had not even been established that the one ship had wrongly run down the other; it had not been established that the debtor himself might not pay a part or the whole of the debt which might possibly be found due as against his ship the *Ringdove*; it had not been established, therefore, what the contribution was to be on the part of his sureties, or even whether any would be required. But a considerable time after the payment of the instalment which was to be paid in respect of his composition had become due, all these facts were ascertained. He had taken no steps to have the debt ascertained, as I have described, either by getting an estimate of it agreed to, or by a procedure before the Court. He had done nothing, but simply omitted the debt from his statement. And the question is, can he be discharged under that section of the Act which says that those debts shall be discharged, and those only, which are due to persons whose names, addresses and amounts of debts appear in the statement? Can it be said that this debtor, having one large contingent debt, which does not in any way appear upon the face of the deed or statement, ought to be discharged, or can be discharged, by the operation of the statute, from the claim of this creditor as coming within the description of creditors whose names, addresses and the amounts of whose debts shall appear? The amount of this creditor's debt does not appear, nor even the mention of the debt, and there is no default on the part of the creditor.

The only arguments which have been adduced before us in respect of this matter are arguments rather pressing upon the possible danger of fraud and damage to the other assenting creditors, which would result, it was said, if a debt could be kept from their knowledge, and not entered in the list, and if a creditor could appear and act in respect of two other debts (which in this case amounted together to 942*l.* 1*l.* 1*d.*) as due to him, and which appeared to be all that was due to him, and yet afterwards could come and claim the full amount of a debt

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subsequently ascertained, without being bound by the deed he had executed, or by accepting the composition under it.

No question of fraud upon the other creditors is raised at all in this case. The other creditors have received the full amount of the composition they agreed to receive, and no suggestion has been made of any collusion at all between the debtor and the creditor in this case. We are not informed how the omission to enter this liability in the list came to pass; but the most reasonable presumption is that one of two things occurred, either of which would come to the same result—either they may have agreed that this was so difficult a claim to be estimated that it was not a thing to come to an agreement upon, and consequently they had better omit it altogether, as the Judge would possibly think when it was brought before him, and they did omit it altogether, possibly on that ground. Or they may have thought that this outstanding liability, which had not yet resulted in debt, might possibly not result in debt at all. There was no reason whatever for supposing that the matter was kept out in any way which could be regarded as a fraud upon the other creditors; and if you come to the question merely as between this debtor and this creditor, what have you? You have a debt due which was not provided for in the deed, and which has not been paid, and therefore no composition was offered or could be offered upon it; there was no party appearing or acting upon it, and consequently it being unpaid, it ought now in common justice and honesty to be paid.

The case which the learned Judges in the Court below seemed to rely upon very much is the case of *Campbell v. Im Thurn* (3). That case appears to me, if I may say it, with great respect to a very learned Judge who took part in this decision, Lord Justice Brett (who had been one of the Judges who decided *Campbell v. Im Thurn* (3), and who made reference to it), to be a case which has not any bearing upon the special point now brought before your Lordships for decision. The case of *Campbell v. Im Thurn* (3) was simply this—A man, whose

name, address and debt were not inserted in the list sent in by the debtor, nevertheless comes into the arrangement, appears and makes a claim in respect of what he alleges to be due to him as his debt; he accepts a composition upon that debt, and in fact does everything as if his address had been inserted, and as if the amount of his debt had been inserted. The Court of Common Pleas there says: "If the parties have made such an agreement, a party who so acts shall not be at liberty afterwards to say, when all that has been done, that he has not waived the conditions inserted in the 126th section for his benefit, and having waived those conditions, according to the maxim, *volenti non fit injuria*, the Court held him to be justly bound by the agreement.

It was said, I think by Lord Chief Justice Coleridge, that he could see no difference between an acquiescence in the non-fulfilment of the other conditions and acquiescence in the amount of the debt, as if Mr. Brown here, by coming in and being cognisant, as he certainly was, from the beginning to the end, of all the proceedings, by coming in and accepting his dividend upon the sum of 942*l.* 1*l.* 1*d.*, could put himself exactly in the position of Mr. Campbell, who came in waiving the conditions as to the name and address and the amount of the debt being inserted in the statement of the debtor; and therefore, said the learned Judge, why should not the same hold good also when a man comes in and accepts a statement of 942*l.* 1*l.* 1*d.* as the amount of the debt due to him, instead of a larger sum, which may become due to him in respect of a contingent debt? If he had done that, if the amount of the debt had been estimated, and the amount of the debt put down upon the composition deed, or if, outside of that arrangement, he had said, "I will agree to an estimate of this contingent debt at so much, and I will take 2*s.* in the pound upon it," or anything like that, the case would have been like the case of *Campbell v. Im Thurn* (3). But how can a man, by taking a composition upon a fixed and certain debt, be said to be waiving the condition, so as to bring in

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what he might have brought in, but what I hold he was in no respect bound to bring in, that being the duty of the debtor himself, namely, a mere contingent liability? If a man chooses to take a composition upon a fixed and certain debt owing to him, how can it possibly be said that that in effect amounts to a payment of another debt which never was paid, and upon which no composition was paid, and for which no agreement at all was come to, and which, unless struck at by the Bankruptcy Act, cannot be denied to be a debt still due in common honesty from the defendant to the plaintiff? I looked to the section to find an enactment which would give relief from such a debt. The Act is careful and precise in saying that the debts only of those whose names and addresses and sums are stated are to be considered as discharged, and no others.

Now I have carefully looked through the judgments of the learned Judges in the Common Pleas Division, who were unanimous in the view they took of this case, but I venture to differ from them upon this simple view. It has now been made clear, I think, by decisions in cases which have not come to your Lordships' House, but which, I think, have been rightly decided, that this is a condition on behalf of the creditors, and that a creditor may, if he thinks fit, waive it, and if he waives it, he is in the same category as others with regard to whom the condition has, according to the precise words of the enactment, been complied with. If he does not waive it, then in the absence of any fraud, and in the absence of any injury to other creditors, and in the absence of anything unfair in the course of conduct he has pursued—I say in the absence of all those circumstances, he ought to be in the position of a person whose debt has not been satisfied, and whose debt it was never intended by any one to satisfy, and that being so, I see no objection that can be made to the claim now put forward.

I am, therefore, of opinion that the decision of the Court of Appeal should be affirmed, and that this appeal should be dismissed with costs.

LORD O'HAGAN.—I am of the same opinion. When the appellant filed his petition in the Court of Bankruptcy on the 24th of May, 1875, under the circumstances I shall not re-state after the full narration of them by my noble and learned friend, the respondent had two several claims against him, one for a sum of 94*l.* 1*l.* 1*d.*, ascertained to have been due at the date of the composition arrangement, and another, which was then unascertained and contingent on the result of the cause of damage pending in the Admiralty Court, with reference to the bailbond entered into by the respondent to prevent the arrest of the *Bingdove*.

The ascertained sum was dealt with in the bankruptcy proceedings. The respondent has received a composition of 2*s.* in the pound on account of it, and, in its regard, the appellant has no farther responsibility. The Admiralty cause has been since determined. The respondent has been held liable to pay, and has paid 399*l.* 14*s.* 6*d.* as the appellant's surety; he has not been repaid that sum or any portion of it. The question is, has he been deprived of his right to recover it by any agreement of his own, or by the legal operation of the composition arrangement?

It was stated amongst the reasons grounding the appeal, and for a time the learned counsel for the appellant contended at your Lordships' bar, that, consistently with the facts in proof, the respondent may be held to have included, in the amount of his proof, the claim in respect of which he is suing in this action. And, if that were so, the appeal should certainly be allowed. But there is really no pretence for the suggestion. The appellant entered the respondent in his statement of affairs as a creditor for 586*l.* 8*s.* 1*d.*, which was afterwards increased by the respondent's proof to a different amount claimed by him, for the respondent claimed specifically 942*l.* 1*l.* 1*d.* "for money lent and advanced" to the appellant "at his request." It is manifest that neither party contemplated the contingent liability as a matter with which the bankruptcy proceedings could

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have any concern. It was more than doubtful whether anything would ever be due upon it. The decision of the Court of Admiralty was uncertain. And even if it should prove adverse, the respondent appears to have had a security by insurance which, but for the appellant's default, would have held him harmless, but whilst the composition was to be payable within a month from the registration of the resolutions of the creditors in August, 1875, the adjudication of the Court of Admiralty, affirming the respondent's liability on the bail bond, was not until February, 1876.

It seems to me then quite clear that, in the composition proceedings, no one dreamt of dealing with anything save the actually existing and finally established claim of the respondent for a specific sum of money lent. All his conduct in the case, his proof, his attendance at meetings, his acceptance of his dividend, had relation to this and this alone. It was so understood by the appellant, who was equally without thought or intention of raising any question about the contingency, or seeking relief against the effects of its possibly adverse realisation. It was put out of consideration either through mutual inadvertence or mutual consent, and it appears to me impossible to say that, by any act or word of the respondent, he agreed to waive any right which might grow out of the bailbond from a judgment against him. No doubt, as has been said, there might have been an agreement, either express or sufficiently evidenced by the conduct of the parties, which would have barred the respondent's claim, even though it had not been formally the subject of a composition. On this point there is no conflict between the learned Judges who have differed so much on other portions of the case. They all adopt the doctrine affirmed in *Campbell v. Im Thurn* (3), to which case reference has been fully and sufficiently made already. But the circumstances of that case were different from those we have to consider. Here, if I am right in my view of the documents, there has been no claim for the amount now in dispute, and no proceeding whatever affecting it, within the contempla-

tion of the respondent or the appellant, or the body of the creditors. There, though the name and address of the creditor had not been entered, the amount of his debt was one of the liabilities, it was really in a position to be affected by the proceedings in which he took an active part, and he was properly held to have assented so as to preclude a subsequent repudiation of the transaction. But here there seems no pretence for saying that there was any assent in fact, and there is no suggestion that there was any design to gain an unfair advantage.

Either party might have stated the contingent claim, but neither did so, and we have had some argument as to the *onus* of making the statements, the respondent alleging that the appellants should have made it, and the appellant insisting that the respondent's failure to make it puts him in default or bars his right to recover. In my view, the controversy is not material. If the statement was needful, both are *in pari delicto*, and the omission may not be injurious to either. If any distinction is to be made, the 126th section of the Bankruptcy Act, requiring the debtor to give an account of the "whole of his assets and debts," with the "names and addresses" of his creditors, would appear to cast on the person who seeks to be free from liability the duty of setting forth the obligations from which he desires to be relieved.

The cases mainly applicable to the construction of this section, and enforcing the duty so imposed upon the debtor, have been already dealt with so fully by my noble and learned friend, Lord Hatherley, that I shall not refer to them again. They make the duty plain and imperative, and indicate the proper and reasonable consequences of the neglect of it.

No doubt, on the other hand, when the creditor's proof was applied to enlarge the amount of the claim, as specified by the debtor, he had the opportunity of making it fuller by referring to the contingency. But they might both, I think, have avoided reference to it without illegality or compromise of their respective rights if there was nothing of fraud in the avoidance, and in certain circum-

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stances which may have existed in this case, it might even have been meritorious if, in the words of Lord Justice Bramwell, they regarded the contingent debt as "so remote and uncertain that it would be unfair to apply any of the debtor's assets to it."

Seeing, therefore, that there was admittedly no fraud in the matter, believing that in the actual relations of the parties, and probably their common doubt whether any debt would ever be established, and finding no trace of injury to the assets from the non-statement of a claim which could only have diminished the dividend, or of any ill design in omitting a disclosure which, as between the creditor and the debtor, it was more incumbent on the latter to have made, I cannot hold that there was any discharge by agreement or by the conduct of the parties of a debt ascertained since the composition was completed, and confessedly still unpaid in whole or in part. Then is the debt discharged by reason of the operation of the composition clauses? It is true, as has been repeatedly urged upon your Lordships, that the policy of the bankrupt law is to make the discharge of the debtor as full and free as possible. But this policy must be applied strictly according to the terms of the statute, save in so far as the operation is modified by the honest agreement of the parties, and in the absence of that agreement those terms do not, in my opinion, sustain the defence of the appellant. He is not *quoad* the claim in question, as one of "the creditors whose names and addresses and the amount of the debts due to whom are shewn in the statement of the debtor," bound under section 126 by the composition resolution, for as to that claim, there is plainly no such statement. And although contingent debts proveable in bankruptcy are also proveable in a composition arrangement, there was here no debt in the statutable sense of the term, due at the date of that arrangement or for some time afterwards.

I concur with the majority of the Judges in the Court of Appeal, that though "by agreement the claim might have been valued and fixed, and put in

the list, without such agreement it could not be. A claim of indefinite amount cannot be put in. The machinery of the composition clauses supposes that there is a definite sum due." Here nothing could be more indefinite, and for the time unascertainable. What the Court of Admiralty might do was wholly doubtful. Whether the liability, even if it should arise, would not be nullified by the arrangement of which we were told, was equally uncertain, and if any one had undertaken to fix the proportion of the dividend on a claim so perfectly indeterminate, he must have failed in the attempt. Composition within the 126th section of the statute would have been impossible, and the parties must have been relegated to the last clause of the section, which certainly does not help the contention of the appellant, or have been left to have an estimate made of the contingent debt under direction of the Court, by a machinery which is not available for recovery under this section.

I am, therefore, of opinion that the judgment of the Court of Appeal should be affirmed, and this appeal dismissed.

LORD BLACKBURN.—I also have come to the same conclusion, that the decision of the majority of the Court of Appeal was right, and that the judgment consequently ought to be affirmed.

The facts are not now in dispute. There can be no doubt that when, at the request of Mr. Breslauer, these two persons, Mr. Wilson and Mr. Brown, entered into that bailbond, they did at his request incur a liability which was contingent at that time, it might be nothing, for the Court of Admiralty might have decided in favour of the *Ringdove*, in which case they would not have been liable for anything, or for 2,300*l.* Between these two limits, nothing and 2,300*l.*, the whole was contingent. It was contingent principally upon what the Court of Admiralty might think fit to decide, and that contingency was one, which it would evidently be very difficult to estimate so long as the Court of Admiralty had not given its judgment. Farther than that I do not go. I merely say it was very difficult to estimate it.

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I do not say that it was impossible to make an estimate of it.

But afterwards—not, however, until 1876—the contingency was terminated, and the Court of Admiralty gave judgment against the *Ringdove* for rather more than 1,500*l.* Messrs. Wilson and Brown paid that sum, and recovered back, from the securities which they held, some part of it; but there remained 800*l.* odd which Messrs. Wilson and Brown paid (in equal moieties, I presume, as they had so taken the bond), and each of them was entitled upon that to recover back from Mr. Breslau half of that sum, or the whole sum jointly, according as the payments were made. It has become immaterial, since the passing of the late Judicature Act, which way it was, for they might sue together. As to Wilson's share of it, there has been an answer independent altogether of the composition; but as to Brown's share, amounting to nearly 400*l.*, it was not, I think, disputed, as it is clearly indisputable, that, if it were not for the registration of this resolution, he would have a cause of action against Breslau to recover that amount.

Breslau, whilst that contingency was yet, in 1875, undetermined, petitioned the Court of Bankruptcy, and proceeded, under the 126th section of the Bankruptcy Act of 1869, to call his creditors together and to lay a statement of his affairs before them. In that statement of his affairs, he put down "Brown, A., & Co." as creditors. I should observe that Mr. Arthur Brown carried on business under the firm of Arthur Brown & Co., but he was the sole partner in the firm. Mr. Breslau put down under "Creditors partly secured" Brown, A., & Co., 586*l.* 6*s.* 1*d.*; then he put down that Brown held certain securities which he estimated at 124*l.* He put him down therefore as a creditor for 462*l.* 6*s.* 1*d.* Had it stood there, without anything more, I do not think that it would have been arguable that that was a description and a putting down of the debt, or the contingent liability which might result in a debt, to Wilson and Brown, from their having at his request entered into the security and submitted to the jurisdiction of the Court of Admiralty. An endea-

your was made to argue at your Lordships' bar that inasmuch as the 127th section of the Act of 1869 provides that "the registration by the Registrar of a special resolution . . . shall in the absence of fraud be conclusive evidence that such resolutions respectively were duly passed and all the requisitions of this Act in respect of such resolutions complied with,"—it was, I say, endeavoured to be argued that the registration was conclusive, that the contingent liability to Messrs. Wilson and Brown was put down and was properly stated as a debt, and that they were properly described as creditors and the amount of their debts also properly described.

I can only say that such is plainly not the meaning of the Act. It is clear that it was intended to provide that such registration would put some things right; but it cannot be supposed that it would have the effect of saying that a creditor whose name and address and the amount of whose debt was not put down or described at all had been properly put down. It might perhaps cure inaccuracies in the description, but to say that it means, where a creditor was not described at all, nor the amount of his debt described at all, that as soon as the resolutions are registered they are to be taken as conclusive of his having been described and the amount of his debt stated, would be putting a construction upon the Act which it is, to my mind, quite impossible to put.

After this, however, coming to the next thing that happens, we find that Mr. Brown did not, as he might have done, remain at home and not attend the meetings of creditors at all; he did come, and he there made oath that the amount of debt put against his name was wrong, and instead of it being 462*l.*, he says that "Louis Breslau is justly and truly indebted to me in the sum of 942*l.* 11*s.* 1*d.* for money lent and advanced by me to the said Louis Breslau;" and then he gives an estimate of the debt and of the securities which, he says, were to be deducted from it in order to arrive at the 942*l.* 11*s.* 1*d.*; and that sum seems to have been agreed to by all parties, and the composition was paid upon it by the

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trustee who was paying it upon all the debts for Mr. Louis Breslauer. A sum of 94*l.* 5*s.* 2*d.* was paid to Mr. Arthur Brown, who gave a receipt for it, that being the amount of the composition upon 942*l.* 11*s.* 1*d.*

Before going further, I merely wish to point out that this sum of 942*l.* described here cannot be said, any more than the description of the 462*l.* put down before, to have included in it a description of the contingent liability to which Mr. Wilson and Mr. Arthur Brown were subject. It seems to me if that had been done which, perhaps, in strictness ought to have been done when the proof for that amount was agreed to—if they had amended and rectified Mr. Breslauer's statement, and made him put in 942*l.* odd for money lent, as being the amount due to Arthur Brown, I do not think it would have brought in this contingent liability to Wilson and Brown into the statement, a bit more than the 462*l.* I wish to point out that, because I think that is material.

Now the learned Judges in the Common Pleas Division relied upon the case of *Campbell v. Im Thurn* (3), upon which I shall have a word to say presently, and they thought that the principle of the decision in that case applied to the present case. I am of opinion that *Campbell v. Im Thurn* (3) was quite rightly decided, though, with all deference to the learned Judges who decided it, I do not think the decision was quite supportable for the reasons which appear to have been given for the judgment in the Court of Common Pleas; still, I think that the judgment was right in itself. I will mention presently what I think was really the point which came to be decided in that case. The Common Pleas Division, as I said before, and Lord Justice Brett in the Court of Appeal, thought that, in principle, the case of *Campbell v. Im Thurn* (3) was undistinguishable from the present case. The majority of the Court of Appeal, however, thought that the principle in *Campbell v. Im Thurn* (3) did not apply here; and Lord Justice Bramwell stated, as his idea of the principle upon which *Campbell v. Im Thurn* (3)

was decided, a ground upon which I shall presently remark.

I must say, with all deference to Lord Justice Bramwell, that what he referred to was not a ground on which *Campbell v. Im Thurn* (3) could be supported. I agree with him in thinking that the present case is distinguishable from *Campbell v. Im Thurn* (3), but not for the reasons which he gives for that result. I am obliged, in stating my reasons for the advice which I now give your Lordships, to state that I do not agree with the reasons of those learned Judges. I do not come to that conclusion lightly, and I would not state that I differed from them unless I thought it was necessary for the decision of the case.

I will now proceed to state what I think to be the point in the present case. First of all, when it is a regular bankruptcy, what is called a pure bankruptcy—that is to say, where the bankrupt has become regularly a bankrupt—the 31st section, in very wide and extensive terms, says that all liabilities are to be proveable, and that “liability” shall include everything “capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent upon any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion.” Those very wide and extensive words would, I think, cover this possible liability depending upon a double contingency, the two contingencies being that the judgment might be given against the *Ringdove*, and that the amount of the judgment might be greater than the amount of the securities which Messrs. Wilson and Brown held in their hands. I should say that this liability came within that section. But the Legislature was aware that there might be very great difficulty in making an estimate of such a contingent liability, and whilst requiring that it should be estimated by the trustee in the first instance, it allowed an appeal to the Court against the estimate, and it provided ultimately that if the

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Court came to the conclusion that the liability was capable of being fairly estimated, the Court was so to declare it, and in that case that liability would not be a proveable debt. That machinery is provided in the case of an actual bankruptcy, and, for anything I know to the contrary here, if an actual bankruptcy had taken place pending the action in the Court of Admiralty and before the learned Judge had come to his conclusion, the Court of Bankruptcy, if the question had come before it, might have said, "We do not think that this liability can be ascertained or fairly estimated at all; the amount of it is not a matter of opinion, it is pure guess-work, and therefore this is not proveable at all."

Now if this had been a regular bankruptcy, and if they had so said, and Breslauner had obtained his discharge, he would still have been liable in respect of this amount; it would have been a debt which was not barred by the discharge. This, however, was not a regular bankruptcy; if it had been, there would have been an order of discharge, and these questions might then have arisen—whether, if Arthur Brown, instead of coming in and trying to prove his claim in respect of this liability, and to get an estimate of it, and failing therein, by the Court deciding that the liability was not capable of being proved or being estimated, or whether, if instead of doing that he had waited until the order of discharge had been given, he could have set up the case that the Court ought to have come to the conclusion that it was not capable of being valued; or whether, having allowed his opportunity of raising that question to pass by, he would have been finally and conclusively bound by the order of discharge. These are questions which do not arise here, and probably never will arise. I do not wish to prejudge them. I only say that I think he would have had very great difficulty indeed in raising such a claim after having so missed his opportunity.

So much upon what would have been the position of things if there had been an order of discharge. But Mr. Williams, to whom I think the House is greatly indebted for the clear way in which he

brought out the various matters not quite clear in themselves, pointed out, I think quite correctly, that Lord Justice Brett made a slip in what he said in the Court of Appeal as to an order of discharge. Lord Justice Brett treats it as if there was an order of discharge in this case. He treats it as if, in the case of a composition under the 126th section in part 7 of the Bankruptcy Act, there was to be an order of discharge given, and he treats it as if it was merely a question of time—as if we were now to consider that Mr. Breslauner had got such an order of discharge from all debts proveable under the bankruptcy, as he would have had if the case had been a case of regular bankruptcy. But Mr. Williams, I think, was perfectly right in saying that that was a mistake, and that although where there has been a single bankruptcy there is such an order of discharge, that is not so under section 126 in part 7. What is submitted for it is, that the creditors may come to an extraordinary resolution, and that "The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors." That is a very different thing from an order of discharge; we have to see what would be the effect of it.

Now had Brown not come in and proved for his 942*l.*, and rectified the proof to that amount, could it have been said here that he was bound by the resolution in respect of the contingent liability? It is to my mind perfectly clear that he could. It is to my mind perfectly clear that he and Mr. Wilson jointly in respect of this contingent liability never were, according to any sense of that word "liability," creditors, the amount of whose debt in respect of that liability was shewn in the statement of the debtor. Whether the debtor could have shewn this amount in the statement or not, is another matter. If it was impossible to put an estimate upon it, and the amount could not be shewn in any way, then it is clear enough

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that the resolution would not bind in respect of it at all. If, although very difficult, it was not impossible to put an estimate upon it, the scheme of the Act throws the burden upon the debtor who seeks to enter into a composition with his creditors to state that amount.

I do not myself see why the debtor in this case might not have put down "contingent liability to Messrs. Wilson & Brown, inasmuch as they have entered into this bailbond in the Court of Admiralty at my request, which I estimate at 100l.," or any other sum that he thought fair and proper. If he had done that, and if no one had objected to it, it would have stood; and then, after the resolution was adopted, it would have been binding upon everybody. If Mr. Brown and Mr. Wilson, or either of them, had chosen to come in upon that, and had said, "You have estimated the contingent liability at 100l., but I say you should have estimated it at 1,000l.," they would, either of them, have been perfectly at liberty to do so. And if any other creditor had said to Mr. Breslauer, "You have put it down at 100l., and Mr. Brown and Mr. Wilson have put it down at 1,000l., but I say the value of it is neither the one nor the other, it should be only a farthing, and consequently they are not at liberty to prove or vote," he might have done so. What would have happened if there had been a dispute of that kind I cannot tell. It may have been that the parties would have gone to the Court according to the 10th clause at the end of the 126th section, which says, "If it appears to the Court, on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly." I think it far from impossible that the result might have been that, if they had gone on with the supposed dispute, the Court of Bankruptcy would have said, "If we wait until the Admiralty suit is at an end, and the contingency is settled, it will be undue delay; if we attempt now to fix an amount upon this contingency, it may be that we may

be doing injustice—we shall therefore do neither the one nor the other, but we shall simply adjudge Breslauer a bankrupt." However, that question does not at all arise in this case.

Now I have to consider whether the case of *Campbell v. Im Thurm* (3) is distinguishable from the present. I have already said that I think that case was rightly decided; but we must see what the reason of it is. What Lord Justice Brett says on the subject has been already read, and I need not read it again. In the case of *Ex parte Carew* (7) Lord Justice Mellish had occasion to give the judgment and said, "It is therefore necessary to decide, first, whether any creditor of a compounding debtor who is not bound by the composition, on account of his name, address and the amount of his debt not having been properly entered, may nevertheless, if he is so minded, take advantage of the composition." Counsel at your Lordships' bar argued that this was a mere *obiter dictum*. I can only say that Lord Justice Mellish clearly did not think so, for he said: "It is necessary to decide it." He then proceeds to what I think is perfectly right. "I am of opinion that this clause in the 126th section, which says that a composition shall only be binding on those creditors whose names and addresses, and amounts of the debts, are shewn in the statement of the debtor, is put in for the benefit of the creditors, for the purpose of compelling the debtor to give an accurate description of the names of his creditors and the amounts of their debts, but was not put in for the benefit of the debtor, so as to enable him to leave out any particular creditor whom he might please, either on purpose or by mistake, so as to deprive those creditors if they should think it for their advantage, to come in under the composition. Therefore, when a subsequent clause says, 'The provisions of any composition made in pursuance of this section may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court,' I am of opinion that an application might be made under that

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enactment, not only by a creditor who is bound because his name, address, and the amount of his debt had been properly entered in the statement, but by any creditor of the debtor who would, in case of his being made a bankrupt, or in case of a liquidation, have been entitled to prove his debt."

I think that that is perfectly correct. I think it a condition for the benefit of creditors. I think that a creditor may waive it. I think that by waiving it he subjects himself to the jurisdiction of the Court of Bankruptcy, but not because he is an assenting creditor, for I take it that that would be quite immaterial. I take it that if a man came in during the proceedings and said, "I claim to prove for 1,000*l.* which has been left out of the list; and if his proof was admitted, and then he used his power to vote against the composition, being an absolutely dissenting creditor, waiving the condition for his benefit for the very purpose of opposing the resolution, nevertheless, if the resolution was carried by the statutory majority, he would be bound by it. Having waived the condition once, he would have waived it altogether, and he would be bound as Lord Justice Mellish determined. He would have subjected himself to the jurisdiction of the Court of Bankruptcy, which might, in a summary manner, prevent his suing for the debt if he was offered the composition; and that, not because he was a consenting creditor, but because he had become a party to the proceedings and consented to the jurisdiction of the Court of Bankruptcy.

Now there would be no difficulty in such a case in the Court of Bankruptcy amending the statement of the bankrupt, and in this case making the debt put down in the statement to Mr. Arthur Brown 942*l.* odd, instead of 462*l.* odd, and if the statement had been thus amended, there could be no doubt at all that if Mr. Brown had sued for the 942*l.* odd, he would have been at law bound. In *Campbell v. Im Thurn* (3) the Court of Bankruptcy had not done that. The statement had not been amended in that case; neither has it been done here. The Court of Bankruptcy, according to the

decision of Lord Justice Mellish, which I think is perfectly right, had summary jurisdiction to stop the suit in *Campbell v. Im Thurn* (3), but the statement had not yet been amended, and the question really before the Court of Common Pleas in *Campbell v. Im Thurn* (3) was, Is that fatal? Must a Court of law say, "We are bound, since that statement has not yet been amended, to give judgment for the plaintiff, and the defendant must step across to the Court of Bankruptcy and obtain an amendment and an injunction against the plaintiff"? or, were they entitled to say, "We consider this, which ought to have been done, as if it had been done; and now that we are a Court both of equity and law, we will treat that as a complete defence"? That, I think, was the real point.

I do not wish, speaking here in the House of Lords, to prejudice, or to express an opinion upon, any matter which is not necessary for the decision of this case; and, therefore, I do not say, and I do not think it likely that the Court of Appeal will ever have to say, whether it was necessary for the Court of Common Pleas to give judgment for the plaintiff, leaving the defendant to go and obtain an injunction from the Court of Bankruptcy, or, whether they might, as the Common Pleas Division did, give judgment for the defendant. I am inclined to think that what the Common Pleas Division actually did was quite right, but they did it, as I said before, not upon what I think was the right ground. In section 126 nothing is said in so many words as to a distinction, and I do not think there is a distinction made between assenting and non-assenting creditors. When the resolution has passed, it is binding as much, and no more, upon those who came in and assented as upon those who came in and opposed; and it is binding as much, and no more, upon those who came in and assented as upon those who stayed away. In no one of these cases is there any distinction between those who assented and those who dissented. But there is a difference, and a very grave one, between those who came in, or who accepted a composition, and so in their own favour waived the conditions, and

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put themselves under the jurisdiction of the Court of Bankruptcy, and those who did not so waive it. That is a very important difference and distinction.

Now in the present case Lord Justice Bramwell seems to have thought, and said in his judgment, that the ground upon which *Campbell v. Im Thurn* (3) was decided was this: that all who voted upon the question of the acceptance of the composition did thereby enter into an agreement at Common Law that they agreed to the composition amongst themselves, that it was a mutual bargain. I can only say that I think that such a supposition is absolutely contrary to the fact. I do not think that a creditor who comes in and votes for a resolution for a composition, dreams that he is entering into a bargain. A creditor who comes in and uses his power to vote against such a resolution most clearly makes no bargain. In either case I think he has waived the conditions, and submitted to the Court of Bankruptcy; and in either case, therefore, I think, subject to the technical point which I have before mentioned, *Campbell v. Im Thurn* (3) was rightly decided.

But, then, if what I have said is the ground upon which the decision in *Campbell v. Im Thurn* (3) is to be supported, and I think it is, it seems to me to be clear that it is undistinguishable from the present case. What position is Mr. Brown in? He has come in and said, "The amount of my debt is described as 462*l.* odd for money lent; it is actually 942*l.* as it is now put; the amount of my debt has been misdescribed, but I waive that, and I come in and say, I submit to the Court of Bankruptcy as regards the debt of 942*l.*;" and he takes the composition upon that sum, which was a further waiver as regards that debt. Upon what principle or reason is it to be said that, because Mr. Brown waived the condition in his favour as to the 942*l.*, therefore he is to be taken to have waived the condition in his favour as to this his contingent liability, of which there is no mention whatever in the statement, which the debtor did not put down, and which the creditor did not claim for. I see no reason why that should be.

If there was any case at all as to its

being kept back with a fraudulent intent, or if there was anything upon which it could be said that there was a fraud upon the Bankruptcy Law, or as regards the composition with the other creditors, that there was a fraudulent getting of some advantage to himself, there might have been a difference arising from such a state of things. But no such defence has been raised here, and I do not believe that it exists. I have very little doubt that, if we could get at the truth, it would be found to be that Mr. Breslauer thought either that this contingent debt was no debt at all, from the extreme difficulty of valuing it, which I have already said may or may not be the case, or as is, perhaps, equally likely, he thought that he was so certain to succeed in his suit in the *Ringdove* case, that there would never be a farthing due upon the liability, and that therefore it was not worth valuing, and it would very likely be found that Brown and Wilson thought the same if they thought of it at all. However that may be, nothing was done, as far as I can see, by either the one party or the other, which, as regards this debt, could amount to a waiver of the necessity of stating the amount of the contingent liability.

Now to come back to the composition, there is not, as I said before—I think Mr. Williams pointed it out—an order of discharge given the debtor at all. If this debt could not be ascertained, and, therefore, could not be proved, if that was impossible, the debtor, of course, could not put it in his statement, and it would not be within the composition. If it was practicable to put an estimate upon it, the frame of the Act laid the burden upon the debtor of doing so; but he has not done so. If he could not do it he is not discharged; if he could do it, he has not done it, and is not discharged. Either way, it is quite clear, to my mind, that the defence fails, unless he could make out a waiver which, as I have already said, I think the decision in *Campbell v. Im Thurn* (3) shews that he might, if the waiver was applicable to this debt. But upon the facts he cannot make out a waiver at all in respect of the contingent liability, which never was thought of, and as to which

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the condition never was waived, and which, being a joint and several contingent liability, to Messrs. Wilson and Brown, clearly could never in any possible sense be described as a debt due to Brown only. It is upon these grounds, and for these reasons, that I think that the judgment of the majority of the Court of Appeal was right, and should be affirmed, and this appeal dismissed with costs.

LORD GORDON.—From the conflicting opinions in this case, your Lordships will see that it is one which gives rise to considerable perplexity as to the way in which it should be disposed of. My own feeling would be in favour of a different view than that which has been expressed by your Lordships.

It occurs to me that there is a very important principle involved in this case, and that its decision will materially affect the law of bankruptcy. As I understand it, the purpose of the Bankruptcy Acts is to provide for the distribution of the assets of bankrupts among their creditors, and to discharge them of all the debts and obligations incurred by them prior to the date of the bankruptcy. If I am right in this, it seems to me that it would be against the spirit and purpose of the Bankruptcy Acts to hold that the creditor in the debt now sued for was to be entitled to a preference over all the other creditors of the bankrupt, and to receive 20s. in the pound on his debt, while the other creditors had to content themselves with 2s. If there had been any fraud averred against the parties, the case would, undoubtedly, have been different, but here there is no allegation of fraud. The debt seems to have been overlooked both by the debtor and the creditor, probably on the supposition that no claim would arise out of the bailbond which the creditor had signed on behalf of the debtor. But the creditor knew that he had come under an obligation for the debtor, and it must be assumed that he knew he might be called upon to pay something in virtue of that obligation. It was a contingent claim which might arise, and which he was entitled under the Bankruptcy Act to prove against his debtor. If any difference had arisen as to

the true value of the debt, there is machinery in the Act for having that fixed, and I think your Lordships have assumed that there might have been a valuation under the provisions of the Bankruptcy Act of 1869.

It is not said that the debtor has been discharged in the present case, or that the proceedings under the composition arrangement have been closed. If they have not been closed, I assume that it is still open for the respondent to prove his debt, and to receive payment of the composition thereon. But whether this be competent or not, the appellant does not dispute his liability for payment of the composition on the amount of the claims. And I think it would be unjust to the debtor, and would be giving a preference to the creditor to which he is not entitled, if it were to be held that his failure to claim on a debt, which he was entitled to claim, put him in the position of drawing full payment for it. I think this would open a door to very questionable proceedings, and no debtor could know that he might not be called on, long after he had obtained his discharge, for payment of debts, or relief of obligations incurred by him before the date of his bankruptcy, and one of the main purposes of the law of bankruptcy would thus be frustrated.

I do not consider that there would be any advantage in going into an examination of the decisions which have been so fully canvassed and examined by the noble and learned Lord opposite (Lord Blackburn). I confine my observations to the principle upon which I venture to suggest a doubt upon the view now taken of the case.

*Order appealed from affirmed, and
appeal dismissed, with costs.*

Solicitors—Crook and Smith, for appellant; Lowless, Nelson & Co., for respondent.

[IN THE QUEEN'S BENCH DIVISION AND
IN THE COURT OF APPEAL.]

1878. } PICKUP v. THE THAMES AND
March 5. } MERSEY MARINE INSURANCE
May 15, 16. } COMPANY (LIMITED).*

*Marine Insurance—Loss by Perils of Sea
—Unseaworthiness—Presumption—Burden of Proof—Misdirection.*

In an action on a policy of insurance on freight it was proved that eleven days after the vessel set sail she put back in a disabled condition, having encountered severe weather.

The Judge directed the jury that the time between the sailing of the vessel and her return was so short that the onus of proof was shifted from the defendant to the plaintiff, and that it was incumbent upon the plaintiff to prove that the unseaworthiness arose from causes occurring after she set sail:—

Held (by the Queen's Bench Division and the Court of Appeal), a misdirection.—Watson v. Clarke (1 Dow, 344) explained.

This was an action against underwriters on a policy of insurance on freight.

By way of defence it was alleged, first, that the loss was not occasioned by the perils insured against; and, secondly, that the vessel was not seaworthy at the time of the commencement of the voyage.

The jury found that the vessel was not seaworthy when she set sail, and that the loss was the consequence of her defective condition operated upon by such weather as was to be expected upon the voyage.

The facts of the case, the direction of the learned Judge to the jury, and the incidents of the trial are fully stated in the following judgment of the Queen's Bench Division.

On motion for a new trial on the ground of misdirection—

Watkin Williams, W. G. Harrison and Lodge, appeared for the plaintiff.

Bull, Cohen, and J. C. Matthew, for the defendants.

Cur. adv. vult.

* *Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.*

The judgment of the Court (1) was (on March 5) delivered by—

COCKBURN, L.C.J.—This was an action on a policy of insurance on freight, on a cargo of rice shipped on board the ship *Diadem*, on a voyage from Rangoon to a port in the United Kingdom.

Amongst other defences was one of unseaworthiness.

The cause came on for trial before my brother Field, and a special jury at Guildhall, when, under the direction of the learned Judge as to the law applicable to the case, the jury found a verdict for the defendants, on the ground that the vessel was unseaworthy on commencing the voyage. The facts, so far as they are necessary for the present purpose, may be stated in a few words:—

The ship having conveyed a cargo of coals to Point-de-Galle, proceeded in ballast to Rangoon, where she loaded a cargo of rice, the freight on which was the subject-matter of the insurance in question. She arrived at Rangoon on the 25th of April, 1874.

Amongst other issues in the cause was one of unseaworthiness at the commencement of her voyage from Galle to Rangoon, but that issue the jury decided in favour of the plaintiff, and no question upon that arises here. For the present purpose the ship must be taken to have been seaworthy on her arrival at Rangoon. She remained there till the 4th of June following when, having loaded her cargo, she set sail on the homeward voyage. Between the 9th and 15th of June she encountered severe squalls and a heavy sea, and laboured heavily and made so much water that the master and crew, becoming alarmed for the safety of the ship, and satisfied with her inability to perform the voyage home, determined on putting back to Rangoon. On the 19th of June when in the Rangoon river, she grounded on the Silver Sand, but was got off again and proceeded to Rangoon, where she arrived on the 20th of June.

In the course of the month of July surveys were held on the ship. She was found to be very much strained, and in several places, where her copper was off,

(1) Cockburn, L.C.J.; Mellor, J.; and Field, J.

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to be very much worm-eaten, and on the 15th of July she was pronounced to be unseaworthy, and there was no contest as to her having been so at that time. The question was whether the rough weather she had encountered between the 9th and 15th of June, and the straining thereby occasioned, had caused her leaky condition—in which case that condition would have been consistent with her having been seaworthy on starting on the voyage; or whether her leaky state had been brought about by the action of the worms, which from the defective condition of some parts of her copper had been able to eat the way into her planks, so as to render many of them in an unsound condition. Arguing on the latter hypothesis, the defendants contended that the worm-eaten condition must have arisen during the period the ship was loading in the Rangoon river, namely, from the 25th of April to the 4th of June; the plaintiff on the other hand contending that the leaky state of the vessel was due to the weather she had encountered, and that her worm-eaten condition, as apparent on the survey, had been produced during her stay at Rangoon between the time of her return thither and the time of the survey—that is to say, between the 20th of June and the 15th of July—the waters there being greatly infested with the species of worms by which wooden vessels are liable to be attacked, and which, owing to portions of her copper having been rubbed off on the occasion of her stranding, had been thus enabled to get at the vessel.

After the close of the evidence and during the addresses to the jury, the question was raised as to the party upon whom, in this particular case, the *onus* of proof lay; and the counsel for the underwriters submitted to the learned Judge to tell the jury as a matter of law that the *onus* of proof was in this instance shifted to the plaintiff. This course, however, at that time the learned Judge declined to adopt, but left the whole issue to the jury, putting the question of burden of proof also to them in the language of Lord Eldon in *Watson v. Clark* (2), and laying before them the

(2) 1 Dow, 344.

evidence on one side and the other necessary to enable them to arrive at a conclusion.

At the close of the summing up the jury retired to consider their verdict, and after a protracted absence returned into Court saying that they were unable to agree on their verdict. In answer to a question put by the learned Judge whether there was any point upon which he could give them any assistance, the foreman asked "whether the Judge could give them any more precise and positive direction as to which of the parties had the *onus* of proof cast upon him," upon which my brother Field again used the language of Lord Eldon, but dealt with it this time as a direction in point of law, and directed the jury as matter of law that while the presumption of law was *prima facie* in favour of seaworthiness, and the burden of proving unseaworthiness was in consequence, in the first instance, on the insurers, yet that if the inability of a ship to proceed on the voyage, becomes evident in a short time after her sailing, the presumption of law is that the inability arose from causes existing before she set sail, and that in such event the burden of proof becomes shifted, and that it then rests with the assured to shew that the inability arose from causes accruing subsequently to the commencement of the voyage. And in reference to the particular case, the learned Judge directed the jury, as matter of law, that the time which elapsed between the departure of the ship from Rangoon on the 4th of June and her putting back on the 15th was a sufficiently short time to shift the *onus* of proof and to make it incumbent on the assured to satisfy the jury that the unseaworthiness of the vessel arose from causes occurring subsequently to her starting on the voyage.

We are of opinion that this direction cannot be upheld and that there must be a new trial; and in this view the learned Judge, on consideration, himself concurs.

We do not say that time may not be an element in the consideration of a question of unseaworthiness. If a vessel very shortly after leaving port founders, or

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becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability, the irresistible inference arises that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as in the absence of every other possible cause, the only conclusion which can be arrived at is that inherent unseaworthiness must have occasioned the result. Indeed on closer consideration it becomes apparent that time enters to a very limited extent into consideration in arriving at this conclusion. If the vessel strikes on a rock or a sandbank immediately after leaving port, or while still in sight of it is overpowered by a storm, the shortness of time which has elapsed since she started becomes at once immaterial. On the other hand, though the vessel may have been at sea days, or even weeks, if during the whole of the time she has had favourable weather, fair winds and calm seas, and yet goes down or proves unable to continue on her course, the same inference as to inherent unseaworthiness presents itself as in the former case, though perhaps with diminished cogency in proportion as the interval has been longer. But in the latter case, as in the former, the inference arises from the impossibility of ascribing the result to any other cause than the condition of the vessel on starting on the voyage, the interval of time being matter of very secondary consideration if of any. It is from the entire absence of any other cause than inherent unseaworthiness that the probative value of such a combination of circumstances is derived. Time can enter to a very limited extent only, if it enters at all, into the question as a factor, in leading to the result. It certainly cannot be said of itself, and without more to give rise to any new presumption of law, or as matter of law, to shift the *onus* of proof from the party on whom the law has cast it. The reasoning applies with peculiar force to the case before us. The

ship had been at sea eleven days before she put back. Assuming for the moment that shortness of time intervening between the departure of a vessel and her inability to keep the sea could shift the burden of proof, we think it cannot be said that an interval of eleven days would be sufficiently short to warrant the application of such a principle as to raise any presumption independently of other circumstances. In that time—it was the stormy season in the Eastern seas—the vessel might possibly have encountered a cyclone. As it was, she was exposed during several days, from the 9th to the 15th of June, to severe squalls and a boisterous sea, and laboured heavily. The question was whether her inability to pursue her voyage, and the unseaworthiness as afterwards ascertained, were due to the action of the winds and waves, in other words, to the perils insured against, or to the antecedent causes of unseaworthiness to which the defendants ascribed them. Under these circumstances the time the vessel had been at sea became a matter of secondary consideration, and, if to be taken into account at all, could only be so as an element in the enquiry, and as one of the facts in the case. It could not properly be held of itself, and independently of the other facts, sufficient to take the case out of the ordinary rule, and, by giving rise to a new presumption, to shift the burden of proof from the insurer to the shipowner.

As we are of opinion that the direction cannot be upheld, and as it is clear, from what took place on the trial, that the verdict of the jury was determined by the direction so given, it follows that judgment cannot be given for the defendants on the finding, and that the rule must be made absolute for a new trial.

Rule absolute for a new trial.

In the Court of Appeal—

Watkin Williams, W. G. Harrison and Lodge, for the defendants, argued, first, that the jury having found that the loss did occur from the perils insured against, the question whether the vessel was sea-

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worthy at the commencement of the risk was immaterial; and, secondly, that if that question was material, the Judge left it properly to the jury. For this proposition they cited *Foster v. Steele* (3), *Watson v. Clark* (2) and *Parker v. Potts* (4).

Butt, Cohen and J. O. Matthew, for the plaintiff, were not called upon to argue.

BRETT, L.J.—I agree with the opinion entertained by the Judges of the Queen's Bench Division (including, I may say, my brother Field himself), that the direction he gave to the jury cannot be upheld. I think it was a misdirection. A good deal has been said in the course of the argument about "burden of proof" and "presumption." Now though in many cases these two expressions may be equivalent, if we were to consider them as invariably identical we should get into difficulties. In cases of unseaworthiness the burden of proof *prima facie* lies with the defendant who pleads it, and, strictly speaking, is never shifted from him. But when evidence of certain facts has been given, then it is often said that certain presumptions or inferences arise which shift the burden of proof, and so they do. It is true, as a matter of reason and of fact, that if a ship sails from a port and sinks or becomes leaky soon after sailing when there is nothing in the weather to account for it, then it is a fair presumption, and the jury may be told that any reasonable man would presume, under such circumstances, that she was unseaworthy before starting, i.e. not in a fit state to encounter the ordinary risks of a voyage. And if the jury, with no further evidence before them, found a verdict to the contrary, the verdict would be against the weight of evidence. But this is a question of fact and not of law. It is a very proper way of guiding a jury to tell them that which is laid down in *Arnould's Marine Insurance*, 5th ed., p. 666, viz. that when a ship has become so leaky as to be disabled soon after going to sea, and there has been no violent storm or unusual peril of the sea,

(3) 3 Bing. N.C. 892; s.c. 6 Law J. Rep. C.P. 265.

(4) 3 Dow, 23.

then the reasonable presumption is that she was not seaworthy when she started, and so they should be told. But all that this amounts to is telling the jury as reasonable men that if there is nothing else in the case to warrant a contrary conclusion, this is the conclusion at which they ought to arrive, and, as Arnould further says, it is for the assured to shew facts to the contrary. But this merely shews the mode which reasonable men would adopt to judge of a fact. The presumption is, as Mr. Harrison said in argument, one of the same nature as that which arises from recent possession in a case of larceny. Therefore I think that all a Judge can do is to lay before the jury the propositions which must be substantiated, and it is for the jury to say whether they have been substantiated or not;—whether or not there is anything in the case to account for the injury to the ship except the fact that she was unseaworthy before starting. As to the question of time, what is "soon after" starting must depend upon circumstances. It would be different in a voyage from Greenwich to Gravesend from what it would be in ocean sailing; and it must be for the jury to say whether, under the circumstances of this particular voyage, the time which elapsed was so short as to raise a presumption of unseaworthiness.

Then, if that be true, is there any authority to the contrary? The case of *Watson v. Clark* (2), in which Lord Eldon gave judgment, is more often cited as laying down a principle of law with regard to seaworthiness than as giving a rule for enunciating a proposition of fact. But the Judges in that case sat in appeal from a Court which decided on the question of fact as well as that of law, and they had to do the same. And as Lord Eldon states, the process of reasoning by which he arrives at the inference of fact which he draws, it is a good thing to point out clearly to a jury as a process by which they ought to form their conclusion, and the question is treated in the same manner in all the treatises. It is the duty of Judges to state to the jury what are the propositions which they must say are

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fulfilled by the evidence, but the Judge cannot say whether the evidence fulfils those propositions or not. It is for the jury to say whether the evidence shews that the state of things relied on by the plaintiff happened so soon after sailing as to raise the presumption of unseaworthiness, and that depends on the circumstances of the particular case. But my brother Field did not leave it to the jury to consider whether eleven days under the circumstances was a sufficiently short time to raise the presumption, but he himself said that it was a short time, and that the *onus* of proof was shifted. I do not agree with that proposition, and my brother Field candidly admitted that his intention on the spur of the moment was to put it to the jury as a matter of law, and that afterwards he saw his mistake. No doubt this was fatal to the defence to the claim for freight. I do not say that if the only question on the record was that of perils of the sea it would have been a misdirection, but the proposition was this—If she was not worm-eaten at Rangoon before sailing, then there is nothing to account for her unseaworthiness, and I think that when the jury were told, as a matter of law, that she was worm-eaten at Rangoon, unless the shipowner could prove the contrary, such a direction must have had a vital effect upon their decision. It was a direction which turned an inference of fact into one of law; and, therefore, the finding of the jury with regard to both policies was unsatisfactory, and consequently there must be a new trial.

COTTON, L.J.—I also am of opinion that there must be a new trial. I think that the direction to the jury in the summing up of the learned Judge at the trial was wrong on two grounds. First, there was a misdirection in telling the jury that the time was so short between the sailing and the disaster as to create the presumption that the vessel's inability to proceed on her voyage arose from causes which existed before she sailed, and secondly, in telling them as a matter of law that the burden of proof as to seaworthiness had shifted from the underwriter to the assured.

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In my opinion the question as to the inference to be drawn from the time is one for the jury, and it is for them to say under all the circumstances of the case whether they are satisfied that the loss was occasioned by her defective condition before she started. But the direction of the learned Judge must have induced the jury to believe that the defendants were relieved from proving their plea of unseaworthiness, and that it was for the plaintiff to prove that the ship was seaworthy at the beginning of the risk.

THE SINGER, L.J.—I am of the same opinion. There are two questions to be decided, first, whether there was a misdirection; and secondly, if there was, did it, within the meaning of Order XXXIX. rule 3, cause a miscarriage of justice on the issue raised as to the cause of the loss? As to the first question, I think that there was a misdirection as to the question of seaworthiness. What was the position of the facts proved when the learned Judge gave his direction? There was evidence that there had been severe weather during the eleven days the ship was at sea. On the other hand, there was evidence that on a survey being made, after her return to Rangoon, traces of worm-eating were found; and on a second survey, the vessel was found to be very badly worm-eaten—quite enough to account for her return to Rangoon. On such facts, what could the Judge leave to the jury? He could not direct them that the *onus* of proof had shifted, for it remained the same. All he could say would be that if there had been no evidence of worm-eating, the plaintiff would have been entitled to a verdict on the question of seaworthiness at the beginning of the voyage, but as there was such evidence, it was for the jury to say whether the evidence shewed that the weather was so bad as to have caused the danger, or whether the evidence of worm-eating, coupled with that as to the weather, shewed that the weather was not sufficient to have caused the danger, but the worm-eating was. But the learned Judge after telling the jury, quite correctly, that, on the issue of unseaworthiness, the *onus*

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was originally on the underwriters, proceeded further to tell them that eleven days was so short a time as to make the burden of proof shift to the plaintiff, who must shew that the disaster was due to causes which arose after the vessel sailed. Now I think that the learned Judge, though he may have laid this proposition down as a matter of law, in reality meant that the burden of proof had shifted as a matter of fact. But, even so, I think that the learned Judge was wrong, for evidence had been given of bad weather, which might have caused the damage. Therefore, I think that, even if the defendants' counsel were right in their contention that the burden of proof had shifted, still the learned Judge misdirected the jury. The shortness of the time and the state of the weather were both evidence for the jury to consider. Secondly, was the misdirection as to seaworthiness such as must have affected the minds of the jury in coming to this decision? I think it was. It is true that on the issue of cause of loss, the *onus* lies on the plaintiffs, and it may also be true that the presumption of seaworthiness affects the issue of seaworthiness only and does not touch that of cause of loss. But it is clear that there is no presumption of unseaworthiness. If the plaintiff proved his policy, that the vessel started, and after sailing encountered such weather as would account for the loss of the vessel by perils insured against, he has made a *prima facie* case, and sustained the burden thrown upon him. But the learned Judge laid a much heavier burden on the plaintiff, by directing the jury that the mere fact that only a short time had elapsed between the sailing of the vessel and the loss, as it were, raised a presumption of unseaworthiness. So that the plaintiff, instead of undertaking to prove loss by perils of the sea in the case of a ship presumably seaworthy, had to prove the same event in the case of a ship presumably unseaworthy. Therefore, I think there was a misdirection as to both points, and my observations have, I think, been enough to shew that the misdirection was sufficient to cause a miscarriage of justice. This appears very plainly from the fact that the jury seem to have had some differ-

ence as to this very point, as to which side was to bear the burden of proof. There is one other matter to consider—the question of authority. The learned Judge relied on the case decided by Lord Eldon. But Lord Eldon in that case was judge both of the fact and of the law, and when the passage cited is looked at, it is clear that he spoke of presumption, not of law but of fact; and it seems to me that the use of the words, “burden of proof,” gives rise to some confusion. As a matter of law, the burden of proof always remains the same. The Judge has to direct the jury upon the burden of proof as a matter of law, and I think it is never right for a Judge to direct a jury that as a matter of fact the burden has altered. That is a question for the jury, and the Judge has to decide merely whether there is any evidence to go to them, and nothing further. Lord Eldon (1 Dow, p. 344) held “that it was a clear and established principle that if the ship was seaworthy at the commencement of the voyage, though she became otherwise only one hour after, still the warranty was complied with, and the underwriter was liable. But when the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was that it was from causes existing before her setting sail on her intended voyage, and that the ship was then not seaworthy, and the *onus probandi* in such case rested with the assured to shew that the inability arose from causes subsequent to the commencement of the voyage.” As to these remarks of Lord Eldon, there are two things to be observed. In the first place, when he says that when a very short time had elapsed the presumption was that the loss was from causes existing before the setting sail, and that the *onus* of proof was shifted, he must mean where the loss has been proved, and the short interval of time which occurred between the sailing and the loss, and nothing more. He cannot mean to say that the *onus* of proof has shifted, when it has been proved that within that short time events have occurred which are sufficient to account for the loss by the perils insured against; and secondly, when he

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speaks of "the presumption," he means the presumption of fact and not of law. For these reasons I think that there has been a substantial misdirection in this case, such as to render a new trial necessary.

Order absolute for a new trial.

Solicitors—Hollams, Son & Coward, for plaintiff;
Freshfields & Williams, for defendants.

1878. } HAYN, ROMAN AND COMPANY
June 18, 22. } v. CULLIFORD AND
July 3. } ANOTHER.

Shipping—Bill of Lading—Excepted Perils—Liability of Shipowner on Bill of Lading not signed by Master—Negligent Stowage.

A shipowner may be liable on a bill of lading which has been signed by some other person than the master of such ship; and therefore, where a bill of lading had been signed by the charterers of the ship, but not on their own behalf but as agents for the shipowner, and with his authority, the shipowner was held liable thereon to the owner of goods shipped under such bill of lading for damage by negligent stowage, such damage not being one of the excepted risks mentioned in the bill of lading, and the shipper of the goods having no notice of any charter-party until after the goods had been damaged.

The exceptive clause in a bill of lading was as follows: "The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry and collision, fire on board or on shore, and all accidents, loss and damage of whatsoever nature or kind, and however occasioned from machinery, boilers, steam and steam navigation, or from perils of the sea or rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed that the captain,

officers and crew of the vessel in the transmission of the goods as between the shippers, owner or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner or consignee":—

Held, that damage from negligent stowage was not within this exceptive clause, so as to exempt the shipowner from liability for the same.

This case was argued before Denman, J., on further consideration by

Butt and J. O. Mathew, for the plaintiffs; and by

Watkin Williams and O. Bowen, for the defendants.

DENMAN, J. (on July 3), delivered judgment as follows:—

The plaintiffs in their statement of claim alleged that they delivered to the defendants 280 bags of sugar in good condition, to be carried by the defendants' steamship *Oleanthes* from Hamburg to London for agreed freight, upon the terms of a bill of lading, by which the goods were to be delivered in like condition, certain perils only excepted (by which perils it was alleged delivery in good condition was not prevented); that the defendants did not deliver the goods in good condition, but damaged and unmerchantable; and that such damage was caused by the sugar becoming tainted with oxide of zinc, owing to the improper and negligent stowing of their goods and the cargo.

The defence, so far as it is material to the questions remaining for my decision, was as follows:—That the ship was, before the time mentioned in the statement of claim, chartered for a voyage from Hamburg to London under a charter-party, by which it was agreed that the ship should be under the control of the charterers, and that the master of the ship should act as the servant and agent of the charterers for the purpose of signing bills of lading, and not as servant or agent of the defendants; that in pursuance of the charter-party, a cargo shipped by different shippers, including the 280 bags shipped under the bill of

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lading mentioned in the statement of claim was taken on board; that the goods were not delivered to the defendants, but to the charterers, or the master as their servant or agent, and not otherwise; that the shippers of the sugar and the plaintiffs had notice of the charter-party, and that the master was servant and agent of the charterers to sign bills of lading, and not servant or agent of the defendants; that the bill of lading contained a clause by which the defendants would not be liable for the damage complained of, even if bound by the bill of lading; and that the damage, if any, and the delivery in bad condition, were acts and defaults for which the charterers and not the defendants were responsible.

The charter-party, which was put in at the trial, was dated the 15th of November, 1877, and was made between the defendants, "owners of the steamship *Cleanthes*," and "Messrs. Pott & Korner, merchants, by the intercession of the ship-broker, W. Zoder," and bound the ship, after discharging her inward cargo, to load from the said merchant a full and complete cargo of general lawful merchandise, and proceed to one wharf only in London, as ordered by charterers' correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7s. 6d. sterling, in full, per ton, gross weight delivered; "it being agreed that for the payment of all freight, dead freight and demurrage, the said master or owner shall have an absolute lien . . . on said cargo, which lien they shall be bound to exercise; the charterers' liability to cease when cargo is shipped and bills of lading signed; the captain shall sign bills of lading at rates as presented, without prejudice to this charter-party." The charter-party was signed by "H. W. Pott & Korner," and "By telegraphic authority of Owners, W. Zoder, as agent."

Alphonse Roman, one of the plaintiffs, who was examined at the trial, swore that his firm had no knowledge of the existence of a charter until the 10th of December, after a claim had been made upon the defendants for the damage for which this action was brought.

The plaintiffs bought the sugar in

November, and received the bill of lading, after paying for it, and gave the bill of lading to Messrs. Middleton, wharfingers, who took the bill of lading, and got delivery from the ship. The freight at the bill of lading rate was paid to one Watkins, who, according to an answer to one of the interrogatories administered by the plaintiffs to the defendants, "acted as broker for the ship in London." Watkins received the freight, and gave a receipt to the plaintiffs headed, "Freight per *Cleanthes*," and signed, "Received for the owners."

It was admitted at the trial that the sugar was damaged by improper stowage; but there was no evidence as to the employment or otherwise of a stevedore, except that in the answers to interrogatories the defendants said they believed that the cargo was stowed by a stevedore employed by Zobel, who was the agent of the ship at Hamburg, at the expense of the ship.

A letter was read at the trial of the 4th of December, 1877, in which the defendants' firm in London wrote to the same firm at Sunderland, stating that a serious claim was pending, "apparently through the fault of the captain," expressing a hope that the amount of damage might turn out to have been exaggerated, and containing this passage, "Watkins will, no doubt, make best of case for steamer; but why the captain stowed poison in casks on top of sugar in bags, it is difficult to understand, and may prove serious to him."

On the 5th of December the plaintiffs wrote to Watkins and to the defendants, informing them of the damage, and inclosing their claim for the full value of the sugar, as being rendered totally worthless. On the 6th Watkins wrote, denying that there was any proof of the sugar being damaged or totally spoilt, and adding that, "if damaged, no doubt it was by perils of the sea." On the 10th of December Wilkins, by the desire of the defendants, referred the plaintiffs to the charterers.

Evidence was given at the trial, and admitted, subject to objection, that in the case of steamships it is uniformly the custom for the broker of the ship, and

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not the master, to sign the bills of lading. The witnesses who proved this usage said, on cross-examination, that the brokers frequently charter the ship, and, when they sign bills of lading for chartered ships, sign them for the owner or for the charterer, according to the authority they may have; and on re-examination said that if they are themselves the charterers, they would sign it in their own name.

The bill of lading relied upon by the plaintiffs was objected to by the defendants' counsel as evidence in the cause, on the ground that it was signed by Pott & Korner, agents, and that there was no evidence of any authority to them to sign it on behalf of the shipowners. I admitted it, subject to objection; and it was, I think, admissible in evidence, if on no other ground, because it was referred to in the pleadings, and not denied to exist. On the contrary, it was in part set out by the defendants in order to raise one of their defences. The question, of course, was still open to the defendants whether it was binding upon them, and whether, if binding, it exempted them from liability.

The question then arises, was there under the circumstances of the case any contract between the plaintiffs and the defendants for the carriage of the goods in question, or was this a contract with the charterers, Pott & Korner?

It was submitted, on behalf of the defendants, that the very form of the bill of lading, coupled with the fact that Pott & Korner had in fact a charter on the ship, was conclusive against any liability on the shipowners.

The bill of lading, omitting the exceptive clause, on which the second contention of the defendants depends, was as follows:—"Shipped in good order and well conditioned in and upon the good steamship *Cleanthes*, whereof is master, P. Andrews, now lying at Hamburg, and bound for London, 280 bags, &c., which are to be delivered in like good order to Hayn, Roman & Co. (the plaintiffs) or their assigns, freight at the rate 7s. 6d. sterling, $\times 10$ per cent., per ton gross weight, to be paid by consignees. In witness whereof the master or agent

of the said ship has signed four bills of lading of this tenour and date, &c. Dated in Hamburg, this 19th day November, 1877: Pott & Korner, agents."

It was contended that, inasmuch as Pott & Korner were in fact the charterers, whether on their own behalf or on behalf of other persons unknown, it ought to be presumed, in the absence of any express evidence of authority to sign the particular bill of lading on behalf of the shipowners, that it was signed by them on their own behalf and not on behalf of the defendants, and that so far as this was a question of fact, I ought so to find.

It was agreed at the trial that, except so far as the question of damages was concerned, all questions of fact and inferences of fact arising upon or to be drawn from the evidence were to be disposed of by me or by any Court before whom the case may come.

Looking at all the facts of the case, I am of opinion that the bill of lading was in fact signed by Pott & Korner not on their own behalf but as agents for the shipowners and with their authority, and that it is on that ground a document binding upon the shipowners, the defendants. I think it impossible to doubt that the defendants knew that bills of lading were to be signed and had been signed on their behalf by Pott & Korner, and only repudiated the bill of lading in question after they knew that a heavy claim had arisen upon it. The letters and telegrams put in at the trial and upon the argument seem to me to establish beyond all doubt that the bill of lading was their contract with the plaintiffs as shippers or consignees of the goods.

This renders it unnecessary to consider minutely the other two grounds upon which the plaintiffs contended that the defendants would be liable, even if the bill of lading was not binding upon them as a document signed with their actual authority. I think that even in that case there would have been strong reason for holding that the defendants were liable.

The result of the able and elaborate argument before me was, to convince me that, under circumstances such as those of the present case, the defendants would

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be responsible upon the principles explained in *Sack v. Ford* (1), *Sandeman v. Scurr* (2), *The St. Cloud* (3) and *Gilkinson v. Middleton* (4).

The plaintiffs in the present case had no notice whatever of any charter-party until after the damage. The bill of lading, though not signed by the master, was signed by persons purporting to act for the defendants; there was nothing calling the attention of the plaintiffs that they were to look to any one save the master or shipowner to perform that which is the *prima facie* duty of the master and shipowner, viz., to stow the goods safely. Under these circumstances I think that that duty being negligently discharged, especially where it was discharged in so palpably negligent a manner as that described in the defendants' letter of the 4th of December, it is clear that an action would lie against the shipowners, and that the shipowners would be estopped from relying upon a charter-party of which the plaintiffs had no notice for any purpose; see per Master of the Rolls, *Peek v. Larsen* (5). The authorities and text-books are all uniformly to the effect that, subject to any stipulations to the contrary in the bills of lading, and in the absence of any notice of a charter, one of the primary duties of the master is to stow the goods carefully. This appears to me to be a duty arising upon the mere receipt of the goods for the purpose of carriage, and to be one which it would require an express contract to supersede or excuse.

Holding, however, as I do, that the bill of lading is binding between the parties as having been actually signed with the authority of the defendants, it becomes necessary to consider another point made by the defendants, viz., that by the terms of the bill of lading itself they are exempt from liability for the damage in question.

(1) 13 Com. B. Rep. N.S. 90; s. c. 32 Law J. Rep. C.P. 12.

(2) 36 Law J. Rep. Q.B. 58; s. c. Law Rep. 2 Q.B. 86.

(3) Br. & Lush. 4.

(4) 2 Com. B. Rep. N.S. 134; s. c. 26 Law J. Rep. C.P. 209.

(5) 40 Law J. Rep. Chanc. 763; s. c. Law Rep. 12 Eq. 378.

This turns upon the true construction of the exceptive clause in the bill of lading, the material parts of which are as follows:—"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry and collision, fire on board or on shore, and all accidents, loss and damage of whatsoever nature or kind and howsoever occasioned, from machinery, boilers, steam and steam navigation, or from perils of the seas or rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners, in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed that the captain, officers and crew of the vessel in the transmission of the goods, as between the shipper, owner or consignee thereof, and the ship and shipowner, be considered the servants of such shipper, owner or consignee."

The defendants in their statement of defence set out the above clause, and alleged that, if the goods were not delivered in good condition, it was owing to "the acts, neglects or defaults of the pilot, master or mariners in navigating the ship." It was contended for the defendants that the word "transmission" in the above clause was even more extensive than the word "navigating," and that it included everything to be done with the goods from the receipt of them from the hands of the consignor to their arrival at their destination, and *Good v. The London Steam Shipowners' Association* (6) was relied on, in which it was held that an injury which happened to a ship moored at a quay where she was lying, having put back to coal, and which injury was owing to the negligent leaving open of a sea-cock, was "damage caused by reason of improper navigation, within the meaning of a deed by which an association of shipowners agreed to indemnify each other against "loss or damage which by reason of the improper navigation of any such ship may be caused to any goods on board." In that case, Willes, J., said—"Improper navigation, within the meaning of this deed,

(6) Law Rep. 6 C.P. 563.

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is something improperly done in the course of the voyage." I do not think that this case assists the decision of that before me, beyond being an authority for the proposition that the ship need not be in a state of motion in order to be in a state of navigation within the meaning of that word as used in the deed there in question. Other cases have decided that the word "navigation" for some purposes includes a period when the ship is not in motion, as, for instance, when she is at anchor. But I do not think that these cases have any strong bearing upon the question, how the words "navigating the ship," and "transmission of the goods," ought to be construed in a clause such as the present.

The contention for the plaintiffs was, that the words "in transmission of the goods," if operative at all, had a limiting effect upon the alleged generality of the previous words, and confined their application to a period subsequent to the period at which locomotion in the ship should commence, and they cited *Ozech v. The General Navigation Company* (7), as shewing that the tendency of the Courts was strong to require clear affirmative proof on the part of the shipowner to enable him to claim exemption under exceptive clauses such as the present; and also the case of *Taylor v. The Liverpool and Great Western Steam Company* (8), in which Lush, J., makes this observation—"The word is ambiguous, and being of doubtful meaning, it must receive such a construction as is most in favour of the shippers, and not such as is most in favour of the shipowner for whose benefit the exceptions are framed." I am of opinion that the contention of the plaintiffs on this point ought to prevail. Though it may be quite correct to say that, for many purposes, negligent stowage is a portion of negligent navigation, and though in the case of *Good v. The London Steam Shipowners' Association* (6), in answer to an observation of counsel, "Would damage arising from negligent stowage be within this deed?" Willes, J., answered—"Cer-

tainly, unless in a port where stevedores are employed," I do not think it follows that, in the case of an exceptive clause such as that now in question, the words "in navigating the ship, or "on transmission of the goods," include "stowage." On the contrary, I think that, applying the principle laid down by Lush J., in *Taylor v. The Liverpool and Great Western Steam Company* (8) mentioned above, which I think ought to be applied in such cases, and considering how easy it would have been to use apt words to exempt the ship-owners from liability for improper stowage, it is more reasonable to hold that the case of negligent stowage is not included under the words relied upon than that it is included.

I therefore think that the plaintiffs are entitled to judgment for the sum assessed by the jury, 501*l.* 6*s.*, and I give judgment accordingly for that amount and costs.

Judgment for plaintiffs.

Solicitors—W. A. Crump & Son, for plaintiffs;
Hollams, Son & Coward, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } BIRD (*appellant*) v. ADCOCK
May 11. } (*respondent*).

Highway—Proceedings before Justices for Non-payment of Rate—Production of Rate Book—Proof of Publication—Statutes 5 & 6 Will. 4. c. 50. s. 27, and 32 & 33 Vict. c. 41. s. 18.

[For the report of the above case, see 47 Law J. Rep. M.C. 123.]

(7) 37 Law J. Rep. C.P. 3; s. c. Law Rep. 3 C.P. 14.

(8) 43 Law J. Rep. Q.B. 205; s. c. Law Rep. 9 Q.B. 546.

[IN THE EXCHEQUER DIVISION.]

1878. }
June 25. }

MAYER v. FARMER.

County Court—Right of Appeal—Reference to Arbitration—Setting aside Award—9 & 10 Vict. c. 95. s. 77—13 & 14 Vict. c. 61. s. 14.

There is no appeal from a refusal of a County Court Judge to set aside an award in an action referred by him to an arbitrator.

Rule to shew cause why the decision of the County Court Judge of Shropshire, refusing to set aside an award and judgment entered thereon, should not be reversed.

Jelf, for the plaintiff, shewed cause.—The Court has no jurisdiction to review the decision of the County Court Judge. The right of appeal is given by 13 & 14 Vict. c. 61. s. 14, which provides that “if either party shall be dissatisfied with the determination or direction of the County Court in point of law or upon the admission or rejection of any evidence, such party may appeal . . . and the Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be.” The award and judgment in this case were made under 9 & 10 Vict. c. 95. s. 77, which provides that “the Judge may in any case, with the consent of both parties to the suit, order the same . . . to be referred to arbitration to such person or persons in such manner and on such terms as he shall think reasonable and just . . . and the award of the arbitrator or arbitrators or umpire shall be entered as the judgment in the cause, and shall be as binding and effectual to all intents as if given by the Judge; provided that the Judge may, if he think fit, on application to him, . . . set aside any such award.” The decision of the Judge, refusing to set aside this award, was not a “determination or direction in point of law or upon the admission or rejection of any evidence,” but an exercise of his discretion.

J. O. Lawrence (A. Yates with him), for the defendant, contended that the Court had jurisdiction. The action had been referred to the clerk of the County Court, and the defendant's contention before the County Court Judge was, that the arbitrator had dealt with matters and accounts not within the submission. This was a question of jurisdiction upon which the Judge's ruling was “a direction in point of law.”

THE COURT (KELLY, C.B., and POLLOCK, B.) held that this was an interlocutory decision, upon which no appeal lay. The remedy by “ordering a new trial or judgment to be entered” provided by the appeal section was not applicable.

Rule discharged with costs.

Solicitors—Smith, Fawdon & Low, agents for Phillips, Osborne & Phillips, Shifnal, for plaintiff; Robinson & Preston, agents for J. Leake, Shifnal, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. {
May 12. { BRADLEY (*appellant*) v. THE
BOARD OF WORKS FOR THE
GREENWICH DISTRICT (*respondents*).

Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 52—Construction of Sewer—Apportionment of Expenses by District Board—Limitation of Time for making Apportionment.

[For the report of the above case, see 47 Law J. Rep. M.C. 111.]

[IN THE COMMON PLEAS DIVISION.]

1878. }
 June 25. } COXHEAD v. MULLIS.
 July 3. }

Infant—Breach of Promise of Marriage—Ratification—Fresh Promise—Infants Relief Act, 1874 (37 & 38 Vict. c. 62).

A promise of marriage is within the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), which by section 2 enacts that—"no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy whether there shall or shall not be any new consideration for such promise or ratification after full age." Therefore no action can be brought for the breach of a promise of marriage made during infancy notwithstanding a ratification of such promise has been made after full age.

Ratification in such case would have reference to the original promise, and would not be evidence of a fresh promise.

This was an action of breach of promise of marriage. Shortly stated, the facts were that the defendant had in October, 1877, before he became of age, promised to marry the plaintiff. At some time previous to the 14th of February, 1878, there had been a quarrel between the plaintiff and the defendant which resulted in the engagement being broken off on that date. It was, however, renewed before the 8th of March, 1878, when the defendant became of age. Since that date the parties were alternately visiting and addressing each other and quarrelling, and continuing on much the same terms as they did before the defendant's majority, but eventually matters resulted in the present action being brought.

The action was tried in the Lord Mayor's Court before the Recorder, and the learned Judge holding that the Infants Protection Act, 37 & 38 Vict. c. 62 (1) applied, nonsuited the plaintiff,

(1) The Infants Relief Act, 37 & 38 Vict. c. 62, by section 1 enacts that "all contracts, whether by specialty or by simple contract, henceforth en-

giving the plaintiff leave to move to set aside the nonsuit. The plaintiff moved and obtained a rule accordingly, against which

Sutton shewed cause, and contended, first, that the words of section 2 of the Infants Protection Act comprised promise of marriage, and consequently that no action could be brought on a ratification; secondly, that there was no evidence of a fresh promise.

Cock, in support of the rule, contended, first, that the words "promise or contract" in the second section of the Act referred to the matters enumerated in the 1st section and the first part of the 2nd section, and would not include promise of marriage; second, that there was evidence of a new contract made after age.

The following authorities were referred to—*Ex parte Kibble* (2), *Roscoe, Nisi Prius*, 580, 12th edition, *Cawthorn v. Cordrey* (3).

Cur. adv. vult.

Judgment was given on the 3rd of July by

LORD COLERIDGE, C.J.—This case raises an interesting question, viz., whether the Infants Protection Act (37 & 38 Vict. c. 62) does or does not apply to the case of a breach of promise of marriage.

The action is brought against a person of full age for the breach of a contract

entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void." Section 2 enacts that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

(2) 44 Law J. Rep. Bankr. 63; s. c. Law Rep. 10 Chanc. 373.

(3) 13 Com. B. Rep. N.S. 406; s. c. 32 Law J. Rep. C.P. 152.

Corhead v. Mullis, C.P.

of marriage which he had made when an infant. There had been various disputes between the parties, and finally the engagement was broken off after the defendant had become of full age. It was admitted that there had been no fresh contract or promise after the defendant came of age, or, at all events, there was no evidence of any such fresh promise. There had been a clear promise before, and there was abundance of ratification after the defendant attained his majority.

Before saying a word upon the question whether the Act applies, I may observe that I am of opinion that, where there is a clear promise, such as was proved in this case—a promise to marry being in this respect like any other contract—ratification, if it exists, must have reference to the contract proved, and that it cannot be said that because there is a ratification from day to day, there is a fresh promise from day to day. Evidence of ratification is one thing; evidence of a fresh promise is another; and if there is positive proof that the promise was made before and the ratification after the defendant became of full age, I am of opinion, supposing the Act applies, that the ratification would not be evidence of a fresh promise, but must be referred to the promise made before the defendant was of age.

It is admitted in this case that there is abundant evidence to fix the defendant, supposing he had been sued under the old law, and therefore the question simply turns upon the recent statute. Now the Act consists of two sections only. [His Lordship read the sections.] The question is, whether this does or does not apply to a case of breach of promise of marriage. The words of the 2nd section, I think, are quite sufficient to include such a promise. The argument was, that the 1st section is entirely confined to contracts entered into for the repayment of money and goods supplied or to be supplied; and that the first part of the 2nd section confines itself entirely to promises made after full age to pay a debt contracted during infancy; and it is suggested that we ought to read the second part of the 2nd section as if it ran thus: "or upon any ratification made after full age

of any *such* promise or contract made during infancy."

I believe this is the first time this section has had to be considered with reference to this sort of action. I should have gladly deferred to any judicial authority which could have been presented as throwing any light on the subject; but, in the absence of any such authority, the tendency of my own mind always is to suppose that Parliament meant what Parliament has clearly said, and not to limit plain words in an Act of Parliament, by considerations of policy as to which minds may differ and as to which decisions may vary, or, by introducing considerations as to the constructions of an enactment when it is entirely uncertain whether such considerations were present to the mind of the Legislature, to render that which is a plain and simple enactment—I will not say inoperative—but difficult and uncertain.

Looking at this section, I find the words change their form, but I cannot agree to the argument of counsel without putting a word into the statute, viz., "*such*," which Parliament has deliberately left out, and which I cannot assume Parliament has carelessly left out meaning that the Judge should supply it. Therefore, upon the best consideration I can give to the matter, I think this Act of Parliament does apply to breaches of promise of marriage. It certainly is a matter which in my judgment comes within the fair contemplation of the law with regard to infants. I see nothing to limit the words of the Act, and I hold therefore that the defendant is entitled to succeed.

My brother Lopes had at first some doubts on the matter; but, before he left London for circuit, he authorised me to say that those doubts were removed. The judgment I have pronounced must therefore be taken to have the sanction and approval of my brother Lopes.

Judgment for the defendant.

Solicitors—R. C. Chapman, for plaintiff; J. W. Heritage, for defendant.

[IN A DIVISIONAL COURT AND IN THE COURT OF APPEAL.]

1878. { PERCY ATTENBOROUGH v. THE
May 1. { LONDON AND ST. KATHERINE'S
DOCKS COMPANY.*
ROBERT ATTENBOROUGH v. SANE.*

Interpleader—Non-coextensive Claims;
1 & 2 Will. 4. c. 58. sec. 1. 23 & 24 Vict.
c. 126. sec. 12—*Judicature Act*, 1873,
Order XVI. rule 18.

*The right to an interpleader order is not
barred by the fact that the claims are not
coextensive.*

Watkin Williams (*Wood Hill* with him)
on behalf of the defendants moved for an
interpleader issue by way of appeal from
an order of FIELD, J., at chambers, dis-
missing the application.

It appeared from the affidavits that in
June, 1877, thirteen butts of sherry were
landed at the port of London as *the
Gibraltar*, from Cadiz, and were entered
by one Dolaro with the defendants (the
London and St. Katherine's Dock Com-
pany) as warehousemen. Dock warrants
in the usual form, signed by the Dock
Company, were issued, making the wine
deliverable to Dolaro or his assigns. On
the 31st of October, 1877, the wine still
being in the possession of the dock com-
pany, a notice of claim was served on
them by one Lopes, the shipper of the
wine at Cadiz, claiming the wine as his,
stating that he had been defrauded of it,
and giving the dock company notice not
to part with it. The company also about
the same time received a demand from
the two Messrs. Attenborough, desiring
the company to deliver the wine to them
on their producing the dock warrants
with Dolaro's signature endorsed, and
representing that they had made advances
to Dolaro on the warrants. The wine
not being delivered to the Attenboroughs
according to this demand, they com-
menced these two actions against the
dock company for wrongfully detaining
the wine, with a claim for damages for
such wrongful detention.

* *Coram* Lord Coleridge, C.J.; and Huddle-
ston, B.; and on appeal *coram* Bramwell, L.J.;
Baggallay, L.J.; and Brett, L.J.

Marriott (*Attenborough* with him), for
the two plaintiffs, shewed cause against
the application.

Sullivan appeared for Lopes.

The following authorities were cited :
Crawshay v. Thornton (1), *Best v. Hayes*
(2), *Meynell v. Angell* (3), *Blackburn on
Contracts of Sale*, 297, *Waller v. Nicholson*
(4), *Baker v. the Bank of Australasia* (5),
France v. Gaudet (6), and *Tanner v. The
European Bank* (7).

LORD COLERIDGE, C.J.—I am of opinion
that the plaintiffs are entitled to succeed
in this motion and that the order of Mr.
Justice Field was correct. I place my
judgment on two grounds. The facts
are that a quantity of wine was delivered
to the London and St. Katherine's Dock
Company, in respect of which they issued
dock warrants making the wine deliver-
able to Dolaro or his assigns. Actions
are brought by Messrs. Attenborough, to
whom the warrants had been assigned by
Dolaro, against the dock company, and
the dock company seek to interplead be-
cause of a claim made on them by one
Lopes, who says that he has been de-
frauded of the wine and that it was
fraudulently deposited with the dock
company, and that Messrs. Attenborough
obtained the warrants under circum-
stances which would give them no prop-
erty in the wine. All, however, that
Lopes has done has been to give notice
of his claim to the dock company, and to
request them not to part with the wine.
Now the actions by Messrs. Attenborough
are not only to recover the wine but also

(1) 2 Myl. & Cr. 1; s. c. 6 Law J. Rep. Chanc.
179.

(2) 1 Hurl. & C. 718; s. c. 32 Law J. Rep.
Exch. 129.

(3) 32 Law J. Rep. Q.B. 14.

(4) 6 Dowl. P.C. 517.

(5) 1 Com. B. Rep. N.S. 515; s. c. 26 Law J.
Rep. C.P. 93.

(6) 40 Law J. Rep. Q.B. 121; s. c. Law Rep
6 Q.B. 190.

(7) 35 Law J. Rep. Exch. 151; s. c. Law Rep.
1 Exch. 261.

Attenborough v. St. Katherine's Docks Co. (App.).

to recover damages for its detention. They say that they have made advances on the security of the wine, the advantage of which they will lose if they do not get the wine. Under these circumstances I think that the dock company are not entitled to interplead. It seems to me that by substituting Lopes as defendant for the dock company, the plaintiffs in these actions would not have the same advantages they would have against the dock company. I think it doubtful whether Lopes would be answerable for all that the dock company have done. The company have not asked for an indemnity, and all that Lopes has done has been to give notice of his claim. It seems therefore to me that to substitute Lopes as defendant for the dock company would not place Messrs. Attenborough, the plaintiffs, in the same position as they now stand. The remedies would not be co-extensive, and the subject matter of the action would not be the same.

There is a further ground on which I desire to put my judgment, namely, the fact that the dock company issued their warrants making the wine deliverable to Dolaro or his assigns, and that Messrs. Attenborough are such assigns. I do not disagree with what Lord Blackburn has said in his work on the *Contract of Sale*, p. 297, as to the difference between a bill of lading and a dock warrant, but although in truth one may convey the property in the goods whilst the other gives only the possession, yet the distinction is not important in the present case, for if one of two claimants is placed in a different position from what he would otherwise have been by the person who seeks to interplead, such person is not in a position to interplead. This is the principle as laid down in *Crawshay v. Thornton* (1), and it seems to me that the present case is exactly that in which one of the parties seeking to interplead have so acted as to disentitle themselves to the benefit of interpleading. On both these grounds I desire to place my judgment.

HUDDLESTON, B.—I am of the same opinion. Though Mr. Marriott did not dispute that the dock company have no

interest in the wine, he has raised what to my mind is a formidable objection to the application for an interpleader. I do not wish to express any opinion as to whether a dock warrant is in the nature of a contract with the holder thereof. The ground on which I put my decision is that the same question could not be raised in the interpleader issue as is raised between the parties to the present action, and I find that in *Day's Common Law Procedure Act* (4th ed.), p. 358, it is stated amongst the general principles applicable to an interpleader under the statute, "That the same question be raisable upon the interpleader issue as was in dispute between the original parties," citing for this *Baker v. The Bank of Australasia* (5). Now as between Messrs. Attenborough and the dock company the question in dispute was, as I collect from the affidavits, not only the right of the Attenboroughs to the goods but also the right to damages for the improper conversion or detention by the defendants. If so, I do not see any issue which could be stated between the Messrs. Attenborough and Lopes in which the right to these damages could be determined. The dock company and Lopes were both tortfeasors as regards the plaintiffs, and the plaintiffs had a right to proceed against both or either of them. In my opinion the learned Judge at chambers exercised, therefore, a wise discretion, and his order refusing the interpleader issue should be supported with costs.

The defendants appealed.

Watkin Williams (Wood Hill with him), for the defendants.

Murriott and Attenborough, for the plaintiffs.

Sullivan, for Lopes.

BRAMWELL, L.J.—My brother Field at chambers and the Common Pleas Division have both held that this is not a case within the Interpleader Act (1 & 2 Will. 4. c. 58. s. 1), as amended and altered by the Common Law Procedure Act of 1860 (23 & 24 Vict. c. 126. s. 12).

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I am unable to concur in the decision, for it seems to me that this is exactly one of those cases to which the provisions of the statute apply. The statute was intended to remedy the evil of having two verdicts about the same matter, and of the holder of goods who had done no wrong whatever being liable to pay twice over for the same transaction. The only remedy for this was the expensive and inconvenient one of a bill of interpleader, and this the statute was passed to remedy. It seems to me that this case is exactly within the very words of the statute; why, therefore, should not the statute apply? I can find no substantial reason. It is said that Lopes is a foreigner resident abroad. That is a good reason why he should give security or be barred, but that is all. Again, it is said that damages could be recovered from the defendants which could not be obtained against Lopes; we will not deprive the plaintiff of the right; if he has it he can maintain it in another action. But it is said that will make two actions necessary. I think the inconvenience of that is fanciful, but at any rate it is not comparable with that which the statute was passed to remedy. All the authorities cited are against Mr. Marriott, with the possible exception of one to which I will come presently. *Best v. Hayes* (2), *Meynell v. Angell* (3) and *Tanner v. The European Bank* (7), all justify the application for an interpleader, and were not noticed by the Court below. The only case in favour of the plaintiffs is *Crawshay v. Thornton* (1). That was the case of a bill in equity, and has no bearing on the present question which arises under the statute; moreover, it was before the Common Law Procedure Act, 1860, which was drawn for the very purpose of meeting that case. Then it is said there is an estoppel here. To my mind there is something monstrous in the proposition that although Lopes could contest the plaintiffs' right, the defendants could not, even though they could shew that the goods were stolen.

Then it was said, and I must confess it occurred to me also, that the proper course would be to proceed under Order XVI. rule 18, and for the defendants to give

notice of indemnity to Lopes. But the state of things provided for by that Order is a different one from the present. The object of the defendants is to get out of the litigation altogether, and, as my brother Brett remarked, the argument in favour of the Order is too good, as it would have the effect of repealing the Interpleader Act. The judgment of the Court below must therefore be reversed.

BAGGALLAY, L.J.—I am of the same opinion, and for the same reasons. I wish, however, to add something to what has been said as to the case of *Crawshay v. Thornton* (1), as that case was mainly relied on by Lord Coleridge in the Court below. It was said that the warrants made a contract which would bring the case within *Crawshay v. Thornton* (1). It is true that that case was decided after the passing of the Interpleader Act, and that Lord Cottenham decided the case on the ground of the existence of a special obligation removing the case out of the operation of such interpleader, and moreover that that view of the case was adopted in the Common Law Courts in the case of *James v. Pritchard* (8), but all that occurred prior to 1860, when the Act was passed expressly to get rid of the principles of the Courts of Equity in the matter, and cases subsequently decided clearly carry out that view. I think, further, that if any similar question arose now in the Courts of Equity, they would not be bound by the restricted doctrine of *Crawshay v. Thornton* (1).

BRETT, L.J.—I am unable to agree with the decision of the Court below. Both Lord Coleridge and Baron Huddleston gave as one reason for that decision that the plaintiffs may recover damages against the defendants which they could not recover from Lopes. Both, therefore, came to the conclusion that in order that the Interpleader Acts may operate, the remedies and damages must be co-extensive. I cannot see how any damages are recoverable beyond the ordinary ones in

(8) 7 Mec. & W. 216; s.c. 10 Law J. Rep. Exch. 92.

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trover, but assuming they are, even then it seems to me that the case does fall within the operation of the Acts. All the circumstances mentioned in the Acts exist here, and nothing is said about the damages being co-extensive. The authorities moreover are directly in point.

Another objection was taken by Lord Coleridge. He seems to suggest that there would be a sort of estoppel on the company on account of their having given warrants to the plaintiffs. I cannot think that there is any such estoppel, and if there were a technical estoppel, I do not see that that would prevent the case from being within the Acts, and I think a Judge ought to disregard the technicality and send the case to be tried on its real merits. I do not stop to enquire whether *Crawshay v. Thornton* (1) is an authority, as the 12th section of the Common Law Procedure Act, 1860, has altered the law on the question.

Judgment below reversed.

Solicitors—G. H. K. & G. A. Fisher, for P. Attenborough; J. Attenborough, for R. Attenborough; Hacon & Co., for the Dock Company; E. D. Lewis, for Lopes.

[IN THE DIVISIONAL COURT SITTING
IN THE LONG VACATION.]

1878. } NASH v. PEASE; ECCLES AND
Aug. 8. } TURNER, garnishees.*

Practice—Garnishee Order—Equitable Debt—Fund vested in Trustees for Benefit of Judgment Debtor and third Party—Form of Order.

The plaintiff had recovered judgment against the defendant in an action of detinue, which judgment still remained unsatisfied. The defendant, under the will of her deceased husband, was entitled to an annuity for the maintenance of herself and

her infant son:—Held, that the annuity was attachable in the hands of the trustees in whom it was vested, subject to an enquiry as to the proportion to be allowed for the maintenance of the son.

This was an appeal from an order of Lindley, J., in chambers, dismissing a garnishee summons taken out by the plaintiff to attach a debt alleged to be due from the garnishees to the defendant. The summons had also been previously dismissed by a Master. The plaintiff had recovered judgment against the defendant in an action of detinue for the delivery of certain articles of furniture, or for damages. This judgment was altogether unsatisfied. The defendant was entitled under the will of her deceased husband to an annuity of 70*l.* a year, to be paid to her by the trustees so long as she should remain a widow, "for the maintenance, education and support" of herself and her infant son. In the event of the son attaining his majority or dying under age, the annuity was reduced to 50*l.* a year. The son was still alive, and a minor. As a matter of fact, the whole 70*l.* was being expended upon the son, who was learning farming. The will contained other provisions in reference to the son, and gave the trustees power of advancement for his benefit out of other funds. The garnishees were the present trustees of the will. Lindley, J., had dismissed the garnishee summons, on the ground that the annuity was not apportionable. This appeal was accordingly brought by the plaintiff.

Lush, for the plaintiff.—Rule 2, Order XLV. of the Rules of Court, 1875, is substantially a re-enactment of the garnishee clauses of the Common Law Procedure Act, with this important difference, that an equitable debt was not attachable at common law before the passing of the Judicature Act. There are two tests by which it may be determined whether a debt is attachable. Is it a debt in respect of which the judgment debtor could himself bring an action against the garnishee? In the event of

* *Coram Kelly, C.B., and Lush, J.*

Nash v. Pease.

the bankruptcy of the judgment debtor would it pass to his assignee? In the case of *Page v. Way* (1) it was held that the life interest of a husband, settled in terms somewhat similar to those of this annuity, passed to the assignee in bankruptcy, after an allowance for the maintenance of the wife and children.

Meadows White (with him *Tindal Atkinson*), for the garnishees.—The process under the garnishee clause is only applicable in the case of debts that are already ascertainable. It is impossible to determine how this annuity ought to be apportioned between the son and the mother. The case is really analogous to that of the half-pay of a naval officer.

KELLY, C.B.—The plaintiff is clearly entitled to his garnishee order, but under the circumstances we shall give no costs against the garnishees. The form of our order will be as follows:—Refer to Master to ascertain, having regard to all the circumstances of the case, what is the proper sum to be allowed for the maintenance of the son. The residue of the annuity to be attached. The garnishees to be allowed their own costs out of the trust estate (2).

LUSH, J., concurred.

Solicitors—George Holden, for plaintiff; Taylor & Hales, agents for E. & T. Clark, Snaith, for garnishees.

(1) 3 Beav. 20.

(2) Subsequently the Master certified that 40*l.* a year ought to be allowed for the maintenance of the son.

[IN THE EXCHEQUER DIVISION.]

1878. } DELMAR AND OTHERS v.
June 5. } FREEMANTLE.

Practice—Rule to Sheriff to pay Money levied—Notice of Motion—Order LIII. rules 1, 2, 3.

In ruling a sheriff to pay money returned by him as levied on a writ of execution, the proper practice is to give notice of motion to the sheriff under Order LIII. rule 3, and not to move for a rule to shew cause.

Fullarton moved for a rule calling on the Sheriff of Surrey to shew cause why he should not pay to the plaintiffs 31*l.* 18*s.* 10*d.* and interest, being the amount of a levy on a *fi. fa.* returned into Court. The sheriff had been ruled to return the writ, and had returned that he had levied the sum indorsed thereon, but he had not paid it to the plaintiffs.

[THE COURT.—Has notice been given to the sheriff?]

No. The application is for a rule to shew cause, in the first instance, under the old practice, and not for a rule absolute after notice under Order LIII. That Order by rules 1 and 2 applies only to applications in an action. This is not an application in an action; it is itself in the nature of an action, the plaintiffs having chosen to rule the sheriff instead of suing him.

KELLY, C.B.—I am of opinion that this is an application in an action. The affidavit is entitled in the action in which the plaintiff issued execution, the rule to the sheriff to return the writ of execution was entitled in the action, and the rule now asked for will be entitled in the action. There is considerable difficulty about the terms of Order LIII. rule 2, which provides generally that "no rule to shew cause shall be granted in any action," but I am inclined to think it applies. Notice of motion must therefore be given to the sheriff.

CLEASBY, B., concurred.

Delmar v. Freemantle, Exch.

On the 18th of June a motion was made upon an affidavit that notice of motion had been given to the sheriff, and no counsel appearing for the sheriff, a rule was granted upon him to pay over the sum indorsed on the *fi. fa.*

Rule granted.

Solicitors—Lewis, Munns & Longden, for plaintiffs; Abbott, Jenkins & Co., for the Sheriff of Surrey.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } THE GUARDIANS OF THE BRAMP-
June 22. } TON UNION (*appellants*) v.
THE GUARDIANS OF THE CAR-
LISLE UNION (*respondents*).

Order of Removal—Divided Parishes and Poor Law Amendment Act (39 & 40 Vict. c. 61), s. 34—Settlement of Pauper—Three Years' Residence.

[For the report of the above case, see 47 Law J. Rep. M.C. 114.]

[IN THE QUEEN'S BENCH DIVISION.]

1878. } SANDYS (*appellant*) v. SMALL
June 26. } (*respondent*).

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63. ss. 6, 8)—Article of Food mixed with other Matter—Notice of such Admixture—Sale to the "Prejudice of the Purchaser."

[For the report of the above case, see 47 Law J. Rep. M.C. 115.]

[IN THE EXCHEQUER DIVISION.]

1878. } BOOK (*appellant*) v. HOPLEY
May 7, 18. } (*respondent*).

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25—Protection to Seller buying with a written "Warranty"—Sale by written Description.

[For the report of the above case, see 47 Law J. Rep. M.C. 118.]

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ADULTERATION OF FOOD—Analysis by public analyst: notification by purchaser to seller. *Barnes v. Chipp* (M.C. 85), 434

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APPEAL—*order for leave to sign judgment: time for appealing*—An order giving plaintiff leave to sign final judgment under Order XIV. rule 1, is an interlocutory order, and an appeal from such order must therefore be brought to the Court of Appeal within twenty-one days. *Standard Discount Co. v. Otard de la Grange* (App.), 3

— *from inferior court: private roads: award, effect of: vendor and purchaser: derogation from grant*—An appeal will lie from the decision of a Divisional Court on appeal from a County Court, if special leave be given, under section 45 of the Judicature Act, 1873, notwithstanding section 20 of the Appellate Jurisdiction Act, 1876, and section 14 of the County Courts Act. *Crush v. Turner* (App.), 689

One H. was possessed of certain lands in the parishes of R. and W., the waste lands of which were about to be enclosed, and in respect of which he was entitled to an allotment. H. sold some of his land to the defendant, expressly reserving the intended allotments. Between the lands conveyed to the defendant and a high road to R. certain strips of land, forming part of the waste lands to be enclosed, were interposed, and over them there were track-ways, which had been used for more than forty years by the occupiers of the property conveyed

to the defendant as a means of access between part of the property and the high road, and which had been used by the defendant without dispute down to the time of the enclosure award. H. afterwards sold the allotments made to him, which included the strips of waste, to the person through whom the plaintiffs claimed. The award, which was duly made and confirmed, did not set out any ways over the allotments. Defendant claimed a right of way over them where the track-ways had passed:—*Held*, that by virtue of section 68 of 8 & 9 Vict. c. 118, any rights of way which might have existed prior to the confirmation of the award, were from that date extinguished, and that defendant had no such right as that claimed; and that the extinguishing of the right of way was not a wrongful derogation from the grant of plaintiff's predecessor in title. *Ibid*.

APPEAL (continued)—from Lord Mayor's Court—The Lord Mayor's Court is an inferior Court within section 45 of the Judicature Act, 1873, and where there has been an appeal from that Court to a Divisional Court under that section no further appeal lies to the Court of Appeal except by special leave of the Divisional Court. *Appleford v. Judkins* (App.), 615

— *jurisdiction: case stated by quarter sessions for the opinion of the Queen's Bench Division*—The Court of Appeal has no appellate jurisdiction to review a decision of the Queen's Bench Division in the matter of a poor-rate, which is a mere opinion binding on no one. So held, per COCKBURN, L.C.J., and BRETT, L.J.; *dissentientibus* BRAMWELL, L.J., and COTTON, L.J. *R. v. The Overseers of Walsall* (App.), 711

— *county courts: reference to arbitration: setting aside award*—There is no appeal from a refusal of a County Court Judge to set aside an award in an action referred by him to an arbitrator. *Mayer v. Farmer*, 760

— See Nonsuit.

ARBITRATION—compulsory reference—Where it appears that the matter in dispute in an action consists in part only of matters of account, the Court or Judge may not refer the whole matter compulsorily under 17 & 18 Vict. c. 125. s. 3. Therefore, where in an action for breach of covenants in a lease to repair and to leave the premises in substantial repair, the defendant denies the whole of the breaches, thus raising a question as to his liability, the Court has no jurisdiction to refer the action compulsorily under the above section. So held by COCKBURN, L.C.J., BRETT, L.J., and COTTON, L.J.; BRAMWELL, L.J., *dubitante*. *Clow v. Harper* (App.), 393

— *reference under the judicature acts: official referee: reference for trial: reference for report: entering judgment: form of order of reference*—The Court or a Judge has no power under the Judicature Act, 1873, ss. 56 and 57, to refer the whole action for trial to an official or special referee. Under section 57 the Court may, by consent, refer any question or issue of fact in an action to an official or special referee for trial, but their power of compulsory reference for trial under that section is confined to questions or issues in an action requiring prolonged examination of documents or local investigation, or questions of account, and any other matters so involved with such issues as to be incapable of being tried separately. *Longman v. East; Pontifex v. Severn; Mellin v. Monico* (App.), 211

A referee under the Judicature Acts to whom the issues in an action are referred for trial has no power to order judgment to be entered. His findings should be separate on each of the issues submitted to him; but, *semble*, that he may by consent of the parties find generally for the plaintiff or for the defendant. *Ibid*.

The old forms of orders of reference under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), are inapplicable to references under the Judicature Acts. *Ibid*.

Where a reference had been ordered to an official referee, and the order of reference was drawn up in the form known as the "Long Order," under the Common Law Procedure Act, 1854, and the parties with knowledge of the terms of the order appeared before the referee, who gave his award,—*Held*, that the referee must be taken to have sat as arbitrator by consent, and that his award was binding on the parties, neither of whom could obtain a new trial. *Ibid*.

The "Rules of the Supreme Court" have not enlarged, and, per BRAMWELL, L.J., could not enlarge, the powers of reference to official or special referees conferred by the statute. *Ibid*.

— See Lands Clauses Consolidation Act.

ASSIGNMENT—of chose in action: money to become due under contract—One Gough contracted with defendant to build him a ship, to be paid for in instalments. Gough being in difficulties, defendant, in order that the ship might be finished, advanced him the whole contract price before it became due. Before the last 100*l.* was advanced, Gough borrowed a like sum from plaintiff, and assigned to him the 100*l.* "to become due" from defendant. Defendant had due notice of this, but notwithstanding advanced the remaining 100*l.* to Gough:—*Held* (by BRAMWELL, L.J., and COTTON, L.J., *dissentientibus* BRETT, L.J.), that he was liable to pay the 100*l.* to plaintiff, the assignment being a good one under the Judicature Act, 1873, section 25, sub-section 6. *Brice v. Bannister* (App.), 722

— See Bill of Sale.

ATTACHMENT OF DEBT. See Debtor and Creditor.

BANKRUPTCY—*joint and separate estates under liquidation: discharge granted by joint creditors only: property left in possession of debtor or subsequently acquired*—A trustee under a liquidation, who, with the authority of the creditors, permits the debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that the debtor was holding himself out as the real owner and dealing with it as such, forfeit his right to it so long as there has been no closing of the liquidation or order of discharge; and his right to it and to any after-acquired property cannot be defeated by a bill of sale given by the debtor subsequently to the liquidation. Where a liquidating debtor has separate as well as joint creditors and assets, an order of discharge by the joint creditors will not operate to discharge him from his separate debts, and any after-acquired property will therefore vest in the trustee appointed under the liquidation. *Meggy v. The Imperial Discount Co. Ltd.* 119

— See Debtor and Creditor.

BILL OF EXCHANGE—*acceptance: acceptance in writing*—A bill of exchange is not sufficiently accepted to satisfy the 19 & 20 Vict. c. 97. s. 6, which requires the acceptance to "be in writing on such bill and signed by the acceptor," if the person on whom it is drawn merely writes his name across the face of it, and there are no words amounting to a statement that the bill is accepted. [See, however, the 41 Vict. c. 13. s. 1.] *Hindaugh v. Blakey*, 345

— *stolen bill: liability of acceptor: negligence: estoppel*—A bill of exchange, with a blank for the drawer's name, and defendant's name written across it as acceptor, was placed by defendant in a drawer in his chambers, from which it was stolen. A drawer's name was forged, and subsequently the bill came into the hands of plaintiff as *bona fide* holder for value. In an action on the bill, —*Held*, that defendant was not liable. By *BRAMWELL, L.J.*, because the negligence of defendant, if any, was not the proximate or effective cause of the loss, and therefore did not estop defendant from denying the validity of the bill. By *BRETT, L.J.*, because the bill was drawn without the authority of defendant, and defendant had been guilty of no negligence. —*Young v. Grote* (4 Bing. 263), *Ingham v. Primrose* (28 Law J. Rep. C.P. 294) and *Coles v. The Bank of England* (10 Ad. & E. 437), questioned. *Barendale v. Bennett* (App.), 624

— See Letters of Credit. Partners.

BILL OF LADING—*goods shipped on account of vendee: to vendor's order or assigns: passing of property*—Plaintiff contracted to purchase a certain quantity of goods from P. & Co. P. & Co. purchased the goods from C., whom they paid, and shipped them from Cyprus to London for and on account of defendants, and delivered the invoice to plaintiff. They drew a bill on plaintiff's firm in London to the order of C. C. discounted it with defendants, and forwarded it to defendants' London agents, together with bills of lading drawn to the order or assigns of P. & Co., with instructions that plaintiff's London firm would be ready to accept and pay it at maturity against delivery of the bills of lading. The bill being presented to plaintiff, he refused to accept it without receiving the bills of lading. Thereupon defendants took possession of the cargo, and, notwithstanding that plaintiff offered to pay the bill of exchange, refused to deliver to him the bill of lading without payment of the bill, together with the freight and charges; and eventually sold the cargo for less than its value. On a special case, the arbitrator found as a matter of fact that the parties had intended that the property should pass to plaintiff on shipment of the goods:—*Held*, that such finding was justified by the facts; that the property had passed to plaintiff, on the tender of payment of the bill of exchange, and that as defendants had no title to the goods, plaintiff could maintain an action against them for the conversion thereof. *Mirabita v. Imperial Ottoman Bank* (App.), 418

— *bill of lading: charter-party: consignee prevented discharging cargo within the time by default of other consignees: demurrage*—The defendants in two actions, who were indorsees of bills of lading for portions of cargoes of wheat, were sued by the respective shipowners for demurrage. In the first action, the bill of lading contained the following stipulation: "Three working days to discharge the whole cargo, or 30 $\frac{1}{2}$ sterling per day demurrage." In the second action the charter-party under which the ship was chartered stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days' demurrage at 35 $\frac{1}{2}$ day by day, and the bill of lading said, "paying freight for the same goods and all other conditions as per charter-party." In both cases the defendants' portions of the cargoes were stowed at the bottom of the hold, and in consequence of the consignees of the upper portions not being ready to take delivery as soon as the ship was ready to discharge, they were unable to clear their portions till after the expiration of the lay days:—*Held*, in both cases, that defendants were liable, on the ground that the stipulation in the bill of lading in the first case, and that in the charter-party (which was to be read into the bill of lading) in the second case, amounted to

an absolute contract to pay demurrage if defendants failed to discharge the cargo within the time, unless prevented doing so by the default of the shipowner. *Straker v. Kidd & Co.* and *Porteous v. Watney*, 365

BILL OF LADING (continued)—*liability of consignee named in bill of lading: delivery to be taken within reasonable time: contract implied by law in bill of lading*—Where there is no express stipulation in a bill of lading it is an implied term of the contract contained in it, that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time; and the person to whom the property in the goods has passed, by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111. s. 1), subject to the liability so to take them. Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charter-party, between the charterers and the shipowner, in reference to the same matter. *Fowler v. Knoop*, 473

—*contract for iron to be delivered during specified months: equal monthly quantities: action for demurrage*—Defendants contracted to buy from plaintiff from 5,000 to 6,000 tons of iron ore, to be delivered at Cardiff "during the months of June, July, August and September." It appeared from the correspondence between the parties which led to the contract that plaintiff had arranged with correspondents at Carthagens for the supply and shipment of the ore. By the 28th of July 4,623 tons of ore were delivered to and accepted by defendants, and on the 29th of July the *Nero* arrived with 767 tons more, notice at the same time being given to defendants of her readiness to discharge. There was considerable delay in discharging the *Nero*, she having made an exceptionally short voyage, and for her detention beyond the lay days, plaintiff had to pay demurrage to the extent of 150*l.*, which he now sought to recover from defendants. The jury found that the tender was a reasonable one, but defendants contended that the quantity ought to have been distributed rateably over the four months, and that, not being bound to accept the *Nero's* cargo till September, they were not liable to pay the demurrage sued for.—*Held*, by LUSH, J., that the contract gave the option to either party to deliver or to demand the amount contracted for; and as no provision was made for exercising the option at any given time, whether in the first month or the last, plaintiff could not tell, until the option was exercised, how many tons should be delivered in any month; also, that the circumstances shewed that the parties could not have contemplated equal monthly quantities. *Calaminus v. Dowlais Iron Company (Lim.)*, 575

—*bill of lading: charter-party: consignee prevented from discharging within the time by the default of other consignees: demurrage*—Defendants were indorsees of a bill of lading for a portion of a cargo of wheat. The charter-party under which the ship sailed stipulated that fourteen working days should be allowed for loading and unloading at the port of discharge, and ten days' demurrage at 35*l.* day by day, and the bill of lading contained the words, "paying freight and other conditions as per charter-party." Defendants' portion of the cargo was stowed at the bottom of the hold, and in consequence of the delay of the consignees of the upper portions in taking delivery, defendants were unable to clear their portion till after the expiration of the lay days.—*Held*, that defendants were liable in an action for demurrage, on the ground that the charter-party (which was to be read into the bill of lading) amounted to an absolute contract to pay demurrage unless prevented from doing so by default of the shipowner. *Porteous v. Watney* (App.), 643

—*excepted perils: liability of shipowner on bill of lading not signed by master: negligent stowage*—A shipowner may be liable on a bill of lading which has been signed by some other person than the master of such ship; and therefore, where a bill of lading had been signed by the charterers of the ship, but not on their own behalf, but as agents for the shipowner, and with his authority, the shipowner was held liable thereon to the owner of goods shipped under such bill of lading for damage by negligent stowage, such damage not being one of the risks mentioned in the bill of lading, and the shipper of the goods having no notice of any charter-party until after the goods had been damaged. *Hayn, Roman & Co. v. Culliford*, 755

The exceptive clause in a bill of lading was as follows:—"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry and collision, fire on board or on shore, and all accidents, loss and damage of whatsoever nature or kind, and however occasioned from machinery, boilers, steam and steam navigation, or from perils of the sea or rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed that the captain, officers and crew of the vessel in the transmission of the goods as between the shippers, owner or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner or consignee"—*Held*, that damage from negligent stowage was not within this exceptive clause, so as to exempt the shipowner from liability for the same. *Ibid.*

BILL OF SALE—certificates: evidence of registration
—It is incumbent on a claimant, under a bill

of sale, to shew that the document filed is a true copy of the original instrument. A certificate of the registration of a bill of sale, without production of an authenticated or office copy of the bill of sale certified to have been registered, is not sufficient. *Halkett v. Emmott*, 436

— *assignment of present and future property: judgment creditor*—M. assigned to plaintiff all the machinery, plant, &c., upon certain leasehold premises, comprising a sugar refinery, warehouse and other offices, as well as the machinery, plant, &c., "which shall hereafter be upon the said premises," for securing a sum of money and interest. The assignment was duly registered under the Bills of Sale Act. The interest due under the above-mentioned security being in arrear plaintiff obtained judgment of recovery of the premises; prior, however, to the writ of possession being delivered to the Sheriff, the latter had seized a considerable amount of machinery and fixtures, used in connection with the sugar refinery, but acquired subsequently to the deed, under a writ of *fi. fa.* issued by defendants upon a judgment obtained against M., who was then in possession of the premises and of the property seized.—*Held* (on the authority of *Holroyd v. Marshall*, 23 Law J. Rep. Chanc. 193), that as the assignment to plaintiff, though of after acquired property, was absolute, and not a mere agreement to assign, and as the goods were sufficiently specific to make the assignment operative in equity, plaintiff was entitled to the property seized as against defendants. *Leatham v. Amor*, 581

— *description of residence of attesting witness*—The attestation to a bill of sale correctly described the witness as "Solicitor, Bloomfield Street, in the City of London." In the affidavit the witness, describing himself as "Solicitor, of 16, Bloomfield Street, in the City of London," proceeded to state that he "resided" at "Grove House, Acton, in the City of London." His residence was in fact at Grove House, Acton, Middlesex. There were three places called Acton in England, none of them being in the City of London:—*Held*, a sufficient description of the residence of the attesting witness, it being one which, though inaccurate, would, coupled with the description in the bill of sale, enable a person of ordinary intelligence to conclude that the suburban Acton must be the place of residence of a solicitor carrying on business in the City of London. *Blount v. Harris*, 596

— See Bankruptcy. Sale of goods.

BOROUGH FUND—Municipal Corporations Act: fines made "payable to her majesty" by subsequent Act. *The Attorney-General v. Moore* (App.) (M.C. 103), 487

BREACH OF PROMISE. See Infant.

BYE-LAWS. See Local Government Act. Public Health Act. Railway Company.

CARRIER—*liability of as insurer for passenger's luggage: negligence*—Railway companies are not insurers of that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he travels or is about to travel; but they are liable for loss or injury to it caused by their negligence. *Berghem v. Great Eastern Rail. Co.* (App.), 318

— "paintings:" *carpet patterns*—The word "paintings" in the Carriers Act means articles of artistic value as paintings. Models and working designs for carpets and rugs, painted by hand and skilfully designed, but of value in the carpet trade only, are not within the class designated. *Woodward v. London and North Western Rail. Co.*, 263

— See Railway and Canal Traffic Act.

CHARTER-PARTY — *construction: time: despatch money for all time saved*—Under the terms of a charter-party, cargo was to be shipped at the rate of 200 tons per running day, and to be discharged as fast as ship could deliver, not exceeding 200 tons per working day. Demurrage, if any, at the rate of 20s. per hour, except in certain cases, and despatch-money 10s. per hour on any time saved in loading or discharging. Ship to load and discharge by night and by day, and as rapidly as possible when required by shippers, consignees or charterers:—*Held*, that, according to the true meaning of the charter party, despatch-money was payable for every hour saved during the whole twenty-four hours, and not merely in respect of a working day of twelve hours. *Laing v. Holway* (App.), 512

— *warranty of class: cancellation of certificate of classification after charter*—Plaintiffs chartered a ship to defendants. The charter-party was headed "A. 1½ on the record of the American and foreign shipping book," and in the body of the document she was described as "classed as above." At the time of chartering she was actually so classed, but afterwards and before loading she was found to have been wrongly classed, and her certificate of classification was cancelled. Defendants thereupon refused to load:—*Held*, that there had been no breach of warranty on the plaintiffs' part, and that defendants were bound to load in accordance with the charter. *French & Son v. Newgass & Co.* (App.), 361

— See Bill of Lading.

CHOSE IN ACTION. See Assignment.

CLERGY. See Public Worship Regulation Act.

COMPANY—*voting at meetings: demand of poll: proxies: election of director: mandamus*—Where by the articles of association of a company registered under the Companies Act, it was provided, that at every meeting all questions should be decided by the result of a show of hands, unless immediately upon such show of hands a poll be duly demanded by shareholders qualified to vote, and holding in the aggregate 2,000 shares or more,—*Held*, that the shareholders demanding a poll must themselves hold the requisite number of shares, and that it is not enough that by the possession of proxies they represent that number. *R. v. The Government Stock Investment Co.*, 478

Where a poll illegally demanded has resulted in the defeat of the candidate for directorship who had obtained the show of hands at the meeting, mandamus will lie to admit him to the office, notwithstanding its assumption and occupation by the candidate victorious on the polling. *Ibid.*

—*liability of directors for fraudulent prospectus issued by agent*—Defendants were directors of an iron ore mining company, which was compelled to cease working for want of funds. Subsequently money was advanced by the defendants, with the exception of defendant Bell, and a small quantity of ore was raised. At an annual general meeting of the company the directors were authorised to raise money on debentures, and at subsequent meetings of the directors it was agreed, in the absence of Bell and without his knowledge, that the advance should be repaid out of the proceeds of the debentures, and, with the concurrence of Bell, that the secretary should employ brokers to place the debentures. The brokers for this purpose issued a prospectus containing unauthorised fraudulent statements. Plaintiff, on the faith of these statements, purchased debentures, and the money was devoted to the repayment of the advances. The company was subsequently wound up, and plaintiff having brought an action to recover his purchase money,—*Held*, by COCKBURN, L.C.J., BRAMWELL, L.J., and BRETT, L.J., *dissentiente* COTTON, L.J., that Bell was not liable to the plaintiff. *Weir v. Bell* (App.), 704

— See Railway Company. Telegraph Company.

COMPENSATION. See Highway. Lands Clauses Consolidation Act. Telegraph Company.

COMPOSITION. See Debtor and Creditor.

COMPULSORY REFERENCE. See Arbitration.

CONTAGIOUS DISEASES (ANIMALS) ACT—Order of Council: transit of animals: vessel conveying sheep from Ireland: jurisdiction of justices: appeal. *Muir v. Hore* (M.C. 17) 99

CONTRACT—*corporation by statute for public purposes: contract not under seal*—By section 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), every contract by the local Board of Health, whereof the value exceeds 10*l.*, and by section 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), every contract by an urban authority, whereof the value exceeds 50*l.*, shall be in writing and sealed with the seal of such board or authority as the case may be. The defendants who were a local board within section 85 of the Act of 1848, and an urban authority within the meaning of section 174 of the Act of 1875, were found by a jury to have authorised their surveyor to employ the plaintiff, an architect, to prepare certain plans for offices they intended to erect, but which they did not erect, and to have ratified the act of their surveyor in procuring them, and such offices were found also by the jury to be necessary for the purposes of the defendants, and the plans necessary for the erection of the offices. The plans were ordered when the Public Health Act, 1848, was in force, but were not finished until that Act had been replaced by the Act of 1875. There was no contract under seal with the plaintiff, nor ratification under seal of any contract with him, and the value of the work done exceeded 50*l.*:—*Held*, that as the enactments requiring a seal were compulsory and not merely directory, and had not been complied with, the defendants were not liable to pay for the plans, notwithstanding the findings of the jury. *Hunt v. The Wimbledon Local Board*, 540

—*master and servant: agreement in fraud of a third party: absence of damage*—An agreement made with the purpose of doing something which is calculated to defraud or injure a third party is illegal and void as between the parties to it; and it makes no difference that no damage has in fact been sustained by such third party. *Harrington v. The Victoria Graving Dock Co.*, 594

— See Assignment. Bill of Lading. Damages. Letters of Credit.

COPYRIGHT. See Dramatic Copyright Act.

CORPORATION—*common informer: "person or persons": action for penalties*—A corporation cannot sue for penalties as a common informer unless expressly authorised by statute. Where, therefore, by a private Act penalties were imposed for selling one sort of coal for another within twenty-five miles of the General Post Office, and the penalty was recoverable

by the "person or persons who shall inform or sue for the same,"—*Held*, that plaintiffs, who were a corporation, could not sue for the penalty. *Guardians of St. Leonard's, Shoreditch, v. Franklin*, 727

Costs—county courts act, 1867: "*action founded on contract*" or "*founded on tort*"—In an action against carriers for loss of goods by delivery to an insolvent purchaser contrary to notice given by plaintiff in exercise of the right of stoppage *in transitu*, plaintiff recovered 12l. Upon objection that plaintiff was disentitled to costs by the County Courts Act, 1867, s. 5,—*Held*, that this was an action "founded on tort" within the meaning of the section, and that plaintiff was therefore entitled to costs. *Pontifex v. Midland Rail. Co.*, 28

— *detinue: contract or tort*—*Detinue* is an action of tort within the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5. *Bryant v. Herbert*, 670

Plaintiffs delivered to defendant a picture in order that defendant might determine whether it was a genuine picture painted by himself or not. Defendant having come to the conclusion that the picture was not genuine, refused to give it back to plaintiffs except upon conditions to which plaintiffs would not agree. In an action brought for the wrongful detention of the pictures, plaintiffs obtained a verdict for 10l., the value of the picture, and 1s. as damages for its detention. The Judge at the trial refused to make any order for the delivery up of the picture, and made no order as to costs:—*Held* (overruling the decision below, 354), that the plaintiffs were not deprived of their costs by 30 & 31 Vict. c. 142. s. 5. *Ibid*.

— *of counter-claim*—The provisions of the County Courts Act, 1867, denying costs in an action in the Superior Court where a minimum is not recovered, do not apply to a defendant recovering on a counter-claim. *Blake v. Appleby*, 407

— *public health act, 1875: compulsory taking of lands: assessment of compensation: costs of arbitration*—An arbitration held for the assessment of compensation in respect of lands taken compulsorily by a local board by virtue of the powers of the Public Health Act, 1875, is not an arbitration under that Act within sections 179 and 180, but is regulated by the provisions of the Lands Clauses Consolidation Acts incorporated by section 176. The costs of such arbitration are, therefore, not in the discretion of the arbitrator. *Ex parte Rayner*, 660

— *costs to follow the event: verdict on second trial: costs of previous trial*—Where plaintiff recovers a verdict, and a new trial is ordered on

the ground of excessive damages, in which new trial plaintiff again obtains a verdict in his favour, the second verdict is the "event," within the meaning of Order LV., which the costs of the whole action are to follow, including the costs of the abortive first trial. *Field v. Great Northern Rail. Co.*, 662

— in action for collision of ships. See Practice.

— Judgment for costs in House of Lords. See Action.

— See Practice. Taxation of Costs. Security for costs.

COUNTER CLAIM. See Pleading. Set-off.

COUNTY COURT—cause sent for trial: new trial: right to trial by jury—Where a cause ordered under 19 & 20 Vict. c. 108. s. 26, to be tried in a County Court, has been tried there accordingly, and afterwards a new trial has been ordered, either party has a right to require a jury on the second trial, notwithstanding the order for the second trial does not direct how the cause shall be tried, and the first trial was by the Judge without a jury. *Ford v. Taylor*, 116

— *action ordered to be tried in the county court where claim reduced below 50l. by payment into court*—Where the claim indorsed on a writ in an action in the Superior Court is reduced below 50l. by a payment of money into Court, the action cannot be sent for trial to the County Court under 30 & 31 Vict. c. 132. s. 7.—The decision in *Osborne v. Homburg* approved. *Poster v. Usherwood* (App.), 30

— See attachment of debts. Costs. Inferior Court. New Trial.

COURT OF APPEAL—Jurisdiction of. See Appeal.

COVENANT—to pay rates, &c. See Landlord and Tenant. Mining Lease. Specific Performance.

CRIMINAL INFORMATION—responsibility of proprietors of newspapers for libel inserted by editor without their knowledge—On the trial of a criminal information for libel it was proved on the part of defendants, proprietors of a newspaper, that they had appointed a competent editor to undertake the literary management of the paper, and that the article in question was inserted by him without their knowledge, and without any specific authority or consent of theirs; and it was sought upon such evidence to raise a defence under section 7 of Lord

Campbell's Act (6 & 7 Vict. c. 96). The learned Judge having ruled that upon proof of the general authority of the editor who had inserted the article, it was not open to defendants to claim the protection of the statute, and having thereupon directed a verdict of guilty, —*Held*, by COCKBURN, L.C.J., and LUSH, J. (dissentiente MELLOR, J.), that a new trial ought to be had on the ground that the section did apply to the case of a libel published by an editor having admittedly general authority; and that it was a question which ought to have been left to the jury whether within the words of exemption in that section the defendants were criminally responsible for his act. *R. v. Holbrook*, 35

never been given, and the debt revives and is capable of being attached under a garnishee order. *Cohen v. Hale*, 496

— *garnishee order: equitable debt: fund vested in trustees for benefit of judgment debtor and third party: form of order*—Plaintiff had recovered judgment against defendant in an action of detinue which judgment still remained unsatisfied. Defendant, under the will of her deceased husband, was entitled to an annuity for the maintenance of herself and her infant son:—*Held*, that the annuity was attachable in the hands of the trustees in whom it was vested, subject to an enquiry as to the proportion to be allowed for the maintenance of the son. *Nash v. Pease*, 766

DAMAGES—breach of contract: improper repairs to steamer: consequent non-employment of vessel—In an action against defendants for breach of contract in improperly repairing a sea-going steam vessel, plaintiffs claimed damages for the loss sustained by the detention of the vessel by reason of such improper repairs:—*Held*, on the authority of *Hadley v. Baxendale*, that they were entitled to do so, the detention of the vessel being the probable result of the breach of contract. *Wilson v. General Iron Screw Colliery Co. Lim.*, 239

— *garnishee: payment under compulsion of law: protection from payment a second time*—Plaintiff having recovered judgment against defendant for 18*l.*, and defendant having recovered judgment against B. for 44*l.*, plaintiff obtained an order, attaching B.'s debt, together with a summons, calling on B. to shew cause why he should not pay to plaintiff 18*l.* of the amount of the debt due to defendant. Afterwards, and before the return of the summons, defendant taxed his costs as against B., and the same day issued a *fi. fa.* under which the sheriff took possession of the goods of B. who gave notice to the sheriff of the summons, and offered to pay the sheriff the debt due to the defendant, less the amount due to the plaintiff. This the sheriff refused to accept, and insisted on being paid the whole amount for which execution was levied. Whereupon B. paid the whole amount under protest:—*Held*, that B. having been compelled by process of law to pay the debt to the sheriff, could not be called upon to pay it a second time to the plaintiff. *Turnbull v. Robertson*, 294

— See Easement. Inferior Court. Mine.

DEBTOR AND CREDITOR—garnishee: "debts owing and accruing"—Salary, payable quarterly, and not due until a future date, is not a debt "due, owing or accruing," and cannot be attached under Order XXIV. rule 4, of the County Court Rules, 1875.—The observations of WIGHTMAN, J., and CROMPTON, J., in *Jones v. Thompson*, approved and followed. *Hall v. Pritchett*, 15

— *composition: contingent debt omitted from debtor's statement: creditor's right of action*—The appellant entered into a bailbond jointly with another on behalf of the appellant for the payment of any damages and costs which might be awarded in a suit then pending in the Admiralty Court. The appellant having become insolvent, presented a petition under the Bankruptcy Act, 1869, for liquidation by arrangement or composition. He inserted in his statement the name and address of the respondent as creditor in respect of a certain sum not connected with the bailbond, but the statement did not contain any mention of the contingent liability on the bailbond. The respondent claimed a larger sum in respect of the inserted debt, and the statement was amended accordingly. The respondent proved for and received a composition on this debt, but no composition was paid to him in respect of the liability on the bailbond. Subsequently the suit in the Admiralty Court was decided

— *garnishee order: claimant: judge by consent trying issue summarily*—Where upon an attachment, under a garnishee order by a judgment creditor, of moneys due to the judgment debtor, a third party claims such moneys for a debt due to him from the judgment debtor, and consents to a Judge at chambers deciding the issue summarily between him and the judgment creditor, instead of asking under Order XLV. rule 7, for an issue to be tried in the usual way, such decision of the Judge is final, and cannot be appealed against by such third party. *Eade v. Winser*, 584

— *garnishee order: payment of debt by cheque: revival of debt*—Where a cheque has been given in satisfaction of a debt, but payment of the draft has been stopped before it has been cashed, the debt and the position of the parties is just the same as though such cheque had

against the appellant, and, on his default, the respondent had to pay the amount secured by the bailbond:—*Held* (affirming the decision of the Court of Appeal, 46 Law J. Rep. 729, *dubitante* LORD GORDON), that the respondent was not bound by the composition proceedings in respect of the contingent debt, and that he was entitled to recover what he had paid under the bailbond. *Breslau v. Brown* (H.L.), 729

DEFAMATION—*libel and slander: malice: privileged occasion*—In an action of defamation, where the Judge has ruled that the occasion on which the defamatory matter was published is a privileged one, it is his duty to direct the jury—That unless they are satisfied that the defendant did not use the occasion for the reason which conferred the privilege, but for some indirect reason or motive, they must find for the defendant.—That the burden of proof of the existence of such indirect reason or motive is on the plaintiff.—That where the direct motive suggested by the plaintiff is malice, he must shew the existence of actual malice, *i. e.*, a wrong feeling; and it is not enough to shew that the defendant acted unreasonably, or without just cause or excuse. *Clark v. Molyneux* (App.), 230

A defamatory communication made by a clergyman to his curate, for the purpose of obtaining his advice as to the course to be pursued by him in an ecclesiastical matter, is privileged.—*So held* per BRETT, L.J., and COTTON, L.J., *dubitante* BRAMWELL, L.J. *Ibid.*

—*privilege: report of ex parte proceedings before a magistrate in a police court: jurisdiction*—The rule that the publication of a fair and correct report of proceedings taking place in a public Court of Justice is privileged, extends to proceedings taking place publicly before a magistrate, though such proceedings consist of an *ex parte* application for a criminal summons, terminating in the refusal by the magistrate to proceed with the charge on the ground that on the facts stated he had no jurisdiction. *Usill v. Hales*, 323

Three men who had been employed by the plaintiff, a civil engineer, in the construction of a railway, applied to a magistrate in open Court for criminal process against plaintiff, alleging, that as they had not been paid their wages, while plaintiff had been paid, they considered he had been guilty of a criminal offence in withholding their money. The magistrate refused the summons considering that he had no jurisdiction. Defendants afterwards published a report of the proceedings which the jury found was a fair and correct report of what occurred:—*Held*, that the report was privileged. *Ibid.*

—“*felon:*” *effect of undergoing punishment*—In an action of libel for calling plaintiff a “felon,” it is no justification to shew that plaintiff has been convicted of felony, without shew-

ing that he actually committed the felony. And per BRETT, L.J., and COTTON, L.J., it must also be shewn that the plaintiff has not undergone the punishment awarded to him for his offence, so as to be purged therefrom. *Leyman v. Latimer* (App.), 470

DEMURRAGE. See Bill of Lading. Charter-party. Ship and Shipping.

DETINUE. See Costs.

DISCOVERY. See Inspection of Documents. Interrogatories.

DISTRESS—for rent. See Landlord and Tenant.

DRAMATIC COPYRIGHT ACTS—*right of representation: penalties: assignment of “London right”*—Plaintiff, the author of a drama, entered into the following agreement with R. & E.:—“Received of Messrs. R. & E. the sum of 75*l.* in part payment of 150*l.* for the London right of a piece to be called ‘Ticket of Leave,’ the residue to be paid at 2*l.* per night, after the first twenty-five nights of the representation of the same.” In an action against defendant for representing the piece without license, the Judge at the trial having held that the term “London right” meant the whole of the plaintiff’s right of representation in London, and that the license was to R. & E. and their assigns.—*Held*, that plaintiff could bring no action for penalties under 3 & 4 Will. 4. c. 15, in respect of representations in London, except as trustee for R. & E. or their assigns. *Taylor v. Neville* (App.), 254

—*infringement: materiality of part appropriated: action referred to decision of judge: explanation by judge of his finding*—To support an action for infringement of dramatic copyright under 3 & 4 Will. 4. c. 15. s. 2, it must be proved that defendant has taken a substantial and material part of plaintiff’s production. *Chatterton v. Cave* (H.L.), 545
Where by agreement the jury were discharged and the cause submitted to the decision of the Judge.—*Held*, that on a motion for a new trial or to take a verdict for plaintiffs, it was competent for the Judge to explain to the Court the reasons and precise meaning of his finding. *Ibid.*

EASEMENT—*prescriptive easements: right to lateral support for buildings: presumption of grant when liable to be rebutted*—Any presumption arising from length of enjoyment, as respects the easement of lateral support to buildings is one which is open to be rebutted. Where it is established that no grant of such an easement was ever made, and none can be implied, the

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presumption from mere enjoyment fails; and where the easement claimed is such that the servient owner, whether he knows of the fact or not, has no practical means of resisting its acquisition, no presumption of a grant can arise. *Angus and Co. v. Dalton and the Commissioners of Her Majesty's Works and Public Buildings*, 163

One of two adjoining houses having been, twenty-seven years before the accident, altered internally by plaintiffs so as to be made to rest chiefly on a pillar built on the edge of their land and contiguous to that on which the adjoining house of defendants stood, fell down when excavations were made by defendants on the site of their house which they had pulled down, and by reason of the pillar being deprived of the lateral support previously afforded by the soil under the adjoining house of defendants. In an action by plaintiffs to recover damages for the loss caused by the fall of their house under the above circumstances,—*Held*, by COCKBURN, L.C.J., and MELLOR, J. (*dissentiente* LUSH, J.), that the mere enjoyment of the lateral support for the twenty-seven years did not give to the plaintiffs a right to such support as against the adjoining owner, no grant having been made or assent given, and none being to be implied. By LUSH, J.—That the house of the plaintiffs had acquired the status of an ancient building; and as mere absence of assent will not prevent a right to support being acquired, the defendants were responsible for the whole of the damage done, of which the excavation made was the sole cause. *Ibid*.

EASEMENT (continued)—*ancient lights: right not limited by the purpose for which light actually used: measure of damages*—Where the access of light to ancient windows is interfered with, the measure of damages is the diminished value of the premises, having regard to any purpose to which they may reasonably be put. The right of the owner of the dominant tenement is to the *quantum* of light which has always entered the windows without reference to the purpose for which it has been used. *Martin v. Goble* dissented from. *Moore v. Hall*, 334

EJECTMENT. See Landlord and Tenant. Recovery of Land.

ELEMENTARY EDUCATION ACT—Application for formation of School Board: voting at preliminary meeting: personation: rules *ultra vires*. *R. v. Sankey* (M.C. 96), 633

ESTOPPEL. See Bill of Exchange.

EVIDENCE—*stamp acts: deed*—Before a deed can be admitted in evidence it must be proved to the satisfaction of the Judge that the instrument is

duly stamped, not only at the time of its production but also in accordance with the law in force at the time when it was first executed.—*Gatty v. Fry* (46 Law J. Rep. Exch. 605) distinguished. *Clarke v. Roche*, 147

—*hearsay: declaration accompanying act: statement of deceased vendor: identification of property*—Statements of a deceased vendor, made at the time of sale to indicate the property sold, are, for the purpose of its identification, admissible in evidence. *Parrott v. Watts*, 79
Plaintiff claimed, under a surrender of copyhold lands in 1845, to be in possession of a certain piece of waste land within the manor of M., purchased by him from B., the then tenant in possession, who was also plaintiff's predecessor in title, and the surrenderor under the deed of surrender. In order to identify the land claimed with a parcel of land described in the deed of surrender as "the common piece on the Mind," the plaintiff stated that at the time of the purchase, B., since deceased, went over the land with him, and pointed out to him "the common piece on the Mind." On objection to this evidence,—*Held*, that it was admissible, as a declaration accompanying and explaining an act. *Ibid*.

— See Bill of Sale. Highway.

EXCISE—License to deal in plate: lower or higher rate of duty: article "where the gold shall be of two ounces or upwards." *Young v. Cook* (M.C. 28), 99

— Wine merchant: wine dealer's license; grocer selling wine off premises without justices' certificate. *R. v. Justices of Bristol, and Palmer v. Thather* (M.C. 54), 272

— Wine and spirit merchant: retailing spirits without excise license: orders taken at one place and executed at another. *Stallard v. Marks* (M.C. 91), 520

EXECUTOR DE SON TORT—*intestacy: compulsory vacation of premises: removal of goods by widow and auctioneer before administration*—B. was manager of some iron works, and as such lived in a house in the neighbourhood. B. died intestate and insolvent on the 22nd of June, 1877. Shortly after his decease and before letters of administration could be taken out, the widow was required to vacate the premises, and it became necessary to remove the furniture which belonged to the deceased. Accordingly, part of it was taken by her to a smaller house, and afterwards purchased, and the residue sold by auction. The proceeds of the auction, as well as the valuation price of the goods retained by the widow, were duly handed over to the administrator afterwards appointed. *Actions*

having been brought both against the widow and the auctioneer, charging them respectively as executors *de son tort*.—*Held*, that they were not liable, on the ground that there had been no wrongful intermeddling with the assets, or dealing with them in such a way as denoted an usurpation of the functions of an executor. *Peters v. Leeder*; *Same v. Borquet*, 673

FACTORS ACTS—*agent entrusted with the possession of goods: what amounts to an entrusting: goods left in possession of vendor after sale: negligence: estoppel*—Plaintiff bought tobacco of H., a tobacco merchant and broker. The tobacco was left in a bonded warehouse, and the dock warrants were left in the possession of H., and no entry of plaintiff's name as owner was made in the books of the dock company. H. afterwards, in fraud of plaintiff, obtained advances by pledging the tobacco to the defendants, who took the dock warrants and obtained fresh ones from the dock company:—*Held*, that plaintiff had not entrusted H. with the documents of title as factor or agent within 6 Geo. 4. c. 94. s. 2, and that plaintiff had not been guilty of such negligence in leaving the dock warrants in the hands of H. as to disentitle him to recover the value of the tobacco from the defendants. [See now Stat. 40 & 41 Vict. c. 39.] *Johnson v. The Cr dit Lyonnais*: *Johnson v. Blumenthal* (App.), 241

FALSE REPRESENTATION—*sale of animals in public market: implied representation of freedom from infectious disease*—Defendant sent pigs, infected with a contagious disease, for sale to a public market (which is an offence under section 57 of the Contagious Diseases (Animals) Act, 1869). The plaintiff bought the pigs, which infected other pigs in his possession, causing him great loss and expense. In an action for breach of warranty and false representation,—*Held* (reversing the decision of the Queen's Bench Division), that the mere act of exposing the pigs for sale in a public market was no evidence of an implied representation by the defendant that they were free from infection, or that he did not know them to be infected. *Ward v. Hobbs* (App.), 90

FIXTURES—Removal of. See Landlord and Tenant.

GAME—Taking during fence months. *Watkins v. Price* (M.C. 1), 79

GAMING. See License and Licensing Acts.

GARNISHEE ORDER. See Debtor and Creditor.

GRANT—When implied. See Easement.

HARBOURS, &c., CLAUSES ACT—*damage to pier by derelict vessel: owner's liability: act of God*—Section 74 of the Harbours, Docks and Piers Act, 1847, enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done shall also be liable to make good the same. . . . Provided always that nothing herein contained shall extend to impose any liability" upon the owner when the vessel is at the time when the damage is caused in charge of a compulsory pilot. A vessel was driven aground by a violent storm, and after the master and crew had been obliged to abandon her, was forced by the wind and waves against a pier, whereby serious damage was occasioned:—*Held* by the majority of their Lordships (affirming the decision of the Court of Appeal), that the owners of the ship were not liable under the above section. *River Weir Commissioners v. Adamson* (H.L.), 193

The exemption from obligation to make good losses or injuries caused by the "act of God" applies to liabilities created by section 74 no less than to those existing before the passing of the Act. *Ibid*.

HIGHWAY—*right to let adjacent strips for pasture: vesting of streets in urban authority: private way: possession against wrong-doer*—By the Public Health Act, 1875, highways (not being turnpike roads) are, in urban districts, vested in and put under the control of the urban authority for the district, which in some places is the local board. In 1771 the Commissioners, under an Enclosure Act, set out E. and C. as private roads. In 1818 E. became a public road, and as such has since been repaired by the parish. C. has always continued to be a private way. Until 1863 the surveyor of highways, and subsequently the local board (to whom the office of surveyors of highways was then transferred, and who in 1875 became the urban authority for the district under the Public Health Act), were accustomed, year by year, to let the right of pasturage on the sides of E. and C., though several persons in the neighbourhood had insisted on the right to put cattle in both places without making any payment. In February, 1876, the local board let to plaintiff the right of herbage on the sides of both E. and C. for a term, notwithstanding which defendant insisted, during the continuance of the term, on turning out his cattle to graze on the sides of both roads. Plaintiff thereupon brought an action for trespass against the defendant:—*Held*, that the action was maintainable so far as related to the sides of E., which, by virtue of section 149 of the

Public Health Act, 1875, had become vested in the local board in such a way as to confer the right of pasture; but that the plaintiff's claim failed as regarded C., the local board having no title, and there being no such actual or conclusive possession on the part of plaintiff as would enable him to maintain an action for trespass against the defendant. *Coverdale v. Charlton*, 446

HIGHWAY (continued)—damage occasioned by raising road: powers of local boards to undertake repairs of parts of turnpike roads—A local board having been constituted in a district through which a turnpike road and footpath passed, an agreement was entered into between the board and the turnpike trustees that the former should take upon themselves the repair of the footpath within their district. Afterwards a further agreement was entered into by which the trustees undertook to raise a certain part of the carriage way and the board the corresponding part of the footpath. The necessary result of raising the footpath was to occasion damage to the plaintiff's house, who thereupon claimed to be entitled to compensation from the board under section 144 of the Public Health Act, 1848. That Act, which by section 68 vests other highways in local boards, and authorises them to "alter such highways as and when occasion may require," and by section 144 directs that they "shall make compensation to all persons sustaining any damage by reason of the exercise of any of the powers of the Act," excludes by section 2 turnpike roads from their jurisdiction. The Local Government Act, 1858, however, authorises a "local board" by agreement with the trustees of any turnpike road to take upon themselves the maintenance, repair, cleansing or watering of any such road or of any part of the said road. By the Public Health Act Amendment Act, 15 & 16 Vict. c. 42, it is enacted that highway in the above 68th section of the principal Act shall mean "any highway repairable by the inhabitants." The question whether the plaintiff was entitled to compensation under section 144 of the Public Health Act, 1848, as a person sustaining damage by the exercise by the local board, the defendants, of the powers of the Act, having been raised by special case setting out the above facts,—*Held*, that even assuming the agreement between the local board and the trustees to be one within section 41 of the Local Government Act, 1858, the rights and liabilities undertaken by the board could only be commensurate with those of the trustees; and there being no provision in the Turnpike Acts for obtaining compensation in such case from the trustees, the defendants were not liable. But *semble*, that an agreement for a longitudinal division of any part of a road is not authorised by section 41 of the Local Government Act, 1858, which contemplates the transfer of a complete portion of a highway from one jurisdiction to another,

not the introduction of a double jurisdiction into the same area. The raising the footpath, therefore, by the defendants not having been authorised by the Acts, could not be the subject of compensation under the Acts, but might render the defendants liable in an action at the suit of any person damaged by it. *Nutter v. The Accrington Local Board of Health*, 521

— Locomotive engines on roads: wheels: width of bearing surface. *Body v. Jeffery* (M.C. 69), 353

— Turnpike Act: roads authorised to be made by trustees under private Act: completion of part of roads: application for contribution towards maintenance out of highway rate. *E. v. French* (M.C. 74), 472

— proceedings before justices for non-payment of rate: production of rate book: proof of publication. *Bird v. Adcock* (M.C. 123), 759

— See Negligence.

HUSBAND AND WIFE—divorce suit by wife: costs of suit: necessities—Where a suit has been reasonably instituted in the Divorce Court by a wife against her husband for a divorce, on the ground of cruelty and adultery, the husband is liable to the wife's solicitor for the fair and reasonable costs, as between solicitor and client, which have been incurred in the prosecution of such suit, although they may be costs which the Registrar of the Divorce Court has disallowed in taxing the wife's costs of such suit, as between party and party. *Ottaway v. Hamilton*, 424. Affirmed on appeal, 725

— separation by agreement: authority to pledge husband's credit: inadequacy of wife's income] —When a wife lives apart from her husband under an agreement by which she is to receive a specified income for her maintenance, and is not to apply to him for anything more, she has, so long as he fulfils those conditions, no authority to pledge his credit; nor can any such authority be implied from the alleged inadequacy of her income. *Eastland v. Burchell*, 500

— charging separate property with wife's debt: action against wife alone]—An action cannot be brought against a married woman without joining her husband as defendant, though the action be brought only in order to declare that property from her separate earnings, and which had become her separate property within the meaning of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), might be made chargeable with the payment of a debt she had contracted whilst living apart from her husband. *Hancocks & Co. v. Lablache*, 514

INCOME TAX—profits : deduction : consumption of capital : mines and minerals—A colliery company claimed to deduct in their assessment to the income tax on the profits of their business a sum for the lessening of the quantity of coal in their mines by getting and selling the coal:—*Held*, that they were entitled to the deduction, having regard to the provision of 29 & 30 Vict. c. 36. s. 8, as to assessing certain concerns mentioned in schedule A according to the rules of schedule D, this being, in estimating "the balance of profits or gains" under rule 1 of case 1 of schedule D (in 5 & 6 Vict. c. 35. s. 100), a deduction proper to be made, and not prohibited by rules 1 and 3 of case 1, or by section 159. *Andrew Knowles & Sons (lim.) v. McAdam, Surveyor of Taxes*, 139

— See Revenue.

INFANT—breach of promise of marriage : ratification : fresh promise—A promise of marriage is within the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), which by section 2 enacts, that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy whether there shall or shall not be any new consideration for such promise or ratification after full age." Therefore no action can be brought for the breach of a promise of marriage made during infancy notwithstanding a ratification of such promise has been made after full age. Ratification in such case would have reference to the original promise, and therefore would not be evidence of a new or fresh promise. *Corhead v. Mullis*, 761

INFERIOR COURT—jurisdiction as to defence and counter-claim—Under sections 89 and 90 of the Judicature Act, 1873, inferior Courts may give effect to counter-claims relating to matters beyond the jurisdiction of the Court, by way of defence to, and to the extent of, the plaintiff's claim, but such Courts have no power to award to a defendant, in respect of such counter-claim, damages in excess of the claim. *Davis v. The Flagstaff Silver Mining Co. of Utah* (App.), 503

— See Appeal. County Court.

INHABITED HOUSE DUTY—income tax : "occupier : police superintendent"—A superintendent of police who lives in a house adjoining the police station, which communicates with it by a door in the yard, the house being liable to be employed for such purposes of the police force as the chief constable may direct, and who is compelled to live there, but is subject to be removed from station to station at any time,

is not liable to inhabited house duty or to income tax under schedule B, as occupier of such house. *Bent v. Roberts*, 112

— **exemption of tenement "occupied for purposes of trade only"**—Premises occupied for the purpose of carrying on the business of a telegraph company held (*dissentiente* *CLHASBY, B.*) to be premises occupied for the purposes of trade within 32 & 33 Vict. c. 14. s. 11, and exempt from inhabited house duty. *The Chartered Mercantile Bank of India v. Wilson*, 153
A building was occupied by a bank and a telegraph company in such a way that all the ground-floor and basement, except the telegraph company's entrance hall, and the basement under it, were the bank's, and the upper floors the telegraph company's, but there were doors between the telegraph company's entrance hall and the bank's lobby, which were open during banking hours to give a second access to the telegraph company's premises, and a care-taker lived on the third floor to protect the entire building:—*Held*, to be a dwelling-house within the Inhabited House Duty Acts. *Ibid.*

INNKEEPER—lien on horses and carriages for general account of guest : waiver of lien by sale—An innkeeper's lien is general, and extends to all the goods of the guest under his control, and therefore to his horses and carriages in the inn stables, in respect of his general account. *Mulliner v. Florence* (App.), 700

The sale of a chattel by the holder waives the lien on it, although the retention of it would put him to expense. *Ibid.*

[See, however, 41 & 42 Vict. c. 38.]

— See Negligence.

INSPECTION OF DOCUMENTS—privilege : evidence obtained for advice of solicitor in relation to intended action—Documents which have been prepared by the agent of a party for the purpose of their being submitted to his solicitor for advice in reference to an intended action, are privileged from inspection; and such privilege is not taken away, if the documentary information obtained for such purpose has not, in fact, been laid before the solicitor at the time inspection is sought. *The Southwark and Vauxhall Water Co. v. Quick* (App.), 258

— **action for breach of charter-party : right to production of proceedings in former action**—Plaintiffs sold a cargo of rice to defendants, and chartered a ship from E. for the purposes of having the same conveyed to the purchasers. Under the terms of the charter-party, plaintiffs undertook to name a safe port for the ship to discharge her cargo. Plaintiffs, at the request of defendants, named a port which turned out to be unsafe, whereupon E. recovered damages in

an action against plaintiffs for breach of the terms of the charter-party. Plaintiffs thereupon (who had, in the contract of sale with defendants, made a like stipulation as to the naming of a safe port by the latter) sought to enforce their remedy over against defendants by action for breach of contract:—*Held*, that defendants were not entitled to inspect the proceedings in the first action, including the correspondence that passed between plaintiffs' solicitors and E.'s solicitors, such documents being privileged from discovery. *Bullock and Co. v. Corrie and Co.*, 352

INSURANCE—*against fire: antecedent contract for sale of premises: insurable interest*—In May, 1868, plaintiff insured certain houses, of which he was seised in fee, in defendants' office against loss or damage by fire. The insurance was continued up to Lady Day, 1876. In December, 1872, the Metropolitan Board of Works, unknown to defendants, served plaintiff with a notice to treat in respect of certain premises, in pursuance of statutory powers enabling them so to do; and in May, 1873, the amount of compensation to be paid was duly fixed by an arbitrator. In May, 1875, the said premises were injured by fire. At that time plaintiff's abstract of title had been accepted by the Board of Works, and a draft conveyance to them was in course of preparation, but no purchase-money had been paid:—*Held*, that plaintiff had an insurable interest in the houses at the time when the fire occurred such as would entitle him to recover from defendants. *Collingridge v. The Royal Exchange Assur. Co.*, 32

— See Marine Insurance.

INTERPLEADER—*non-coextensive claims*—The right to an interpleader order is not barred by the fact that the claims are not coextensive.—So held by the Court of Appeal, reversing the Queen's Bench. *Attenborough v. London and St. Katherine's Docks Co.* (App.), 763

— See Sheriff.

INTERROGATORIES—*discovery of facts relied on by other side: evidence: conversations*—Under the new procedure either party to an action may obtain discovery, by interrogatories, of all the facts relied on by the opposite party as establishing his case, but not of the evidence of such facts. Where facts so relied on consist of conversations, the general effect of such conversations may be asked for, but not the details. *Eade v. Jacob* (App.), 74

JURISDICTION. See Appeal. Public Worship Regulation Act. Railway Commissioners. Ship and Shipping.

JURY—Right to. See County Court.

JUSTICE OF THE PEACE—Notice of action: *bona fide* belief of authority. *Agnew v. Jobson* (M.C. 67), 469

LANDLORD AND TENANT—*fixtures: leave to remove: surrender of lease: removal within reasonable time*—Defendant was lessor of certain premises, of which Jackson was tenant under a lease for fourteen years, from April 2, 1876. During his tenancy Jackson erected a greenhouse, the defendant undertaking to allow him to remove the same. The greenhouse was so affixed to the soil that it would not, in the absence of agreement, have been removable. Subsequently Jackson granted a bill of sale to H., whereby he assigned, amongst other things, "all the greenhouses on the premises," and gave the assignee power to enter and sell the same. H. having entered on April 4, 1877, the greenhouse was advertised for sale at an auction of Jackson's chattels, held on May 4, but not then bought. After the auction the plaintiff made an offer for the greenhouse which was accepted on June 7. In the meantime the auctioneer, who had been in possession for H. under the bill of sale, and kept the keys of the premises, had, on May 11, sent the keys to the defendant, and on May 14 the defendant had taken possession. On June 7 notice was sent to the defendant of the sale to the plaintiff, and that the purchaser was about to remove the greenhouse. The defendant having denied the plaintiff's right to remove,—*Held*, that a surrender of the term had taken place on May 14, that no claim to remove was made within a reasonable time after, and that therefore the greenhouse was not removable by the plaintiff. *Moss v. James*, 160

— *conveyance subject to void lease: acceptance of nominal rent reserved under void lease*—Plaintiff was owner in fee of certain cottages and land conveyed to him subject to an unexpired lease for sixty years. He received rent from the tenant under this lease at the nominal rate, reserved under the lease, of 6d. a year, and gave a receipt for it "for chief rent." The lease had been granted by a former tenant for life without leasing power, and contained a covenant for quiet enjoyment. In an action of ejectment by plaintiff against the tenant in possession under this lease,—*Held*, that as the void lease gave no action on the covenant for quiet enjoyment to defendant against plaintiff, it afforded no defence to this action; and the receipt of rent under the circumstances did not create a tenancy from year to year. *Smith v. Widdlake* (App.), 282

— *outgoing tenant: compensation for seeds, acts of husbandry, &c.*—A custom by which the incoming tenant of a farm is alone liable to compensate the outgoing tenant for seeds,

acts of husbandry, tillages, &c., for which, as outgoing tenant, he is entitled to be compensated, is unreasonable, and cannot be supported at law. *Bradburn v. Foley*, 331

— *distress for rent: lodgers goods protection act*—The mere fact of a person being an under-tenant is not sufficient to prevent his being a lodger within the meaning of the Lodgers Protection Act, 34 & 35 Vict. c. 79. *Phillips v. Henson*, 273

F., who was tenant of a house under a lease for a term of years, made an agreement in writing with plaintiff, by which F. let to plaintiff, as a quarterly tenant, and at a quarterly rent, certain specified rooms, being all the rooms in such house except three, in which F. resided:—*Held*, that such agreement was not inconsistent with plaintiff being a lodger, and as such entitled to the protection given to lodgers by 34 & 35 Vict. c. 79. *Ibid*.

— *covenant to pay all rates: expense of drainage: public health act*—Plaintiff let certain houses to defendant for a term of years, and defendant covenanted to pay "all and all manner of taxes, rates, charges, assessments and impositions whatsoever, at any time during the said term to be charged, assessed or imposed on the said premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever." An urban sanitary authority for the district within which the houses were situated, required defendant, under the Public Health Act, 1875, to abate a nuisance arising from the drains of the said houses, and for that purpose to construct proper and sufficient drains, and defendant having refused to execute such works or to pay for the same, plaintiff executed them according to the directions of the said sanitary authority, and then sued defendant for the expense incurred in executing such works:—*Held*, that plaintiff was not entitled to recover the same, as it was not a charge imposed by the Act upon the premises but on the landlord personally, and was therefore not within the terms of defendant's covenant. *Rawlins v. Biggs*, 487

— *yearly tenancy: agreement for a six months' notice to quit: year's notice not necessary: agricultural holdings act*—Section 51 of the Agricultural Holdings Act, which enacts that, "Where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same," does not apply to a yearly tenancy where the parties have expressly agreed for a six months' notice to quit. *Wilkinson v. Calvert*, 679

— *Surrender by operation of Law*. See Principal and Surety. And see Lease. Mining Lease.

LANDS CLAUSES CONSOLIDATION ACTS—*compensation for land taken: taxation of costs of arbitration by master: jurisdiction of court to review*—Where the costs of an arbitration, held to settle the compensation to be paid for land taken under the Lands Clauses Consolidation Act, 1845, have been taxed by a master under section 1 of the amending Act of 1869, the Court has no jurisdiction over the taxation and cannot review it.—*Owen v. The London and North Western Railway Company* approved. *In re Sandbach Charity Trustees and The North Staffordshire Rail. Co.* (App.), 10

— *superfluous lands: adjoining owner: railway company: lands acquired by agreement: mines and minerals under superfluous lands*—Land *bona fide* acquired by a railway company under their Act for the permanent purposes of their undertaking, which at the expiration of the time limited for the sale of "superfluous lands" is not required for use at the moment, yet will, through the growing traffic or other causes, be required for use within a reasonable time, is not "superfluous land" within section 127 of the Lands Clauses Consolidation Act, 1845. *Hooper v. Bourne* (App.), 437

Lands which might, if necessary, have been acquired compulsorily by a railway company, but which were in fact acquired by them by agreement, are in respect of the Lands Clauses Consolidation Act, 1845, section 127, in the same position as if they had been acquired compulsorily. *Ibid*.

Mines and minerals expressly granted to a railway company with land which has become "superfluous" under section 127 of the Lands Clauses Consolidation Act, 1845, do not pass to the adjoining owner. *Ibid*.

— *railway: superfluous lands: "the purposes of the undertaking"*—Lands acquired by a railway company under their Act, and ever since retained *bona fide* for the purposes of the Act, in the belief that they will be required at some future time for such purposes, and with the intention of so applying them, are not "superfluous lands" within the meaning of section 127 of the Lands Clauses Act, 1845, though they have never been actually used for the purposes of the Act during the time specified in that section. *Betts v. Great Eastern Rail. Co.* (App.), 461

In an action of ejectment to recover lands from a railway company as superfluous, the question to be left to the jury is, whether a reasonable person with a knowledge of all the facts actually existing at the end of the ten years prescribed in section 127, would then have been justified in coming to the conclusion that the lands would be required for the purposes of the company. *Ibid*.

Semble, that lands adjacent to a railway station, occupied by granaries, coal-sheds and a public-house, let to tenants and used by them in

connection with the traffic upon the railway, were "used for the purposes of the undertaking" within the meaning of the Lands Clauses Consolidation Act. *Ibid.*

LAND TAX—*exemption of site of hospital: removal of hospital*—An hospital which was erected before the passing of 4 Will. & M. c. 1, imposing a land tax, and the site of which was exempted from that tax by the provisions of 38 Geo. 3. c. 5. ss. 25 and 29, was by a decree of the Court of Chancery removed to another site, and the old site was discharged from the charitable trusts to which it was then subject:—*Held*, affirming the decision of the Court of Appeal, that the removal of the hospital and secularisation of the site did not remove the exemption from land tax conferred on the site as "land belonging to an hospital before the fourth year of William and Mary," by 38 Geo. 3. c. 5. s. 29. *Cox v. Rabbits* (H.L.), 385

LEASE—*covenant by lessee not to use premises as a "beer shop": sale of beer not to be consumed on the premises*—Defendant, as assignee of a lease, granted in 1868, covenanted (*inter alia*) that he would not permit a certain house "to be used as a beershop." Defendant, who carried on the business of a grocer at this house, had subsequently obtained a license for the sale of beer not to be consumed on the premises; and in pursuance of the license beer was sold on the premises, but not drunk thereon:—*Held*, that there had been a breach of the covenant. *Bishop of St. Albans v. Battersby*, 571

— See Landlord and Tenant. Mining Lease.

LETTERS OF CREDIT—*bills of exchange: contract between giver of letter and purchaser of bills: conditional contract to accept*—Letters of credit, containing a promise to accept bills, create a contract between the giver of the letters and the person who advances money on the faith of them only when such letters are intended to be shewn to third persons for the purpose of obtaining advances, or where the giver of the letter has so conducted himself that such an intention may fairly be presumed. *Union Bank of Canada v. Cole* (App.), 100

Documents in the form of letters of credit were addressed by the defendants to S. & Co., corn merchants, authorising them to draw bills on the defendants against shipments of grain. To the documents certain conditions were appended. S. & Co. drew bills upon the defendants under the credit so opened without performing the conditions. The plaintiffs, having notice of the conditions, and knowing that they were unfulfilled, advanced money on the bills so drawn, which the defendants refused to accept. In an action against the defendants for not accepting the bills,—*Held*, that if the documents created a contract be-

tween the plaintiffs and defendants, it was subject to such of the conditions as were not necessarily subsequent to the advance. *Ibid.*

LIBEL. See Criminal Information. Defamation.

LICENSE AND LICENSING ACTS—*Suffering gaming on premises by licensed person: playing at "puff and dart": receipt by winner of prize.* *Bew v. Harston* (M.C. 121), 678

— Conviction for selling beer without license: penalty: imprisonment in default of payment without warrant of distress: summary jurisdiction act. *Ex parte Brown* (M.C. 108), 710

— License to sell beer for consumption off the premises: refusal by justices. *R. v. The Justices of the Chertsey Division of Surrey* (M.C. 104), 644

— Appeal against conviction: condition of notice to court of summary jurisdiction; service on clerk to justices. *Ex parte Curtis* (M.C. 35), 192

— "any new tenant": transfer of license: application to special sessions for license to new occupier, when to be made: expiration of license of preceding occupier. *In re Todd* (M.C. 89), 678

— Keeping a dog without a license: license subsequently obtained on the same day: fraction of a day. *Campbell v. Strangeways* (M.C. 6), 85

— See Excise.

LIGHT AND AIR. See Easement.

LIMITATION OF ACTION—*local board acting as surveyor of highways*—By section 109 of the Highway Act, 5 & 6 Will. 4. c. 50, no action is to be brought against any person for anything done under that Act after three months after the fact committed, for which such action was brought. The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 117, constitutes the local Board of Health surveyor of highways, with all the powers of any such surveyor in England, and by section 139 of that Act, every action against any inspector, or any person acting under the general Board of Health, or the officer of health, clerk, surveyor, inspector of nuisances, or the officer acting under the direction of the local Board, for anything done under the provisions of that Act, is to be commenced within six months after the accrual of the cause of action, and not afterwards:—*Held*, that an action of trespass against a local board of health for an act done by the board as surveyor of highways, which was commenced less than

six months, though more than three months after the alleged trespass, was not too late. *Taylor v. Meltham Local Board of Health*, 12

LIQUIDATION. See Bankruptcy.

LOCAL GOVERNMENT ACT—validity of bye-laws: power to pull down buildings erected in contravention of bye-law as to deposit of plans: construction of word streets:—By section 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), Local Boards have power to make bye-laws with respect to—First, the level, width and construction of new streets; second, the structure of the walls of new buildings; third, the sufficiency of space about buildings; fourth, the drainage, &c., of buildings. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter or pull down buildings:—*Held* (affirming the decision below, page 289), that the power to pull down buildings for which the local boards might make provision was not confined to cases of contravention of bye-laws relating to structure, but might be extended to cases of contravention of bye-laws relating to the giving of notices, the deposit of plans, &c. *Baker v. The Mayor, &c., of Portsmouth* (App.), 223
The word “streets” in sub-section 1 of section 34 includes not only the roadway but also the buildings at the side of the roadway. *Ibid.*

— See Highway.

LODGERS PROTECTION ACT. See Landlord and Tenant.

LORD MAYOR'S COURT—an inferior Court. See Appeal.

MANDAMUS—when it lies. See Company. Railway Company. University Tests Act.

MARINE INSURANCE—policy: construction: deviation:—In an action on a policy of insurance on four steam pumps insured for a voyage on a salvage steamer, “at and from A. to the *Alexandra* steamer ashore near D., whilst then engaged at the wreck, and until again returned to A.” it was proved that during the return voyage the steamer *Alexandra* was obliged by stress of weather to run to D. for refuge, and was lost with the pumps on board before she could arrive there:—*Held*, that there had been a deviation from the risk insured, and that no action would lie on the policy. *Wingate, Birrell and Co. v. Foster* (App.), 525

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— *policy: partial loss: cost of repairs to ship: measure of damages: salvage expenses:—*Plaintiff, who was the owner of a ship, effected a policy for 1,200*l.* with the defendants on his vessel, valued at 2,600*l.*, against the usual sea risks on an out and home voyage from C. to L. The policy contained the usual suing and labouring clause. During the voyage the ship sustained damage at sea, the cost of which, after the usual deduction of one-third new for old, together with certain particular average charges covered by the policy, amounted to the sum of 3,178*l.* 11*s.* 7*d.* The plaintiff had, in addition to this expenditure, to pay 519*l.* for salvage services and general average expenses. The ship being old, the effect of these repairs was to make her a much stronger and better ship than she was before the damage. In an action on the policy the defendants contended that the loss was to be estimated by the depreciation of the ship as a saleable chattel, and not by the cost of the repairs; and also that in the case of a partial loss the assurer could not be liable for more than a total loss with benefit of salvage:—*Held* (affirming the decision of the Queen's Bench Division, 46 Law J. Rep. Q.B. 716), that the measure of damages when the shipowner elected to repair, was, as in all cases, to be ascertained by the cost of the repairs less the proper deduction of “one third new for old,” even though the result might be to make the underwriters liable for more than a total loss with benefit of salvage. *Held also* (reversing the decision of the Queen's Bench Division), that, though the damage done was so great as to exhaust the policy, and the assured had refused to abandon, he was entitled to recover, under the suing and labouring clause, a proportion of the salvage expenses beyond the 1,200*l.* *Lohre v. Aitchison* (App.), 534

— *loss by perils of sea: unseaworthiness: presumptive burden of proof: misdirection:—*In an action on a policy of insurance it was proved that eleven days after the vessel set sail she put back in a disabled condition, having encountered severe weather. The Judge directed the jury that the time between the sailing of the vessel and her return was so short that the onus of proof was shifted from the defendant to the plaintiff, and that it was incumbent upon the plaintiff to prove that the unseaworthiness arose from causes occurring subsequently to her setting sail:—*Held* (by the Queen's Bench Division and the Court of Appeal), a misdirection. —*Watson v. Clarke* (1 Dow, 336) explained. *Pickup v. The Thames and Mersey Marine Insurance Co. (Lim.)* (App.), 749

MARRIAGE—Breach of Promise of. See Infant.

MASTER AND SERVANT—liability of master for negligence of servant: common employment: railway company: joint operations of two companies:—At Leeds there are two railway sta-

tions adjoining one another, one belonging to the Great Northern Railway Company and the other to the North Eastern Railway Company. Part of the lines running into the two stations are used in common by the two companies for the interchange of traffic between the two lines. This part is under the management of a "joint station staff" in the employment of the Great Northern Railway Company. Half of the wages of the joint station staff is paid by the North Eastern to the Great Northern Railway Company. While S., a signalman on that staff, was employed in his ordinary duties he was struck and killed by a passing engine of the North Eastern Railway Company, which at the time he was not engaged in signalling, through the negligence of the driver. In an action against the North Eastern Railway Company by the widow of S., under Lord Campbell's Act,—*Held* (reversing the decision of the Exchequer Division), that the deceased was not, at the time of his death, engaged in a common employment or service with the engine driver so as to take away the liability of the defendants for the negligence of their servant; and that plaintiff was entitled to recover. *Swainson v. The North Eastern Rail. Co.* (App.), 372

MASTER AND SERVANT (continued)—*shipowner and captain, relation between: negligence of captain: liability of shipowner*—Defendant Lester, who was the registered owner of a ship, and who was also registered as "managing owner," under the Merchant Shipping Act, 1875, traded with her for about three months, employing the defendant Lilee as captain. It was then verbally agreed between Lester and Lilee, that on condition Lester received one-third of the net profits, Lilee should be at liberty, without being subject to any control on the part of Lester, to take the ship wherever and to whatever port he chose, to take any cargo, and to refuse any cargo. Lilee was also to engage and pay the seamen, and to find all stores required by the ship. Plaintiffs' wharf having been injured through the negligent management of the ship while under the control of Lilee, they brought an action against Lester and Lilee.—*Held*, that Lester had so far retained his ownership of the ship as not to divest himself of responsibility for the negligence of Lilee, and he was therefore liable in the action. *Fowler v. Lock* (41 Law J. Rep. C.P. 99) distinguished. *Steel v. Lester*, 43

— Tramway company: money deposited by conductor on entering service forfeited for breach of rules: agreement that certificate shall be final as to cause of forfeiture. *The London Tramways Co. (Lim.) v. Bailey* (M.C. 3), 74

— Infant: contract of service: employer's and workman's act. *Leslie v. Fitzpatrick* (M.C. 22), 89

— Truck Act: wages: deduction for damage. *Smith v. Walton* (M.C. 45), 223

— See Contract.

MERCHANT SHIPPING ACT. See Master and Servant.

METROPOLIS MANAGEMENT ACT—Construction of sewer: apportionment of expenses by district board: limitation of time for making. *Bradley v. Board of Works for Greenwich District* (M.C. 111), 760

MINE—*action for injury to land from mines of adjoining owner: damage, when to be estimated: recovery of prospective damage: right to support of adjacent land*—Where injury has been occasioned to land and buildings by mining operations under the land of an adjoining owner, the plaintiff is entitled to recover, in an action founded upon such injury, compensation, not only for the damage that has actually occurred at the time of action brought, but also for the prospective damage resulting from the defendant's act. As the cause of action was complete at the moment that the first damage accrued to him, the plaintiff must recover once for all in one and the same action for all damage past, present and future, resulting from that one cause of action—for the reason that no occurrence of damage subsequently, as the result of the original act of the defendant, would give a fresh cause of action.—So held, *per MILLER, J.*, and *MANISTY, J.*; *COCKBURN, L.C.J.*, *dissentients*; and *per COCKBURN, L.C.J.*—There being no abstract right to the support of the adjacent land, the act of the excavating owner is only tortious when it produces and to the extent to which it produces actual damage. On the one hand, therefore, the defendant is not liable for damage which has not occurred, and which never may occur; and on the other, each fresh interference with the enjoyment of property, on the occurrence of subsequent damage, is a wrong done, and creates a further cause of action, of which the plaintiff can avail himself. *Lamb v. Walker*, 451

— *damage by escape of water*—Appellants were owners of mines adjoining and communicating with, but on a higher level, than mines belonging to respondent. Appellants' mining operations had caused part of the surface of their land to give way, whereby hollows and openings were formed communicating, by means of the underground workings of appellants' mines, with the mines of respondent. Across the surface of appellants' land ran a stream, which in 1866 had been diverted by them into another channel. In November, 1871, owing to a heavy rainfall, the stream burst its banks

and overflowed into the hollows on the appellants' land; the water thus accumulated percolated by the openings through appellants' mines into respondent's mines. Respondent brought an action for the damage thereby caused, and the jury at the trial found that the rainfall was excessive, but that the flooding was caused chiefly by the improper execution and insufficient condition of the new channel, and that the stream in its diverted course was more likely to overflow and do more damage than if it had been allowed to flow in its former channel:—*Held* (affirming the decision of the Court of Appeal, 43 Law J. Rep. Exch. 70), that the appellants were liable for the damage suffered by the respondent. *Smith v. Musgrave* (H.L.), 4

— *support for surface: inclosure act: reservation of lord's right to minerals: public rights*

—An Act for inclosing the waste lands of a manor directed that the commissioners under the Act should set out highways over the lands, and extinguished all former roads which should not be so set out. The Act reserved to the lord his right to the minerals, with power to work them as freely as if the Act had not been made:—*Held*, that the lord was not entitled to work the minerals so as to damage highways set out under the Act. *The Benfieldside Local Board v. The Consett Iron Co. (Lim.)*, 491

— Liability to fence shaft of abandoned mine: owner: person interested in minerals. *Evans v. Mostyn* (M.C. 25), 258

— Owner's responsibility for breach of general rules by another person. *Baker v. Carter* (M.C. 87), 586

— *mining company: cost-book system: action by creditor in collusion with company against a shareholder*—A creditor of a cost-book mining company will not be allowed to bring an action against a shareholder of the company for the purpose of enforcing a call, and therefore if the action be not really an action by the creditor, but a collusive action by the company, it will be stayed. *Escott v. Gray*, 608

MINING LEASE—covenant to pay rent: deduction for rates—A mining lease contained a covenant by the lessee to pay rent "free from all deductions whatsoever," and that the lessee "also shall and will pay or cause to be paid all manner of taxes, rates, assessments, charges and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed or imposed upon the said demised mines and premises, the landlord's property tax only ex-

cepted." The lessee having been assessed, and having paid the general district rate and poor rate in respect of the demised mines claimed under section 8 of the Rating Act, 1874, to deduct one moiety of the amount so paid from his rent:—*Held*, that the lessee had not "specifically contracted" to pay the rates in question within the meaning of the 8th section, and was therefore entitled to deduct the amount claimed from the rent. *Chaloner v. Bolckow* (H.L.), 562

MORTGAGE. See Recovery of Land.

MUNICIPAL CORPORATIONS ACT. See Borough Fund.

MUNICIPAL ELECTIONS ACT—nomination: burgess roll on which the name of person nominated must appear: jurisdiction to review decision of mayor—It is sufficient to entitle a person to be nominated for the office of councillor for a municipal borough that, if otherwise duly qualified, he be enrolled on the burgess roll in force at the time of the election, although his name may not be on the burgess roll which was in force at the time of the nomination. Therefore, where one of several candidates for the office of councillor was nominated on the 23rd of October, 1877, who was not enrolled on the burgess roll for the year beginning the 1st of November, 1876, but was enrolled on the burgess roll for the year beginning the 1st of November, 1877, when the election was held, and was in all other respects qualified to be elected councillor,—*Held*, that he was rightly nominated. *Budge v. Andrews*, 586

The Court of Common Pleas has jurisdiction, on a petition questioning the election, to review the decision of the mayor, who had allowed an objection to such nomination, on the ground that the name of such candidate was not on such previous burgess roll. *Ibid*.

NECESSARIES. See Husband and Wife.

NEGLIGENCE—obstruction of highway by dangerous instrument: injury immediately caused by act of third person: remoteness of damage—A person placing a dangerous obstruction in a highway or in a private road over which persons have a right of way, is bound to take all necessary precautions to protect persons exercising their right of way; and if he neglects to do so, is liable for the consequences. *Clark v. Chambers*, 427

Case in which it was held that the defendant having unlawfully placed a dangerous obstruction in the road was liable if injury occurred to an innocent party lawfully using the road, his unlawful act being the primary cause of the evil, although the immediate cause of the injury was the act of some other person. *Ibid*.

NEGLIGENCE (continued)—evidence of: question for jury—While respondent was travelling on the appellants' railway in a carriage, all the seats of which were occupied, three more persons got in and remained standing until the train arrived at the next station, where there was a crowd of persons, some of whom tried to enter the carriage just as the train was starting; respondent rose from his seat and tried to prevent any more passengers from getting in. After the train had started respondent fell forward, and put his hand on one of the hinges of the door to save himself; at the same moment a porter pushed away the persons who were trying to get in, and slammed the door, crushing the thumb of respondent, who brought an action for the injury so caused:—*Held* (reversing the decision of the Court of Appeal, 46 Law J. Rep. C.P. 376), that there was no evidence of negligence proper to be left to the jury. *Metro-politan Rail. Co. v. Jackson* (H.L.), 303

In actions for negligence the rule is that from any given state of facts the Judge must say whether negligence can legitimately be inferred, and the jury must say whether it ought to be inferred. The case of *Bridges v. The North London Railway Company* (42 Law J. Rep. Q.B. 151; s.c. Law Rep. 7 E. & I. App. 213) lays down no new principle of law on the subject. *Ibid.*

— **wire fencing: adjoining occupiers of land: injury to cattle through eating wire**—Defendants' land was separated from plaintiffs' by a fence which had been put up by defendants' predecessors in title, and which was maintained by defendants. This fence was constructed of old wire rope, the strands of which had by long exposure to the weather decayed and separated into pieces; some of these fell on to plaintiffs' land where they lay hidden among the grass. Plaintiff's cow in grazing picked up and swallowed one of these pieces of wire and in consequence died:—*Held*, that plaintiff was entitled to maintain an action for the loss of the cow.—*Wilson v. Newberry* (41 Law J. Rep. Q.B. 31) distinguished. *Firth v. The Bowling Green Co.*, 358

— **inn keeper: liability for injury to guests**—It is the duty of an hotel keeper to take reasonable care of the persons of his guests, so that they are not injured by reason of a want of such care on his part whilst they are in the hotel as his guests. *Sandys v. Florence*, 598

A statement of claim alleged that, while plaintiff was using an hotel, of which defendant was proprietor, as a guest for reward to defendant, by the negligence of defendant the ceiling of the room in which plaintiff then was, fell upon and injured him:—*Held*, on demurrer, that such statement sufficiently shewed a cause of action. *Ibid.*

— of acceptor. See Bill of Exchange. And see Factor's Act. Master and Servant. Public Health Act. Telegraph Company.

NEW TRIAL—case remitted for trial to County Court: motion for new trial—Where an action brought in the High Court has been tried in a County Court, pursuant to a Judge's order, under 19 & 20 Vict. c. 108. s. 26, a motion for a new trial must still be made to the Divisional Court within four days from the day of trial; the old practice as to actions so remitted for trial to a County Court, not being affected by Order XXXIX. rules 1 and 1a of the Judicature Act. *London v. Roffey*, 16

— **action in Chancery Division tried before a jury: motion for new trial of such action, before what court to be made**—An action in the Chancery Division having been tried with a jury before a Judge of the Queen's Bench Division, a motion for a new trial on the ground of misdirection was made before a Divisional Court of the Queen's Bench Division:—*Held*, that the motion could not properly be so made. *And, Semble*, per FRYER, J., the application might be made to the Judge before whom the trial took place. But see this case, on appeal, 47 Law J. Rep. Chanc. 51. *Hunt v. The City of London Real Property Co. Lim.*, 42

NONSUIT—appeal for new trial: court of appeal—Where a plaintiff has been nonsuited at the conclusion of his case, the appeal must be by application to a Divisional Court for a new trial, unless the nonsuit has been entered upon admitted facts. *Exty v. Wilson* (App.), 664
Where the nonsuit has been entered upon admitted facts,—*Semble*, that an appeal lies to the Court of Appeal under Order XL. rule. 4. *Ibid.*

NOTICE OF ACTION—form of notice: public health act: action for a nuisance—In an action against a local board acting under the Public Health Act, 1848 (11 & 12 Vict. c. 63), for not having properly filled up a trench which the board had caused to be made in a road for laying down a sewer, by reason of which that part of the road gave way, and the plaintiff's horse was injured, the notice of action given in compliance with section 139 of that Act stated that the board did by their "labourers, servants and others on or about the 15th of May last negligently, carelessly and improperly leave a certain portion of the said road or highway in an insufficient and improper state of repair, whereby a horse" of the plaintiff "sank into the said road or highway, and was thrown therein," and injured:—*Held*, that the notice was not limited to a complaint of an injury from non-repair of the road, but was applicable to a cause of action arising from an act of misfeasance.

ance, and was therefore a sufficient notice of the cause of action. *James Smith & Co. v. West Derby Local Board*, 607

— See Justice of the Peace.

NOTICE TO QUIT. See Landlord and Tenant.

PARLIAMENT—*county vote: list of voters: name on wrong list: amendment*—The appellant was duly qualified to vote for the county as occupier of a house and land rated at 12*l.* and upwards. The appellant's name, which should have appeared on the list of voters entitled "as occupiers of the rateable value of 12*l.* and under 50*l.* rental," by mistake appeared on the list of voters entitled "in respect of property, including occupiers at a rent of 50*l.* and upwards." Opposite to his name in the third column of this list under the heading, "nature of qualification," was inserted "occupier of a house and land rated at 12*l.* and upwards." On objection to the vote,—*Held*, that under the powers of amendment given by 6 Vict. c. 18. s. 46, the Revising Barrister had power to transfer the appellant's name to the proper list. *Ballard v. Robins*, 50

— *county vote: disqualification of voter: bribery: report of election judge*—By the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), section 11, sub-section 14, the Judge who has tried an election petition in which a charge is made of any corrupt practice at the election, is to report to the Speaker *inter alia* "whether any corrupt practice has been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice;" and by section 43 of such Act it is enacted that "where it is found by the report of the Judge upon an election petition under the Act that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election," and shall, amongst other things, be incapable of being registered as a voter during seven years next after being so found guilty. An election Judge appointed to try a petition against the election and return of A. G. as a member to serve in Parliament for the borough of K. reported, in compliance with the directions of the Parliamentary Elections Act, 1868, that it "was proved before him that the said A. G. was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854, and he further reported that the nature of such corrupt practice was the promising before and at the time of the said election to certain voters for the said borough of K. and other inhabitants thereof that the said A. G. would, in the event of

his being returned at the said election, and after such return, give to such voters and other voters and inhabitants of K. an entertainment consisting, among other things, of meat and drink, with the view and intent to induce such voters to vote for him the said A. G. at such election:"—*Held*, that, even if the promising to give an entertainment to voters under the circumstances stated in such report amounted to bribery, it was not found by such report, either in express words or by necessary inference, that bribery had been committed by or with the knowledge and consent of the said A. G. at the said election, and that therefore the said A. G. was not disqualified by the said 43rd section of the Parliamentary Elections Act, 1868, from being registered as a county voter. *Grant v. the Overseers of Pagham*, 59

— *borough vote: freehold: residence*—By 2 Will. 4. c. 45. s. 33, no person qualified as a freeholder to vote for a borough, shall be registered unless he shall have resided for six calendar months previous to 31st July within the borough or seven miles thereof. The appellant was entitled to a vote for the borough of Exeter, in respect of a freehold qualification. With the exception of two months, he had, as tenant, occupied a house within the limits of the borough for six calendar months previous to the 31st of July. For those two months appellant, with his wife and child, went to reside with his mother-in-law, who occupied one of a number of almshouses, also situate within the borough. The appellant's residence there was contrary to the rules of the almshouses, but he was not disturbed, and, except for one day when he went to London on business, he and his family lived and slept as guests in the house so occupied by his mother-in-law for the two months:—*Held*, that the appellant's residence within the borough was a sufficient compliance with the requirements of 2 Will. 4. c. 45. s. 33, to entitle him to be registered. *Beal v. Ford*, 56

— *county vote: lease of waste of manor: freehold tenure*—S. claimed to be entitled, as a freeholder, to vote for the county in respect of a lease of part of the waste of the manor of N. The burgesses of the borough of N. had from time immemorial exercised rights of common of pasture over the manor of N., and at Courts leet holden for the borough of N., it had been the practice for 100 years past and upward for the mayor and burgesses of the borough to present to the lord of the manor of N. individual burgesses for occupation of pieces of waste land of the manor; in all such cases the person so presented took possession of the apportioned pieces of waste, and paid rent to the lord. About one-tenth of the wastes had been thus enclosed, but a sufficiency of such land was left for the use by the Commoners of their rights

of pasture. S. being duly presented for occupation of a piece of the waste land in accordance with the custom, entered into occupation thereof, and in 1861 was granted a lease by the lord, similar to leases which, since 1838, had been granted in like cases, namely, a lease for three lives, with a covenant for renewal. S. continued to occupy under this lease, and paid rent to the lord:—*Held*, that S. had such a freehold interest as would entitle him to be registered as a voter for the county. *Phillips v. Salmon*, 53

PARTIES TO ACTIONS — *change of: survival of cause of action: statutory fraud: death of plaintiff: right of administratrix to be joined as party*—The original plaintiff had recovered a verdict in an action against the defendants for statutory fraud. Pending an appeal to the House of Lords, the plaintiff died: *Held*, that the administratrix of the plaintiff was entitled to be joined as a party to the action, under rule 4, Order L. of the Rules of Court, 1875. *Twy-cross v. Grant*, 676

— See Husband and Wife.

PARTNERS—*bill of exchange: power of partner to bind firm: blank acceptance*—A partner has no implied authority to bind his firm by issuing acceptances in blank. *Hogarth v. Latham & Co.* (App.), 339

F., of the firm of L. & Co., gave an acceptance purporting to be made by the firm, with a blank for the name of the drawer. C. gave it to H. for value. H. filled up the bill, putting the name of his firm, H. & C., as drawers, and indorsed it to himself, knowing when he did so that F. had no authority to accept the bill:—*Held*, that L. & Co. were not liable on the bill at the suit of H. *Ibid*.

Semble, that a *bona fide* holder for value to whom the bill had come in a perfect state would have been entitled to sue. *Ibid*.

— *partnership debt: joint and several liability: judgment recovered against one or more of several co-contractors*—Defendant being jointly interested with W. & Co. in a contract in respect of which they were indebted to plaintiff, plaintiff recovered judgment against W. & Co. W. & Co. afterwards became bankrupt. Plaintiff proved against their estate, and then brought an action on the contract against defendant:—*Held*, that the judgment obtained against W. & Co. was a bar to the action. *Kendall v. Hamilton* (App.), 665

Partnership debts are not necessarily joint as well as several, the liability of the estate of a deceased partner on a partnership contract being based on the ground that where there is no survivorship of interest there ought not to be survivorship of liability. *Ibid*.

PAYMENT—by cheque. See Debtor and Creditor.

PAYMENT INTO COURT—effect of. See County Court.

PENALTY. See Corporation.

PLEADING—*counter-claim raising questions between defendant and plaintiff along with any other person: who may be made a defendant*—A defendant may bring in as defendants to his counter-claim, in addition to the plaintiff, all such persons as he could, if he had sued the plaintiff in a cross action, have joined with the plaintiff as defendants to such action, that is to say, all persons against whom he could claim relief along with the plaintiff, whether jointly, severally or in the alternative. *Turner v. Hednesford Gas Co.* (App.), 296

To an action for breach of contract defendants leged that, as plaintiff had not executed the contract as specified by the agreement, they had thereby become entitled to put an end to the contract, and they sought, by way of counter-claim, to recover damages from plaintiff for the expenses caused by his default. They also made R., who, as surety for the due execution of the contract by plaintiff, had entered into a bond with defendants, a defendant to the counter-claim, and they sought to recover the amount of his bond as damages. R. applied to have so much of the counter-claim as related to him struck out:—*Held* (reversing the decision of the Exchequer Division), that the whole of the counter-claim must be allowed as it raised a question between defendants and plaintiff, along with R. the surety, and that R. was properly served with the counter-claim. *Ibid*.

— *inconsistent defences: embarrassing defence: payment into Court, and denial of plaintiff's right to sue*—There is nothing in the Judicature Acts or Rules to prevent a defendant pleading inconsistent defences. Therefore, in general, a defendant may in his statement of defence deny the right of plaintiff to sue, and at the same time pay a sum of money into Court under Order XXX. in satisfaction of plaintiff's claim, since such a course, though raising inconsistent defences, does not necessarily tend to prejudice, embarrass or delay the fair trial of the action within the meaning of Order XXVII. rule 1. *Berdan v. Greenwood* (App.), 628

Quere, whether in some cases, e.g., actions brought to try a right, or to clear plaintiff's character, or where fraud is charged, such pleading should be allowed. *Ibid*.

— See Inferior Court. Set-off. Practice.

POLL. See Company.

POOR LAW. See Settlement of paupers.

POOR RATE—Canal: lands of a like quality. *Company of Proprietors of the Regent's Canal v. Assessment Committee of St. Pancras* (M.C. 37), 192

—Rateable value of shipyard: enhancement of rateable value by machinery and plant. *Laing v. Overseers of Bishopscarmouth and Assessment Committee of Sunderland Union* (M.C. 41), 337

PRACTION—trial by jury: order depriving successful party of costs: "application made at the trial"—In a cause tried at the assizes by a Judge and jury an application to deprive the successful party of costs was made an hour after verdict, and while another cause was proceeding:—*Held*, that the application was not too late under Order LV., which requires the application to be made at the trial. *Kynaston v. Mackinder* (App.), 76

—cause remitted to county court unless security given: enlargement of time for giving security—Where the time limited by an order made under section 10 of 30 & 31 Vict. c. 142, remitting an action for trial to a County Court unless plaintiff give security for costs, has expired, the action nevertheless remains in the Superior Court until the plaintiff has lodged the original writ and order with the Registrar of the County Court; and until this has been done, a Master has jurisdiction to grant to the plaintiff further terms as to his giving security, upon compliance with which he will be at liberty to proceed in the Superior Court notwithstanding his disobedience to the first order.—*So held* by the Court of Appeal, affirming the decision of the Queen's Bench Division. *Welpley v. Buhl* (App.), 151

—action dismissed for want of prosecution: power to enlarge time—Where the time limited by an order dismissing an action for want of prosecution unless statement of claim be delivered within that time, has expired, and plaintiff has not then delivered his statement of claim, the action is dead, and a master has no jurisdiction upon a subsequent application to grant plaintiff further time for delivering a statement of claim. *Whistler v. Hancock*, 152

—judgment by default: setting aside judgment—Where judgment has been suffered by default, lapse of time is not in itself a valid objection to an application to set such judgment aside as irregular, if defendant has acted *bona fide*, and the lateness of the application has done no irreparable injury to plaintiff. *Atwood v. Chichester* (App.), 300

—setting aside judgment by default after order for substituted service—An order for substituted service, under Order IX. rule 2, is not absolutely

final and conclusive, but it is competent to the Court to set aside the judgment regularly signed after such order. This is, however, a matter of discretion, and a defendant will not be let in to defend as of right merely because he was ignorant of the fact that process had been issued against him. *Watt v. Barnett*, 329

Where such ignorance appeared upon affidavits which also alleged that defendant had a good defence upon the merits, the Court set aside the judgment upon the terms of defendant giving security for the amount of the judgment and costs. *Ibid.*

—order changing solicitor: solicitor's costs: conflict between rules of equity and rules of common law—An order for changing a solicitor in an action is not to be conditional on payment of the costs of the original solicitor, unless under exceptional circumstances, as the rule in Equity before the Judicature Act, 1873, did not require such payment as a condition precedent to the change, and now, in accordance with section 25, sub-section 11 of the Judicature Act, 1873, the rule in Equity must prevail. *Grant v. Holland*; *in re Norton*, 518

—writ specially indorsed: demurrer to indorsement—A writ specially indorsed in lieu of a statement of claim is equivalent to ordinary pleading. Therefore, where plaintiff specially indorsed his writ with a claim shewing no cause of action, and gave notice under Order XXI. rule 4, that the special indorsement was the statement of claim, defendant was allowed to demur. *Robertson v. Howard*, 480

—district registry writ: appearance out of district: notice to plaintiff: judgment in default of appearance: indorsement on writ—A writ was issued out of a district registry against a defendant resident out of the district. The defendant entered an appearance in London, but failed to give notice to the plaintiff under Order XII. rule 6a.:—*Held*, that the appearance was not complete, and that the plaintiff was entitled to sign judgment. *Smith v. Dobbin* (App.), 65

The writ was indorsed "This writ was issued by T. W. G., of Hereford, whose address for service is T. W. G., care of T. W. & Son, 11, Bedford Row, W.C.;"—*Held*, a sufficient indorsement under Order IV. rule 3a. *Ibid.*

—costs: collision of ships: compulsory pilot age—The rule of the former Court of Admiralty, that in an action of collision of ships, no costs are allowed to the party who, after raising other defences, succeeds on the defence of compulsory pilotage alone, does not apply to cases in the Exchequer Division.—*The Daicos* (47 Law J. Rep. P., D. & A. 1) distinguished. *General Steam Nav. Co. v. London and Edinburgh Shipping Co.*, 77

— Explanation by Judge of his findings. See Dramatic Copyright. And see New Trial. Parties. Security for Costs. Sheriff. Staying Proceedings.

PRINCIPAL AND AGENT—control over property: sale of subject matter of the agency]—An agreement was entered into between F., a broker, and R., a colliery owner, "in consideration of the services and payments to be mutually rendered," that F. should act as R.'s agent at Liverpool for the sale of his coals for seven years. It was stipulated that R. should not employ any other agent at Liverpool; that F. should not act as agent for any other principal; that the rates and terms of sales should be under R.'s control, and that if F. could not sell, or if R. could not supply a certain amount of coal within the year, either party might put an end to the agreement. Before the expiration of the seven years R. sold the colliery, whereupon F. brought an action against him for breach of the agreement:—*Held*, that the action was not maintainable, for that the agreement merely bound R. to employ F. as his agent for the sale of such coal as he should send to Liverpool, and was necessarily determined on his parting with the subject matter of the agency. *Rhodes v. Forwood* (H.L.), 396

PRINCIPAL AND SURETY—rights of surety: securities: discharge of surety]—A surety is entitled to the benefit of any security which the creditor has received for the debt, though he has received it after the contract of suretyship; and therefore, where the creditor has so dealt afterwards with such security that on payment by the surety it cannot be given to him in the same condition as it was when the creditor first acquired it, the surety is discharged to the extent of such security. *Campbell v. Rothwell*, 144

— *bond: alteration of agreement between principals: discharge of surety: landlord and tenant: surrender by operation of law]*—In an action against a surety on his bond, whereby he guaranteed the performance of a covenant by his principal, the lessee of a farm and flock of sheep, to deliver up to the plaintiff at the end of the tenancy, with the farm, a like number and quality of sheep regularly heathed and pastured on the farm, it was proved that an alteration had been made in the terms of the letting by the surrender of a small part of the farm and a proportionate reduction of the rent. The jury found that the alteration had not made any material difference in the relation between the parties, so as to affect the capacity of the tenant to perform his covenant:—*Held* (affirming the decision below, page 81), by *COTTON, L.J.*, and *THESIGER, L.J.* (*BRETT, L.J.*, dissenting), that the surety was discharged. By *COTTON, L.J.*, and *THESIGER, L.J.*—Any alteration in the form of the agreement between

principals discharges the surety, unless it is self-evident that the alteration cannot prejudice the surety; the surety himself being the judge as to materiality. By *BRETT, L.J.*—The surety is discharged where there has been a material alteration, or an alteration of some specific provision of the agreement, but not otherwise. —By the whole Court (overruling the decision below).—The mere surrender of a small part of demised premises and proportionate reduction of the rent does not in itself amount to a surrender by operation of law of the old tenancy, and the creation of a new one. *Holme v. Brunskill* (App.), 610

PRIVILEGE. See Defamation. Inspection of Documents.

PROHIBITION. See Railway Commissioners.

PROPERTY TAX. See Income Tax.

PUBLIC HEALTH ACT—construction of drain communicating with sewer: liability of local authority for negligence]—Where a local authority by agreement with the owner of premises constructs, so as to communicate with their sewer, a drain from his premises which they could have required him to make under section 23 of the Public Health Act, 1875, such agreement is not *ultra vires*, and they are responsible to him for any damage caused to his premises by the negligent construction of the drain. *Hall v. The Mayor, &c., of Bailey*, 148

— *clerk to local board: bye-laws as to rescission of resolution: dismissal of servant: quo warranto]*—A bye-law of a Local Board of Health, duly made and confirmed, forbade the rescission of any resolution of the Board, unless at a meeting where at least as many members were present as were present when such resolution was passed:—*Held*, that such bye-law did not apply to the dismissal of the clerk to the Board; for a resolution to effect this was not in the nature of a rescission of that by which he had been appointed but was a new resolution in itself. Such clerk, therefore, holding his office under the Public Health Acts, "at the pleasure of the Board," could not obtain an information in the nature of *quo warranto* because of his dismissal by the resolution of a meeting consisting of fewer members than were present when he was appointed. *Ex parte Richards*, 498

Where application is made for an information in the nature of a writ of *quo warranto* by a person who is liable to immediate dismissal from the office in which he seeks to be reinstated, the Court will not, in the exercise of its discretion, grant the application. *Ibid*.

— Paving of private streets: recovery of expenses from owners in default. *Lewis v. Cardiff Urban Sanitary Authority* (M.C. 101), 512

— See Contract. Highway. Landlord and Tenant. Notice of Action.

PUBLIC WORSHIP REGULATION ACT—jurisdiction of judge: *requisition to hear it at a particular place: direction of archbishop a condition precedent to jurisdiction*—The Public Worship Regulation Act (37 & 38 Vict. c. 85), in section 9, enacts that when a representation against an incumbent under that Act has been transmitted by the bishop, in the mode prescribed, to the Archbishop of the province, "the Archbishop shall forthwith require the Judge" (i.e., the Judge of the Provincial Courts of Canterbury and York, appointed under section 7 of the Act) "to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." A representation under this Act having been in due course transmitted to the Archbishop of Canterbury by the Bishop of Rochester, the Archbishop sent to the Judge a requisition to hear the matter of the representation "at any place in London or Westminster, or within the said diocese of Rochester as you may deem fit." The Judge gave due notice to the defendant that the case would be heard at Lambeth. Lambeth is in the province of Canterbury, but not in the diocese of Rochester. The defendant did not appear, and the case having been heard in his absence, judgment was pronounced against him:—*Held*, on motion for prohibition, that all the proceedings before the Judge were void, on the ground that the Judge had no jurisdiction except by virtue of the requisition to him of the archbishop, and that the archbishop having limited the place for hearing, the Judge had no power to hear the case outside the limits so prescribed. *Hudson v. Tooth*, 18

QUO WARRANTO. See Public Health Act.

RAILWAY AND CANAL TRAFFIC ACT—conditions limiting liability of company for damage: "just and reasonable:" *alternative rate of charge: wilful misconduct of servants of company*—Defendants charged two rates for the conveyance of certain articles—one the ordinary parliamentary rate, when they take the ordinary liability of the carrier, and the other a reduced rate, in which case they make it a condition of carriage that the sender relieves them of all liability for loss or damage, except upon proof that such loss or damage arose from wilful misconduct on the part of the company's servants:—*Held*, that under these circumstances, the condition relieving the company when goods are carried at the lower rate is "just and reasonable," within section 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31). *Lewis v. Great Western Rail. Co.* (App.), 181

The plaintiff's agent sent cheeses, one of the articles conveyed at the lower rate, from London to Shrewsbury. The cheeses were improperly packed into the train by the company's

servants in London, and in consequence arrived at Shrewsbury in a greatly damaged condition:—*Held*, that though there was clear evidence that the cheeses had been in fact improperly packed, yet, as there was none to shew either that the packers knew that they were packing them in a manner likely to damage them, or that it had been brought to their knowledge that that mode of packing might lead to such damage, and that they had then packed the cheeses in that mode, careless whether it would result in such damage or not, there was no evidence of wilful misconduct on their part, so as to render the defendants liable. *Ibid*.

— *undue preference: reduction of charges: gratuitous cartage: parties having advantages afforded by rival lines*—Plaintiff carried on business as a brewer at Burton, and employed defendants to convey goods for him by their railway. Plaintiff's premises were not connected with defendants' or any other line by sidings. Plaintiff was charged by defendants a station to station rate for the carriage of goods to and from Burton (which rate also included a charge for station accommodation), and 1s. a ton for cartage to and from the station. Three other firms at Burton had premises connected with a rival line, belonging to the Midland Railway Company, by sidings, from which all goods forwarded or received were loaded and unloaded. The cost of cartage was thus saved, and, in addition, the Midland allowed a rebate of 9d. per ton—a sum which fairly represented the value of the station accommodation and other services which were, in consequence of the sidings, not required to be performed by the Midland. Defendants, solely with a view to attract the traffic of the three firms from the Midland, carted goods for them gratuitously and allowed a rebate of 9d. a ton off the station to station rate; the result being that plaintiff had to pay 1s. 9d. a ton more than the three firms for goods carried under the same circumstances:—*Held*, that the transaction amounted to a breach of section 90 of the Railways Clauses Consolidation Act, 1845, as being a reduction of charges in favour of the three firms, and of section 2 of the Railway and Canal Traffic Act, 1854, as being an undue preference of the three firms, and that plaintiff was entitled to recover back the 1s. 9d. a ton from defendants. *Evershed v. The London and North Western Rail. Co.* (App.), 284

RAILWAY COMMISSIONERS—order on two companies to do joint acts for giving facilities—The Railway Commissioners have no power to make an order on two railway companies to afford to the public facilities for conveyance by doing jointly acts which neither company could do separately. And where such an order was made, the High Court of Justice prohibited the commissioners from enforcing it. *Toomer v. London, Chatham and Dover Rail. Co. and the South Eastern Rail. Co.*, 276

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RAILWAY COMPANY—mandamus to comply with order of Board of Trade: inability of company to comply with the order—A mandamus will not lie to compel a railway company to construct a bridge in lieu of a level crossing pursuant to an order of the Board of Trade where it appears that the company are wholly without funds, and have not the means of providing the money required for that purpose. *In re The Bristol and North Somerset Rail. Co.*, 48

— **bye-law: when unreasonable and bad: passenger travelling without ticket**—The 8 & 9 Vict. c. 20. s. 103 enacts that if any person travel in any carriage of the railway company without having previously paid his fare, and with intent to avoid payment thereof, he shall forfeit to the company a sum not exceeding forty shillings. Section 108 of such Act empowers a railway company to make regulations "for regulating the travelling upon or using and working of the railway," and section 109 enables the company, "for better enforcing the observance of such regulations," to make bye-laws provided such bye-laws be not repugnant to law or to the said Act. A bye-law made pursuant to that enactment required a person travelling without a ticket, or failing or refusing to shew or deliver up his ticket, to pay the fare from the station whence the train originally started to the end of his journey:—*Held*, that such bye-law was void, on the ground that it attempted to inflict a penalty for doing that without fraud which by section 103 could be punished only if done with fraud, and also on the ground of its being manifestly unequal in its operation and so unreasonable. *London, Brighton and South Coast Rail. Co. v. Watson*, 684

— **Bye-law: passenger travelling without ticket.** *Benham v. Hoyle* (M.C. 51), 281

— **scire facias: director's qualification: "shareholders: estoppel"**—Defendants T. and A. were named as directors in the special Act of a railway company. The Act provided that the qualification of directors should be fifty shares of 10*l.* each, and that the directors named in the Act should continue in office till the first ordinary meeting of the company. T. never acted as a director, and another director was appointed in his place. A. acted as director for a time and then resigned, and his place on the board was informally filled up. No shares were allotted to either of the directors, and the whole of the share capital of the company was placed in other hands. A register of shareholders of the company was drawn up in which the names of defendants did not appear. No ordinary meeting of the company was held, and the resignations of defendants and the sealing of the register were therefore informal. In an action of *scire facias*, brought several years after defendants' resignations of their director-

ships, by the public officer of another company which had obtained a judgment against the first named company,—*Held*, that as no shares had been allotted to defendants, and they were not *de facto* directors, and all the share capital of the company was in other hands, defendants could not be made liable as directors on their share qualifications except by way of estoppel; and that no estoppel had been raised. *Porter v. Emmens* explained and distinguished. *Kippling v. Todd*; *Same v. Allan* (App.), 617

— See Master and Servant. Negligence.

RECOVERY OF LAND—mortgage with power of sale after notice: payment of mortgage debt by bill during currency of notice: revival of notice on dishonour of bill—Mortgage of the equity of redemption of premises as security for payment of a sum of money, with the condition that, if default should be made for seven days after notice requiring payment, the mortgagee might sell. The mortgagee subsequently gave due notice, and on the sixth day after took a bill at three months for the amount from the mortgagor, who died the following day. The bill was dishonoured, and thereupon the mortgagee, without giving any further notice, sold the premises to the plaintiff, who brought ejectment against the defendant, the mortgagor's widow:—*Held*, that the power of sale having been well exercised, the defendant was not entitled to redeem, but must give up possession to the plaintiff. That the giving of the bill operated as a suspension of the remedy by sale, and of the running of the notice, and that both revived when the bill was dishonoured; no further notice was therefore necessary. *Wood v. Merton*, 191

REFERENCE—under Judicature Acts. See Arbitration.

REVENUE. See Income Tax. Inhabited House Duty.

SALE OF GOODS—in possession of sheriff: passing of property: ship: transfer or assignment of: registration—Possession of goods by a sheriff under a writ of *fiery facias* does not prevent the debtor from making an effectual sale of the goods by delivery to a purchaser while the sheriff is in possession. *Union Bank of London v. Lemanton* (App.), 409

A ship built for a foreign owner, and not intended to be registered as a British ship, was assigned by the builder to a creditor under an agreement, not in the form prescribed by the Merchant Shipping Act, 1854. The assignment was not registered under section 19 of that Act, nor under section 7 of the Bills of Sale Act:—*Held*, that the vessel was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that, therefore, the assignment was valid without registration under that

Act; and also that the assignment came within the exception in section 7 of the Bills of Sale Act, by which transfers of ships are exempted from the provisions of that Act. *Ibid.*

— *false pretences: bona fide purchase by third party: passing of property*]—Goods were supplied by plaintiffs to one Blenkarn, who had taken premises at 37, Wood Street, and in ordering the goods had signed his name in such a way as to induce plaintiffs to believe that he was a member of a well-known firm of Blenkiron & Sons, in Wood Street. For this fraud Blenkarn was tried and convicted of obtaining the goods under false pretences. Before his conviction defendants had honestly bought the goods in question from him, and had sold them again. In an action for conversion of the goods,—*Held* (affirming the decision of the Court of Appeal, 46 Law J. Rep. Q.B. 233), that the property in the goods did not pass from plaintiffs, who were consequently entitled to recover their value from defendants. *Lindsay & Co. v. Cundy* (H.L.), 481

SCIRE FACIAS. See Railway Company.

SECURITY FOR COSTS—*plaintiff residing abroad: admission of plaintiff's claim: counter-claim for damages on independent cause of action*]—The provisions in Order XIX. rule 3, enabling a defendant to counter-claim in respect of unliquidated damages instead of being obliged to bring an independent action, has in view the convenience of the mode of trial, and does not put a plaintiff residing out of the jurisdiction in any worse position as to giving security for costs, than he was when a cross action against him was necessary. Where, therefore, a defendant admitted the claim of a plaintiff residing out of the jurisdiction, but set up a counter-claim for damages arising out of another transaction, overtopping the plaintiff's claim in the action, he was held, as being virtually plaintiff in respect of the balance on the counter-claim, not entitled to require security for his costs from the plaintiff. *Winterfeld v. Bradnum*, 270

— *special circumstances*]—The fact that an appellant is a foreigner not domiciled in England, and having no assets there, is a "special circumstance," which entitles the respondent to security for costs of appeal from an interlocutory order, under Order LVIII. rule 15. *Grant v. The Banque Franco-Egyptienne* (App.), 41

— *insolvent plaintiff: past as well as future costs*]—After the action had been set down for trial plaintiff became insolvent and filed a petition for liquidation:—*Held*, that he was rightly ordered to give security for past as well as future costs. *Brocklebank v. The King's Lynn Steamship Co.*, 321

— *of appeal: special circumstances*]—On an application for security for the costs of an appeal, under Order LVIII. rule 15, the Court may take into consideration the subject-matter of the action, and give weight to the circumstance that the appeal is frivolous or vexatious. *Usill v. Hales. Usill v. Brearley. Usill v. Clarke* (App.), 380

Semble—that the mere fact that an appellant is poor, and therefore unlikely to be able to pay costs, is not in itself a "special circumstance" in consequence of which the Court will order him to give security for the costs before proceeding with the appeal. *Ibid.*

SET-OFF—*assignment of chose in action: debt on a contract: set-off of damages for breach by the assignor*]—Plaintiff sued as assignee of a debt for work done under a contract. Defendant delivered a "statement of defence and counter-claim," claiming "by way of set-off and counter-claim" damages for breach of the contract by the assignor in not completing the work within the time agreed on:—*Held* (on demurrer), that defendant was entitled to set off or deduct these damages, but that the form of the statement of defence must be amended, inasmuch as it did not shew that the defendant claimed only to set them off and not to recover them. *Young v. Kitchen*, 579

SETTLEMENT OF PAUPERS—Abolition of derivative settlements: criminal lunatic: husband and wife. *Guardians of Great Yarmouth v. Clerk of the Peace of London* (M.C. 61), 272

— Abolition of derivative settlements: pending order of removal. *Guardians of Barton Regis Union v. The Churchwardens, &c., of Liverpool* (M.C. 62), 240

— Settlement: illegitimate pauper. *Guardians of Tenterden Union v. Guardians of St. Mary, Ishington* (M.C. 81), 434

— Settlement of paupers under sixteen: second marriage of parent: widowed mother. *Guardians of Keynsham Union v. Guardians of Bedminster Union* (M.C. 73), 469

— Derivative settlement: parentage: retrospective operation of statute. *Guardians of Westbury-on-Severn Union v. Overseers of Barrow-in-Farness* (M.C. 79), 518

— By three years' residence. *Guardians of Brompton Union v. Guardians of Carlisle Union* (M.C. 114), 768

SHERIFF—*levy without sale: right of sheriff to poundage*]—Where a sheriff has seized goods in execution of a writ of *fieri facias*, but before

sale the debtor pays the debt and costs, the sheriff is entitled to poundage under 28 Eliz. c. 4. *Mortimore v. Cragg* (App.), 348
Bissicks v. The Bath Colliery Company (46 Law J. Rep. Exch. 611) approved. *Roe v. Hammond* (46 Law J. Rep. C.P. 791), overruled.
Nash v. Dickinson (Law Rep. 2 C.P. 252) distinguished. *Ibid.*

SHERIFF (continued)—*execution: poundage and levy fees*—A sheriff's officer went with a warrant for executing a writ of *f. fa.* to the execution debtor's shop, told the debtor the particulars of the warrant, and that unless payment were made a man must remain in possession. The debtor thereupon, although he had paid the debt to the creditor, paid the amount demanded, which included poundage and levy fees:—*Held*, that there was a sufficient seizure and levy to render poundage and levy fees payable. *Bissicks v. The Bath Colliery Co. Lim.* (App.), 408

— *interpleader: return to writ of f. fa.: side-bar rule: right to immediate return pending interpleader issue*—Pending an interpleader issue as to the property in goods seized by a sheriff under a writ of *f. fa.*, the execution creditor has not an absolute right to an immediate return of the writ. *Angell v. Baddeley* (App.), 86

A sheriff having seized certain goods under a writ of *f. fa.*, three different persons put in claims to separate portions of the goods. The sheriff interpleaded, and three separate interpleader orders were made. One of the claimants in pursuance of the order paid into Court the value of the goods claimed by him, to an amount sufficient to answer the debt. The other two claimants disobeyed the order; but the sheriff, instead of selling the goods claimed by them, abandoned possession of the whole. The plaintiff, thereupon, obtained a side-bar rule calling on the sheriff to return the writ:—*Held*, affirming the judgment of the Queen's Bench Division, that the plaintiff had no right to such return, and that the side bar rule ought to be set aside. *Ibid.*

— *rule to sheriff to pay money levied: notice of motion*—In ruling a sheriff to pay money returned by him as levied on a writ of execution, the proper practice is to give notice of motion to the sheriff under Order LIII. rule 3, and not to move for a rule to shew cause. *Delmar v. Freemantle*, 767

SHIP AND SHIPPING—*stranding of ship where no damage: jurisdiction of wreck commissioner: suspension of master's certificate*—The jurisdiction to suspend the certificate of the master of a ship has not been extended by the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), sections 29 and 32, to cases not within sections 242 and 432 of the Merchant Shipping Act,

1854 (17 & 18 Vict. c. 104), and therefore where an enquiry into the stranding of a ship where no damage has been done is held by a wreck commissioner under section 32 of the later Act, he has no jurisdiction upon such enquiry to suspend the certificate of the master of the stranded ship. *Ex parte Story*, 266

— *non-delivery of cargo: right of captain to sell: duty of captain to give notice to shipper*—In an action against a shipowner for non-delivery of a cargo of maize, which had become heated, and was sold by defendant at an intermediate port during the voyage, the jury found that the cargo was damaged by its own inherent vice; that it was impossible for defendant to carry it to the port of destination; that the sale was what a prudent man would have done under the circumstances; but that there was no such urgent necessity for the sale as to give no time or opportunity to give notice to plaintiff, the owner of the cargo:—*Held*, on these findings, that defendant had no right to sell without the plaintiff's consent, and that the action would lie. *Acatos v. Burns* (App.), 566

— *general average: part of vessel cut away to save whole adventure: sacrifice of mere wreck*—A ship being caught in a storm portions of the rigging gave way to such an extent that the main mast began to lurch violently, whereupon, fearing that the masts would rip up the decks and thereby endanger the safety of the ship, the captain ordered it to be cut away, which was done. In an action by the owner of the ship to recover from the owners of the cargo their proportion of general average loss incurred by the sacrifice of the mast, the Judge left to the jury the following questions; first, Are you of opinion that the mast was virtually a wreck and gone at the time it went over? secondly, Do you find it was hopelessly lost? The jury answered both questions in the affirmative:—*Held*, by the Court of Appeal, reversing the decision of the Common Pleas Division, that there had been no misdirection, and that substantially the right questions had been left to the jury. *Shepherd v. Kottgen* (App.), 67

If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. *Ibid.*

— *general average: services of shipowner: remuneration to shipowner: commission on disbursements*—A shipowner, who upon the stranding of his ship incurs trouble in arranging for the salvage, forwarding and identification of the cargo, and in the distribution

of the proceeds of the sale of the unidentified portions of the cargo among the consignees, is not entitled to claim as general average, under an average agreement between himself and the consignees, remuneration for such services, nor to be paid a commission on the sale of the cargo or on his disbursements. *Schwuster v. Fletcher*, 530

— See Bill of Lading. Charter-party. Harbour, &c. Clauses Act. Marine Insurance. Practice.

SOLICITOR—costs: charge on property recovered]—

An order declaring a solicitor entitled to a charge for his costs under the Solicitors Act, 23 & 24 Vict. c. 127. s. 28, on a judgment recovered in an action which he was employed to prosecute, must not be made by any other Judge than the Judge who tried the action. *Higgs v. Schröder*, 426

— Costs in suit in Divorce Court. See Husband and Wife.

— Changing. See Practice.

SPECIFIC PERFORMANCE—parol agreement: acceptance of title: waiver of objections to title: reasonable covenants: right of re-entry: severance of reversion]—Taking possession of land under a parol agreement for a lease is not in itself an acceptance of the title, but merely evidence of such acceptance which may be rebutted. But taking possession without taking objection to known defects in title amounts to a waiver of such objections. *Hyde v. Warden* (App.), 121

A person who agrees to accept an assignment of an under lease is not to be held to have constructive notice of the terms of the original lease, unless he has had a fair opportunity of ascertaining its terms. *Ibid.*

Defendant, having agreed to take an assignment of an underlease from plaintiff, found on examining the lease that it contained a covenant by plaintiff not to underlet without the consent of the lessor, the lessor agreeing not to withhold his consent from any assignment to a respectable and responsible person:—*Held*, that the fact that the lessor's consent had not been obtained at the time of the agreement to take an assignment was not enough to enable defendant to resist a claim for specific performance. *Ibid.*

Semble, a power of re-entry on non-performance of covenants does not entitle the lessor to re-enter for breach of a negative covenant, such as a covenant not to assign without consent. *Ibid.*

A covenant by the lessee not to mow meadow-land more than once in a year is not so unreasonable or unusual as to form a valid objection to the lessee's title on the part of a proposed assignee. But a covenant that the lessor and his assigns shall have a right of re-

entry on the bankruptcy of the lessee or his assigns, or if execution should issue against him, is a valid and fatal objection, disentitling the lessee to specific performance of an agreement to accept an assignment. *Ibid.*

B. was in possession of two farms, of one as freeholder, and of the other for a term of years ending Michaelmas, 1889. B. leased the whole to N. for fourteen years, from Michaelmas, 1870, subject to a covenant for re-entry in case of the lessee's bankruptcy, and plaintiff became the assignee of N.'s lease. During plaintiff's term, B. granted to him a lease of the leasehold farm from Michaelmas, 1884, for five years, ending at the same time as the original lease to B.:—*Held*, that the last-mentioned lease, as it conferred merely an "*interesse termini*" on plaintiff, was no severance of the reversion, such as to extinguish the right of re-entry by the original lessor. And further, that such lease for five years, being expressed to be made subject to the former lease, would not affect the right of entry thereby reserved.—*Doe d. Freeman v. Bateman* (2 B. & Ald. 168), approved of. *Ibid.*

Where two distinct properties, held under separate titles, are comprised in one lease, and the reversion of one of them becomes vested in the lessee, this does not extinguish a right of re-entry in respect of the property of which the reversion remains in the lessor; the rules as to severance of reversion by assignment to third parties not being applicable to cases where a portion of the reversion is vested by assignment in the lessee himself. *Ibid.*

Where land is purchased for immediate occupation the Court will not direct a general enquiry as to title, so as to give the vendor an opportunity of making good defects which existed in the title when possession should have been given. *Ibid.*

STATUTE—effect of repeal of special words on general words]—In order to ascertain the effect of a repealing statute the repealed words must be looked at. Where in any statute special words are followed by general words, any subject-matter which is aptly described by the special words, comes within the purview of the statute by force of the special words, and not of the general words. If, therefore, the special words are repealed, the subject-matter ceases to be within the purview of the statute, though aptly described by the general words in the absence of the special words. *Attorney-General v. Lamplough* (App.), 555

STAYING PROCEEDINGS—winding-up of company: liquidator's costs]—Plaintiffs brought an action in the Queen's Bench Division against the defendant company, after a resolution to wind up the latter had been passed and confirmed, for the purpose of recovering a sum of money for goods supplied. On an application by the liquidator to the Court to stay the action, under

the provisions of 36 & 37 Vict. c. 66. s. 24, sub-sec. 5, it appeared that there were no funds capable of being distributed among the creditors, the assets being barely sufficient to cover the liquidator's own costs. The Court nevertheless made the order, staying the proceedings in favour of the liquidator. *Rose v. The Gardden Lodge Coal, Coke and Firebrick Company (Lim.)*, 338

STAYING PROCEEDINGS (continued)—motion for new trial: appeal: jurisdiction of the court of appeal to stay proceedings—Where an order nisi for a new trial has been refused by a Divisional Court, and granted on appeal by the Court of Appeal, such order should not include a stay of proceedings. A stay of proceedings in such a case must be obtained by a substantive application to the Divisional Court or a Judge in chambers, or from the Court of Appeal on appeal from such substantive application. And per BRETT, L.J.—The Court of Appeal has no original jurisdiction in any case to order a stay of proceedings or of execution. *Goddard v. Thompson (App.)*, 382

SUPERFLUOUS LANDS. See Lands Clauses Consolidation Act.

TAXATION OF COSTS—special allowance for attendance of witnesses at trial—The effect of Rule 8 of the special allowances for costs contained in the Rules of August, 1875, is to give the Master a discretion as to what allowances should be made for the attendance of witnesses in Court, untrammelled by the old scale of charges. *Turnbull v. Janson*, 384

— *agreement to pay fixed sum for costs: right to delivery of bill of costs: special circumstances*—By 6 & 7 Vict. c. 73, a person not the party chargeable may, if there are "special circumstances," have a solicitor's bill of costs referred for taxation, even after payment. *Re Heritage; ex parte Docker*, 509

In 1875, H., as solicitor for the Credit Foncier, commenced an action against D. to recover a sum of money due from him on a promissory note. After long negotiations the Credit Foncier were induced by H. to accept a composition, D. at the same time agreeing to pay H.'s costs. D.'s solicitor thereupon asked H. to name a lump sum for his costs, and H. named 200*l.* as a fair and reasonable sum. The money was paid by D. in February, 1877; twelve months later D. applied for the delivery of a bill of costs, alleging that the sum paid by him was excessive, and that great pressure was used by H. to compel him to agree to the sum named for costs:—*Held*, that the case did not come within the provisions contained in 6 & 7 Vict. c. 73, at all, and that, even if it did, there were no special circumstances such as would justify the Court in exercising its jurisdiction. *Ibid.*

— See Lands Clauses Consolidation Act.

TELEGRAPH COMPANY—purchase of undertaking by government: compensation to officers: annual emolument—By the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8, sub-sec. 7, officers who have been for a fixed period in the employment of a telegraph company whose undertaking has been purchased by the Postmaster-General under the provisions of the Act, and who have been in receipt of a yearly salary, or of remuneration not less than 50*l.* a year, are entitled, in the event of their receiving no offer of an appointment from the Postmaster-General in the telegraphic department of equal value to that held under the company, to an annuity by way of compensation for loss of their office, equal to a certain portion of the annual emolument derived by them from their office. S. was an officer of a telegraph company whose undertaking had been purchased by the Postmaster-General, and was entitled, so far as salary and term of office were concerned, to compensation under the Telegraph Act, 1868. It was part of his duty, when required, to travel on the company's business. When he so travelled, his ordinary salary ran on, but his additional expenses were paid by the company, who agreed that he should receive certain fixed weekly sums in lieu of making him bring in an account of his expenditure, and then repaying him:—*Held*, that the amount saved by S. out of the sums so paid to him for travelling expenses was to be taken into consideration in calculating the annual emolument derived by him from his office. *R. v. The Postmaster-General (App.)*, 435

— *duty to recipient of telegram: negligence: delivery of message to wrong person*—Plaintiffs, merchants at Valparaiso, received through defendants a telegram purporting to come from London and addressed to them, ordering a large shipment of barley. No such message was ever in fact sent to plaintiffs. The misdelivery of the message was caused by the negligence of defendants, and occasioned heavy loss to plaintiffs, in consequence of a fall in the market price of barley. In an action to recover the amount of this loss,—*Held* (affirming the decision below, 46 Law J. Rep. C.P. 197), that there was no duty owing by the defendants to the plaintiffs in the matter, either by contract or law, and therefore no action would lie. *Dixon v. Reuter's Telegraph Co. (Lim.) (App.)*, 1

THAMES WATERMEN ACT—"Worked or navigated": barges towed by steamer. *Elmore v. Hunter (M.C. 8)*, 79

TIME—for appealing. See Appeal. And see Limitation of Action. Metropolis Management Act. Practice.

TRESPASS TO LAND—*percolation of water from artificial mound: consequential damage: cause of action*—Plaintiff's statement of claim alleged that defendants deposited on their land and against a wall of defendants, adjoining the house of plaintiff, a large quantity of soil, clay, &c., thereby raising the surface of defendants' land above that of the land on which plaintiff's house was built; and that plaintiff's house was consequently injured by the percolation of water through defendants' wall:—*Held*, on demurrer, that the statement shewed a good cause of action. *Hurdman v. The North Eastern Rail. Co.* (App.), 368

TRUCK ACT. See Master and Servant.

UNIVERSITY TESTS ACT—*Hertford College Act: endowment of new college with religious restriction as to enjoyment: endowment of new fellowship in old college: mandamus*—The University Tests Act, 1871, having removed all restrictions, tests and disabilities from the holding of any lay office, or the taking of any lay degree in the universities or in any college or hall subsisting at the date of the Act, afterwards, in 1874, the non-corporate body of Magdalen Hall was by Act of Parliament dissolved, and its property transferred to Hertford College, which the same Act created and incorporated as a college. Power was given by section 7 of the Act to the college to accept endowments for various purposes upon such terms and conditions as might, with the sanction of the Chancellor of the University, be agreed on between the college and the donor; but section 13 provided that nothing in the Act contained should be construed to repeal any of the provisions of the University Tests Act, 1871. By a gift, the terms of which were sanctioned by the Chancellor and accepted by the college, a person endowed a fellowship in Hertford College, limiting it to members of certain churches. Notice of an election of a fellow upon the foundation having been advertised, the prosecutor asked to be admitted to the examination as a Nonconformist, but was informed by the authorities of the college that he would not be elected even if successful in the examination, on the ground that though otherwise well qualified he was not a member of any of the specified churches. The prosecutor did not attend the examination, and a person in all respects qualified was elected:—*Held*, on demurrer to the return to a writ of mandamus commanding the governing body to examine the prosecutor as a candidate for the fellowship the election for which had been advertised, that the return, which set forth the facts of the case, was good on the following grounds—That the prosecutor had not presented himself for examination at the time appointed by the college, and examination was a condition precedent to the right of election. That even if he had so presented himself and had been

wrongfully refused examination or election, the wrong done him would have been corrigible by the visitor of the college and not by the Courts of law. That the office was already legally full. That the University Tests Act, 1871, does not prevent the creation of new colleges in the universities, the endowments of which may be confined to the members of a particular religious community; and that Hertford College, not having been a subsisting college at the time of the passing of the University Tests Act, 1871, is not governed by that Act *proprio vigore*. That Hertford College is not made subject to the University Tests Act by the provisions of the Hertford College Act, except so far as relates to that part of the endowments which was transferred to the college from the old foundation of Magdalen Hall, and such other endowments as were already given at the time of the passing of the last-mentioned Act. *R. v. The Principal, Fellows and Scholars of Hertford College, Oxford* (App.), 649

Semble, that the University Tests Act prevents the establishment of new foundations with religious restrictions in colleges subsisting at the date of the Act. *Ibid*.

VALUATION LIST—What hereditaments to be separately valued. *Raulence v. The Guardians of Hursley Union* (M.C. 31), 229

VENDOR AND PURCHASER. See Specific Performance.

VESTRY—*election of vestrymen: absence of qualification: "rated or assessed": claim to be rated: tender of rate: finality of decision of inspectors*—Defendant occupied jointly with his father premises in the metropolitan parish of R. of sufficient value to qualify him to act as a vestryman. Up to and including April, 1876, the rates in respect of the premises had been made on the father alone. Shortly after the rate was made in April, 1876, defendant applied to the churchwardens and overseers of R. to place his name on the rate-book as partner with his father in the firm of Williams & Son, but no step was taken by the authorities in the matter. In May defendant was elected vestryman by poll, and the inspectors appointed under ss. 16, 17, 18, 19, 22, of the Metropolis Management Act, 1855, declared that he was duly elected. Subsequently in the same month the demand for the rate was made on the father alone. In June defendant voted as a vestryman. In July he required the rate to be altered by the addition of the words "and Son." It was so altered, and the rate was paid by Williams and Son. An action having been brought against the defendant under the Metropolis Management Act, 1855, s. 54, to recover a penalty for his acting as vestryman without qualification,—*Held*, that as defendant was not "rated or assessed" within sec. 54 of the same Act he was liable to the penalty; that the decision of the

inspectors as to the qualification of the candidates is not final; that section 4 of the Metropolis Amendment Act, 1856, is not retrospective in its operation so as to exempt from the penalty one who pays the rate subsequently to his acting as vestryman. *Goodhew v. Williams* (App.), 313

WARRANTY—What amounts to. See Adulteration of Food. And see Charter-party.

WAY—Extinguishment of right of. See Appeal.

WILL—*construction of: personal estate, property, chattels and effects: seized: freehold estate not included*—Testator by his will disposed of his property as follows:—"I give and bequeath unto my wife (here followed various sorts of personal property, specifically enumerated), and all other my personal estate, property, chattels and effects whatsoever and wheresoever of which I am now seized, possessed or entitled to, or may hereafter acquire, or can hereby dispose of, to hold the same unto my said wife, her executors, administrators and assigns, for her and their own use and benefit absolutely." Testator then disposed of the real estates, vested in him by way of mortgage and in trust, by "devise" to his wife and brother, "their heirs and assigns," the money secured on such mortgages to be "considered as part of my personal estate:"—*Held*, that testator's freehold estates did not pass under the will. *Jones v. Robinson*, 673

WINDING-UP OF COMPANY—*repudiation of shares bought under fraudulent representation*—The principle that a shareholder who has been induced to take shares in a company by the fraudulent representations of the directors, cannot repudiate his shares or recover back the price paid for them after the company has been wound up, if at the time of the intended repudiation there are any debts of the company unpaid, extends to the case of a voluntary winding-up without supervision. *Stone v. The City and County Bank*; *Collins v. Same*, 681

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WRIT OF SUMMONS—*form of special indorsement on writ*—Plaintiff claimed by indorsement on his writ of summons a certain sum from defendant as "contribution to payment of certain bills and promissory notes in which he and plaintiff were jointly liable, &c.," without specifying any dates or giving further particulars of his claim:—*Held*, that the writ was not specially indorsed under Order III. rule 9 of the Rules of Court, 1875. *Walker v. Hicks*, 27

— *renewal of writ where right to sue barred by statute of limitations*—Where more than twelve months has elapsed since the date of a writ, and it has not been served on defendant, the Court has no power under Order LVII. rule 6, to enlarge the time appointed by Order VIII. rule 1, for application to be made to renew the same, if at the date of the application plaintiff's right to sue is barred by the Statute of Limitations. *Doyle v. Kaufman*, 26

ERRATA.—Page 54, second column, at the ninth line from the top, for "having" read leaving.

Also, page 130, second column, in line seventeen from the top, obliterate the word "reversion."

Also, page 382, first column, at the seventh line from the bottom, for "XXIX." read XXXIX., and at page 383, first column, at the third line from the bottom, for "section 58" read Order LVIII.

Also, page 665, second column, at the second line from the top, for "defendant" read plaintiff.

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SUPREME COURT OF JUDICATURE. RULES

Dated November 7th, 1876.

I, the Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, do hereby, in pursuance of the seventeenth section of "The Appellate Jurisdiction Act, 1876," appoint Sir William Baliol Brett, Mr. Justice Lush, Mr. Baron Pollock, and Mr. Justice Manisty to be the four Judges of the Supreme Court of Judicature, by whom, together with the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, Rules of Court for carrying into effect the enactments contained in the said section of the said Act shall be made as therein mentioned. And this appointment is to continue in force until the first day of January, 1878.

CAIRNS, C.

1. These Rules may be cited as "The Rules of the Supreme Court, December, 1876," or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Order and Rule mentioned in the margin.

2. These Rules shall come into operation on the 1st December, 1876.

ORDER XXXVI.

Trial.

3. Order XXXVI., Rule 22, is hereby repealed, and instead thereof the following rule shall take effect :—

Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.

4. Where in any action in the Chancery Division the action or any question at issue in the action is ordered to be tried before any Commissioner or Commissioners of Assize, or at the London or Middlesex sittings of any Division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question or issue should be so tried and should not be tried in the Chancery Division.

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ORDER XXXIX.

New Trial.

5. Order XXXIX., Rule 1, is hereby repealed, and instead thereof the following provision shall take effect :—

Rule 1. Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a Judge without a Jury, the application for a new trial shall be to the Court of Appeal.

6. Applications for new trials shall be by motion calling on the opposite party to shew cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a Judge shall enlarge the time :—

An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

ORDER XL.

Motion for Judgment.

7. Order XL., Rules 4 and 6 are repealed, and Rule 5 is repealed so far as it affects trials before a Judge; and the following Rule shall be substituted for Rule 4 :—

4. Where, at or after the trial of an action by a Jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the Jury upon the question or questions submitted to them.

Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

An application under this Rule shall be to the Court of Appeal.

ORDER LVIIA.

Divisional and other Courts.

8. The following proceedings and matters shall continue to be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single Judge to be taken before a Divisional Court.

Proceedings on the Crown side of the Queen's Bench Division.

Appeals from Revising Barristers, and proceedings relating to Election Petitions, Parliamentary and Municipal.

Appeals under section 6 of the County Courts Act, 1875.

Proceedings on the Revenue side of the Exchequer Division.

Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.

Cases stated by the Railway Commissioners under the 36 & 37 Vict. c. 48.

Cases of Habeas Corpus, in which a Judge directs that a rule nisi for the writ, or the writ be made returnable before a Divisional Court.

Special cases where all parties agree that the same be heard before a Divisional Court.

Appeals from Chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said Division where the action has been tried with a jury.

9. Where, by section 17 of the Appellate Jurisdiction Act, 1876, or by these Rules, any application ought to be made to, or any jurisdiction exercised by the Judge before whom an action has been tried, if such Judge shall die or cease to be a Judge of the High Court, or if such Judge shall be a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the President of the Division to which the action belongs may either by a Special Order in any action or matter, or by a General Order applicable to any class of actions or matters, nominate some other Judge to whom such application may be made, and by whom such jurisdiction may be exercised.

10. Every vacation Judge shall have the same power and authority as heretofore.

ORDER LVIII.

Appeals from Inferior Courts.

11. Rule 16 of the Rules of the Supreme Court, December, 1875, is hereby repealed, and instead thereof the following provision shall take effect :—

Every Judge of the High Court of Justice for the time being shall be a Judge to hear and determine Appeals from inferior Courts, under section 45 of the Supreme Court of Judicature Act, 1873. All such Appeals (except Admiralty Appeals from inferior Courts, which until further order shall be assigned as heretofore to the present Judge of the Admiralty Court,) shall be entered in one list by the Officers of the Crown Office of the Queen's Bench Division; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those Divisions shall from time to time direct.

Nothing in this Order shall affect the validity of any Rule or Regulation heretofore issued with reference to such Appeals by the Divisional Court formed under the said section.

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
WM. BALIOL BRETT.
ROBT. LUSH.
C. E. POLLOCK.
H. MANISTY.

LAW JOURNAL REPORTS, 1878.

SUPREME COURT OF JUDICATURE.

ORDER IN COUNCIL

UNDER

THE APPELLATE JURISDICTION ACT, 1876.

Dated November 28th, 1876.

At the Court at *Windsor*, the 28th day of *November*, 1876.

PRESENT :

The QUEEN's most Excellent Majesty,

Lord President,
Lord Chamberlain,
Earl of Derby,
Mr. Secretary Cross.

WHEREAS there was this day read at the board a representation, dated at the Council Chamber, Whitehall, on the 15th November instant, from the Right Honourable and Most Reverend the Archbishop of Canterbury, the Right Honourable and Most Reverend the Archbishop of York, the Right Honourable and Right Reverend the Bishop of London, the Right Honourable the Lord Chancellor, and the Right Honourable the Lords of the Judicial Committee of Her Majesty's Privy Council, humbly recommending to Her Majesty that the following be the rules under the Appellate Jurisdiction Act, 1876, by which it is enacted that Her Majesty may, by order in Council with the advice of the Judicial Committee of Her Majesty's Privy Council, or any five of them, of whom the Lord Chancellor shall be one, and of the archbishops and bishops being members of Her Majesty's Privy Council, or any two of them, make rules for the attendance on the hearing of Ecclesiastical Cases as assessors of the said committee of such number of the archbishops and bishops of the Church of England as may be determined by such rules, and that the rules may provide for the assessors being appointed for one or more year or years, or by rotation or otherwise, and for filling up any temporary or other vacancies in the office of assessor :—

I. The Archbishop of Canterbury, the Archbishop of York, and the Bishop of London shall be ex officio assessors of the Judicial Committee of Her Majesty's Privy Council on the hearing of Ecclesiastical Cases according to the following rota, that is to say, the Archbishop of Canterbury from this day until the 1st of January, 1878; the Archbishop of York from the 1st of January,

1878, till the 1st of January, 1879; and the Bishop of London from the 1st of January, 1879, until the 1st of January, 1880, and so on by a similar rotation for the period of one year each.

II. The other bishops of dioceses within the provinces of Canterbury and York shall attend as assessors of the Judicial Committee on the hearing of Ecclesiastical Cases

according to the following rota, that is to say, from this day until the 1st of January, 1878, the four bishops who on this day are the four junior bishops for the time being; seniority for the purpose of this order to be reckoned from the date of appointment to the Episcopal See; from the 1st of January, 1878, till the 1st of January, 1879, the four bishops who on the 1st of January, 1878, shall be the four bishops next in order of seniority; and from the 1st of January, 1879, till the 1st of January, 1880, the four bishops who on the 1st of January, 1879, shall be the four bishops next in order of seniority, and so on by a similar rotation until the senior bishop for the time being is reached, when the rotation shall be carried back to and again commenced with the junior bishop.

"III. In the event of any one, or more than one, vacancy occurring in the office of ecclesiastical assessor, the vacancy or vacancies shall be filled up by the person or per-

sons then next according to the rotations aforesaid.

"IV. A summons to attend on the hearing of every ecclesiastical case about to be heard before the said Judicial Committee shall be issued to the five ecclesiastical assessors for the time being; and no such case shall be heard before the said Judicial Committee unless there are at least three of such assessors present at the hearing: Provided that the assessors present at the commencement of the hearing of any such case shall continue to be the assessors for that case until it shall be fully heard and disposed of, although their term of office, according to the rotation aforesaid, may in the meantime have expired: Provided also, that in the event of the death, resignation or absence by reason of illness or other unavoidable cause, of any one of the assessors present at the commencement of the hearing, the hearing of the case may proceed so long as at least two assessors are present."

Her Majesty, having taken the said representation into consideration, was pleased, by and with the advice of Her Privy Council, to approve the said rules made upon the recommendation of the Right Honourable the Most Reverend and Right Reverend Prelates, the Right Honourable Lord Chancellor, and the Right Honourable the Lords of the Judicial Committee as aforesaid, and to order, as it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution. Whereof the Most Reverend and Right Reverend the Archbishops and Bishops of Dioceses, within the provinces of Canterbury and York, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

C. L. PEEL.

LAW JOURNAL REPORTS, 1878.

SUPREME COURT OF JUDICATURE.

APPELLATE JURISDICTION ACT, 1876.

FORM OF APPEAL, METHOD OF PROCEDURE, and
STANDING ORDERS

Applicable to all Appeals presented to the House of Lords on and after the 1st day of November, 1876.

(As amended, December, 1876.)

To the Right Honourable the House of Lords.

The humble petition and appeal of A.

YOUR petitioner humbly prays that the matter of the Order (or Orders, or Judgment or Interlocutor,) set forth in the schedule hereto* (or, so far as therein stated to be appealed against) may be reviewed before Her Majesty the Queen in Her Court of Parliament, and that the said Order (or, so far as aforesaid) may be reversed, varied or altered, or that the petitioner may have such other relief (if specific relief be desired, it can be so stated in the prayer) in the premises as to Her Majesty the Queen, in Her Court of Parliament, may seem meet; and that (here name the respondents) may be required to lodge such printed cases as they may be advised, and the circumstances of the cause may require, in answer to this appeal; and that service of such order on the solicitors in the cause of the said respondents may be deemed good service.

To be signed by two Counsel.

(Here insert schedule.)

FORM OF SCHEDULE.

"From Her Majesty's Court of Appeal (England).

"In a certain cause (or matter) wherein A was plaintiff and B. was defendant.

"The Order appealed from is in the words following, viz., (*set forth Order complained of in italics*) or, the Order referred to in the above prayer is in the words following, the portion appealed from being printed in italics (*set forth Order, the portion complained of being printed in italics*, the portion not complained of being printed in Roman type").

We humbly conceive this to be a proper case to be heard before your Lordships by way of appeal.

To be signed by two Counsel.

I , clerk to Messrs. , of , solicitors for the appellants within-named, hereby certify that on the day of I served Messrs. of solicitors for , the within-named respondents, with a correct copy of the foregoing appeal, and with a notice that on the day of , or as soon after as conveniently may be, the petition of appeal would be presented to the House of Lords on behalf of the appellant.

DIRECTIONS FOR AGENTS.

Method of Procedure.

In accordance with the foregoing notice, the appeal, printed on parchment (quarto size), in such form as will enable paper copies

thereof to be hereafter bound up with the printed cases, is to be lodged in the Parliament Office for presentation to the House, and (if the House be then sitting, or if not, on the next ensuing meeting of the House,) an order thereon for service on the respondents or their solicitors, ordering the respondents to lodge cases in answer to the appeal, will be issued to the appellant's agent, such order, together with an affidavit of due service entered thereon, to be returned to the Parliament Office *within* the period granted to the appellant for lodging his printed case, under Standing Order No. V.

Each appellant, where there are more than one, is required to enter into the recognizance. The appellants are required to submit to the clerk of the parliaments within one week after the date of the presentation of the appeal (unless the sum of 200*l.*, as required by the Standing Order, be paid to the receiver of fees to the Parliament Office for payment into the fee fund of the House of Lords (1),) the names of the sureties who propose entering into the *Bond*; and, in the event of a substitute being proposed to enter into the recognizance in lieu of the appellants, the name of such substitute. *Two clear days' previous notice* of the names so proposed (for bond and recognizance) is to be given to the solicitor or agent of the respondents, and at the time of submitting the said names to the clerk of the parliaments, a certificate from the solicitor or agent of the appellants is to be lodged in the Parliament Office, certifying his belief in the sufficiency of the sureties and substitute so proposed. At the termination of one week from the lodgment of such certificate, the *bond* and *recognizance* are to be issued to the solicitor or agent of the appellants for execution before a commissioner appointed to administer oaths in the Supreme Court of Judicature in England, or a Commissioner appointed to administer oaths in Chancery in Ireland, or before a Justice of the Peace in Scotland. The bond and the recognizance (whether entered into by the appellants or by a substitute) to be returned to the Parliament Office within one week from the date of the issue thereof to the solicitor or agent of the appellants.

The solicitors of those respondents who purpose lodging printed cases in answer to the appeal should attend at the Parliament Office for the purpose of ascertaining the due execution of the recognizance and bond, and entering their names in the appearance book. (Notice of the meeting of the Appeal

Committee is only sent to the solicitors of respondents who have thus signified their appearance in the cause.)

In English Appeals six weeks' time, and in Irish and Scotch Appeals eight weeks' time, from the date of the presentation of the Appeal, is granted to all parties to lodge printed cases and the appendices thereto (2).

In Appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a *joint* case with reasons *pro* and *con*, following the practice heretofore in use in Common Law Appeals on a Special Case.

It is obligatory on the appellant, within the respective periods so limited as above, to lodge his printed cases, or the joint case before mentioned, and a printed appendix consisting of such documents, or parts thereof, used in evidence in the Court below, as may be necessary for reference on the argument of the appeal.

It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties. (Ten copies of the appendix, as soon as printed, to be delivered to the solicitor of the respondent.) The respondent is allowed to print any additional documents, used in evidence in the Court below, which may be necessary for the support of his case on the argument of the appeal, such documents to be paged consecutively with the appendix. (The proof to be examined, as aforesaid, by the respective solicitors, and prints delivered to the solicitor of the appellant.)

The costs incurred in printing the appendix will, in the first instance, be borne by the appellant, and the cost of the additional documents by the respondent, but these costs will ultimately be subject to the decision of the House with regard to the costs of the appeal.

The case and appendix must be printed quarto size, with seven or eight letters in the margin for facilitating reference, and should be submitted in proof to the clerks in the Judicial Office. Forty copies of the case and appendix are required to be lodged in the Parliament Office; and subsequently, on the lodgment of the respondent's case, ten bound copies (see directions in the

(1) All drafts and cheques to be made payable to "House of Lords Fee Fund," and to be crossed, "Bank of England, Western Branch."

(2) *Note*.—Petitions for extension of time, lodged during the recess, do not prevent the dismissal of an appeal. (For form of Petition see Appendix C.)

appendix hereto as to binding printed cases).

Where reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix containing such document.

There is no penalty on respondents who do not lodge their printed cases within the time limited by Standing Order No. V., but respondents can only appear at the bar on a printed case.

As soon as the printed cases of all parties and the appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is obligatory on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited by Standing Order No. V. (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the before mentioned "order of service" upon the respondents or their solicitors). A respondent who has lodged his printed cases is at liberty to set down the cause for hearing on the first sitting day after the expiration of the time limited by the Standing Order for lodging printed cases.

The cause will then be ripe for hearing, and will take its position on the effective cause list.

Standing Orders applicable to all Appeals presented to the House of Lords on or after the 1st day of November, 1876.

STANDING ORDER I.

Ordered, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment or interlocutor appealed from.

In cases in which the person entitled to appeal be within the age of one and twenty years, or covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland, such person may be at liberty to present his appeal to the House, provided that the same be lodged in the Parliament Office within one year next after full age, discovery, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland. But in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment, or interlocutor appealed against.

STANDING ORDER II.

Ordered, that all petitions of appeal be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the Court below, or shall purpose attending as counsel at the hearing in this House.

STANDING ORDER III.

Ordered, that the "order of service" issued upon the presentation of an appeal for service on the respondent or his solicitor, be returned to the Parliament Office, together with an affidavit of due service entered thereon, within the time limited for the appellant to lodge his printed cases, unless within that period all the respondents shall have lodged their printed cases; in default, the appeal to stand dismissed.

STANDING ORDER IV.

Ordered in all appeals that the appellant or appellants do give security to the clerk of the Parliaments by recognizance to be entered into, in person, or by substitute, to the Queen of the penalty of 500*l.*, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of the appeal; and further, that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the clerk of the Parliaments, to enter into a joint and several bond to the amount of 200*l.*, or do pay in to the account of the fee fund of the House of Lords the sum of 200*l.*; such bond, or such sum of 200*l.*, to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal the appellant or appellants do pay in to the account of the fee fund of the House of Lords the said sum of 200*l.*, or submit to the clerk of the Parliaments the names of the sureties proposed to enter into the said bond; and, in the event of a substitute being proposed to enter into the said recognizance, the name of such substitute; two clear days' previous notice of the names so proposed for bond and recognizance to be given to the solicitor or agent of the respondent: Ordered, that the said bond and the recognizance (whether entered into by the appellants or by a substitute) be returned to the Parliament Office, duly executed, within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed.

STANDING ORDER V.

1. Ordered that in English appeals the printed cases and the appendix thereto be lodged in the Parliament Office within six weeks from the date of the presentation of the appeal to the House; in Scotch and Irish appeals, within eight weeks; and the appeal set down for hearing on the first sitting day after the expiration of those respective periods (or as soon before, at the option of either party, as all the printed cases and the appendix shall have been lodged); on default by the appellant the appeal to stand dismissed.

2. Ordered, that in all appeals from Scotland the appellant alone, in his printed case or in the appendix thereto, shall lay before this House a printed copy of the record as authenticated by the Lord Ordinary; together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed, and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall, in their cases, lay before the House a copy of the case presented by them respectively to the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible.

3. Ordered, that all printed cases be signed by one or more counsel, who shall have attended as counsel in the Court below, or shall purpose attending as counsel at the hearing in this House.

STANDING ORDER VI.

Ordered, that all cross-appeals be presented to the House within the period allowed by Standing Order No. V. for lodging cases in the original appeal.

STANDING ORDER VII.

Ordered, with regard to appeals in which the periods severally dating from the presentation of the appeal under Standing Orders Nos. III., IV., V., and VI. expire during the recess of the House, that such periods be extended to the third sitting day of the next ensuing meeting of the House.

STANDING ORDER VIII.

Ordered, that where any party or parties to an appeal shall die pending the same, sub-

sequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case.

The like rule shall be observed by the appellant and respondent respectively, where any person or persons, party or parties in the Court below, have been omitted to be made a party or parties in the appeal before this House, and shall, by leave of the House, upon petition or otherwise, be added as a party or parties to the said appeal after the printed cases in such appeal shall have been lodged.

STANDING ORDER IX.

Ordered, that when any petition of appeal shall be presented to this House from any interlocutory judgment of either division of the Lords of Session in Scotland, the counsel who shall sign the said petition, or two of the counsel for the party or parties in the Court below, shall sign a certificate or declaration, stating either that leave was given by that division of the Judges pronouncing such interlocutory judgment to the appellant or appellants to present such petition of appeal, or that there was a difference of opinion amongst the Judges of the said division pronouncing such interlocutory judgment.

STANDING ORDER X.

Ordered, that in all cases in which this House shall make any order for payment of costs by any party or parties in any cause without specifying the amount, the clerk of the Parliaments or clerk assistant shall, upon the application of either party, appoint such person as he shall think fit to tax such costs, and the person so appointed may tax and ascertain the amount thereof, and shall report the same to the clerk of the Parliaments or clerk assistant: And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation for and in respect thereof as are now or shall be fixed by any resolution of this House concerning such fees; and the said person so appointed to tax such costs may, if he thinks fit, either add or deduct the whole or a part of such fees at the foot of his report: And the clerk of the Parliaments or clerk assistant may give a certificate of such costs, expressing the amount so reported to him as aforesaid; and the amount

in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs.

APPENDIX A.

(Certificate of Sufficiency of Sureties, &c.)

Lodged in the Parliament office on the
day of 18 .

In the House of Lords.

"A. and others v. B. and others."

In compliance with Standing Order No. IV., I (we) submit the names of (full name) of (address) and (full name) of (address) { as fit and proper sureties } to enter into the { bond } thereby required : and I (we) certify in { my } belief, that the said (full name) and the said (full name) { are each } worth upwards of { 200l. } over and above { their } just debts. { 500l. } { his }

This certificate may be signed by the country solicitor or agent of the appellants.

I (we) certify that a copy of the above certificate and two clear days' notice of the intention to lodge the same in the Parliament Office has been served on the solicitors or agents of the respondents.

To be signed by the London solicitor or agent of the appellants.

APPENDIX B.

(Directions for Binding Printed Cases for the use of the Law Lords.)

1. Ten copies bound in purple cloth ; two of the ten to be inter-leaved, as regards the cases only.

2. Short title of cause on the back.

3. Label on side, stating short title of cause and contents of the volume, thus :—

"A— and others v. B— and others."

Printed copy of the appeal.

Appellants' case.

Respondent B.'s case.

Respondent C.'s case.

Appendix.

4. The volume to be indented, and the

names of the parties written on the indentations to their respective cases.

5. References to the reports of the cause in the Courts below, or the words "Not reported," to be written on the fly sheet.

6. The bound copies to be lodged immediately after the respondents' cases are delivered in.

The agents are requested to use their discretion as to the size of the volume, arrangement of the cases and appendix. In dealing with bulky cases, it may be found advisable to bind the appendix as a separate volume, and also to divide the appellants' and respondents' cases into separate volumes.

It is the duty of the appellants' agent to carry out these directions.

APPENDIX C.

(Petition for Extension of Time to Lodge Cases, &c.)

(To be engrossed on foolscap paper, and (unless assent of respondent's agent be obtained) a copy, and two clear days' notice of intention to present, to be given to respondent's agent.)

In the House of Lords. (Insert short title of cause.)

To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled.

The humble petition of the appellant

Sheweth, That your petitioner presented petition of appeal on the

day of complaining of (insert dates of orders or interlocutors complained of).

That the time allowed by Standing Order No. V. ((or) extended by your Lordships' order of the (state date)) for the appellant to lodge his printed cases and the appendix, will expire on the (state date).

That your petitioner (set forth cause of delay).

Your petitioner therefore humbly prays that your Lordships will be pleased to grant him (set forth time required) further time to lodge his printed cases, and the appendix, and set down the cause for hearing. And your petitioner will ever pray.

Agents for the appellant.

We consent to the prayer of the above petition,

Agents for the respondent.

August, 1876.

LAW JOURNAL REPORTS, 1878.

SUPREME COURT OF JUDICATURE.

ORDER AS TO FEES

To be taken by any Official Referees that may be attached to the Supreme Court.

Dated February 1st, 1876.

The Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby, in pursuance and execution of the powers given by the Supreme Court of Judicature Act, 1875, and all other powers and authorities enabling him in this behalf, order and direct, in manner following :—

The fees to be taken by any Official Referee to be attached to the Supreme Court under the provisions of section eighty-three of the Supreme Court of Judicature Act, 1873, shall be as follows :—

	£	s.	d.
Upon a reference, for every hour or part of an hour, the Official Referee is occupied . . .	1	1	0

Where the sittings under a reference are to be held elsewhere than in London, there shall be paid in addition to the above, 1*l.* 11*s.* 6*d.* for every night the Official Referee, and 15*s.* for every night the Official Referee's clerk, is absent from London, together with reasonable costs of their locomotion from London and back.

A deposit on account of fees and expenses before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit.

Where the sittings are held elsewhere than in London, the plaintiff in the action shall provide, at his expense, a place to the satis-

faction of the Official Referee in which the sittings may be held.

Upon the conclusion of the sittings on a reference, the Official Referee shall forthwith transmit to the Treasury a return according to the form annexed, on which shall be affixed stamps equal in amount to the fees and moneys received for such sitting and expenses.

The Official Referees shall conform to any regulations that may be made from time to time by the Treasury for the accounting for all fees and monies paid to them.

CAIRNS, C.
G. BRAMWELL.
WM. BALIOL BRETT.
JAMES HANNEN.

1st February, 1876.

We certify that this order is made with the concurrence of the Commissioners of Her Majesty's Treasury.

ROW. WINN.
J. D. H. ELPHINSTONE.

SUPREME COURT OF JUDICATURE. RULES

Dated November 7th, 1876.

I, the Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, do hereby, in pursuance of the seventeenth section of "The Appellate Jurisdiction Act, 1876," appoint Sir William Baliol Brett, Mr. Justice Lush, Mr. Baron Pollock, and Mr. Justice Manisty to be the four Judges of the Supreme Court of Judicature, by whom, together with the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, Rules of Court for carrying into effect the enactments contained in the said section of the said Act shall be made as therein mentioned. And this appointment is to continue in force until the first day of January, 1878.

CAIRNS, C.

1. These rules may be cited as "The Rules of the Supreme Court, May, 1877," or each separate rule may be cited as if it had been one of the rules of the Supreme Court, and had been numbered by the number of the order and rule mentioned in the margin.

2. These rules shall come into operation on the 1st June, 1877.

ORDER XIV.

Leave to Defend where Writ specially Indorsed.

3. Order XIV., rule 1, of the Rules of the Supreme Court is hereby repealed, and the following rule is substituted:—

Where the defendant appears to a writ of summons specially indorsed under Order III., rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no de-

fence to the action, call on the defendant to shew cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, making an order empowering the plaintiff to sign judgment accordingly.

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
COLERIDGE.
FITZROY KELLY.
WM. BALIOL BRETT.
ROBT. LUSH.
C. E. POLLOCK.
H. MANISTY.

May, 1877.

LAW JOURNAL REPORTS, 1878.

SUPREME COURT OF JUDICATURE. RULES.

Dated November 7th, 1876.

I, the Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, do hereby, in pursuance of the seventeenth section of "The Appellate Jurisdiction Act, 1876," appoint Sir William Baliol Brett, Mr. Justice Lush, Mr. Baron Pollock, and Mr. Justice Manisty to be the four Judges of the Supreme Court of Judicature, by whom, together with the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, Rules of Court for carrying into effect the enactments contained in the said section of the said Act shall be made as therein mentioned. And this appointment is to continue in force until the first day of January, 1878.

CAIRNS, C.

1. These rules may be cited as "The Rules of the Supreme Court, June, 1877," or each separate rule may be cited as if it had been one of the rules of the Supreme Court, and had been numbered by the number of the order and rule mentioned in the margin.

2. These rules shall come into operation on the 19th June, 1877.

ORDER V.

Subject to the power of transfer, and subject also to the power of the Lord Chancellor by order from time to time otherwise to direct, every cause or matter which shall be commenced in the Chancery Division of the High Court shall be assigned to one of the Judges thereof by marking the same with the name of such of the same Judges as the plaintiff or petitioner may in his option think fit.

ORDER LI.

In the Chancery Division a transfer of a cause from one Judge to another may by the same or a separate order be ordered to be made or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the Judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the Judge to whom it was assigned at the time of transfer, and as if such Judge had made the decree or judgment, if any, made therein, unless the Judge to whom the cause is transferred shall direct that any further proceedings therein, before or after the hearing or trial thereof, shall be taken and prosecuted before himself or before an official or special referee.

CAIRNS, C.
A. E. COCKBURN.
G. JESSEL.
ROBT. LUSH.

LAW JOURNAL REPORTS, 1878.

SUPREME COURT OF JUDICATURE.

I, the Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, do hereby order and direct as follows :—

I. Each of the several causes which have been or shall be transferred to Mr. Justice Fry shall, until further order, be deemed to have been transferred to him for the purpose only of trial or of hearing.

order, be assigned to the said Mr. Justice Fry by the same being marked by the plaintiff or petitioner with the name of the said Mr. Justice Fry.

Dated this 19th day of June, 1877.

II. No cause or matter shall, until further

CAIRNS, C.

LAW JOURNAL REPORTS, 1878.

SUPREME COURT OF JUDICATURE.

ORDER IN COUNCIL AS TO WINTER ASSIZES.

Dated August 13th, 1877.

At the Court at *Osborne House, Isle of Wight*, the 13th day of *August, 1877.*

PRESENT :

The QUEEN'S Most Excellent Majesty in Council.

In pursuance of section 5 of the Winter Assizes Act, 1876, and of the Winter Assizes Act, 1877, Her Majesty is pleased, by and with the advice of her Most Honourable Privy Council, to order as follows :—

The jurisdiction of the justices and Judges of the Central Criminal Court at any session of oyer and terminer or any gaol delivery held for the Central Criminal Court district in the months of October, November, December, or January, shall extend to the following counties, and parts of counties, neighbouring to the said district (hereinafter referred to as counties, and parts of counties, to which this order relates), viz. : the county of Sussex ; the county of Berks ; the county of Herts ; and such parts of the counties of Kent and Surrey as are not included in the Central Criminal Court district ; as if such counties and parts of counties were included in the Central Criminal Court district ; and the Central Criminal Court Act shall apply to the said counties and parts of counties, and offences committed therein, as if the same counties and parts of counties were mentioned in that Act :

Subject, nevertheless, to the following modifications and exceptions :—

(1.) Nothing in this order shall authorise the trial at the Central Criminal Court of any person who shall have been admitted to bail and shall not be in custody at the time of such trial, unless he be jointly charged with another person in actual custody, or of any person for any offence triable at quarter sessions, except in accordance with the provisions of sections 18 and 19 of the Central Criminal Court Act.

(2.) For the purposes of this order, the counties and parts of counties to which this order relates shall be deemed to be included in the commission in force for the time being for the Central Criminal Court.

(3.) Unless the Central Criminal Court shall otherwise direct, no person shall be summoned or returned from any of the counties or parts of counties to which this order relates to serve on any grand jury or petty jury at the Central Criminal Court ; but any grand jury or petty jury, constituted in accordance with the provisions of the 4th section of the Central Criminal Court Act, shall have authority to inquire of, present, try and determine all offences with respect to which jurisdiction is by this order conferred on the Central Criminal Court.

(4.) Until Her Majesty is pleased, by and with the advice of her Privy Council, otherwise to order and direct, it shall be lawful for any justice of the peace or coroner, having jurisdiction within any county or part of a county to which this order relates, to commit any person charged with having committed any offence with respect to which jurisdiction is by this order conferred on the Central Criminal Court, and which has been committed, or is alleged to have been committed within the jurisdiction of such justice or coroner, either to the gaol to which, but for the said Winter Assizes Acts and this order, such person would have been commit-

ted, or to the gaol of Newgate, there to remain until he can be tried in pursuance of this order, or in due course of law.

(5.) When in pursuance of this order any person shall be committed to any gaol other than Newgate, the sheriff of the county in which the gaol to which prisoner is committed is situated, or the keeper of the same gaol, shall, six days at least before the next sitting of the Central Criminal Court at which the prisoner can be tried, or at such other time as the Justices or Judges of the said Court, or any two or more of them, shall from time to time direct, cause such person, with his commitment and detainers, to be safely removed from the gaol to which he was committed, without any writ of *habeas corpus* or other writ, to the gaol of Newgate, there to remain until delivered by due course of law.

(6.) Where any person is committed for trial in any county or part of a county to which this order relates, any of the Justices and Judges of the Central Criminal Court or the committing justice or justices, or any two of the justices of the county or place in which he was committed, may, upon the application of such prisoner, direct the treasurer of the county or place where the prisoner was committed to advance to the prisoner a sum not exceeding 20*l.* to enable him to defray the travelling expenses of his witnesses to and from the Central Criminal Court; and the treasurer shall advance such sum, and shall deduct it out of the amount allowed by the Court in respect of such witnesses.

(7.) Where, for the purposes of the trial of any offence, with respect to which jurisdiction is by this order conferred upon the Central Criminal Court, recognizances are entered into for attendance at any Court of oyer and terminer or general gaol delivery for any county to which this order relates, such recognizances shall be deemed to have been entered into for attendance at the then next ensuing session of oyer and terminer and gaol delivery to be holden for the Central Criminal Court district as enlarged by this order, in the month of October, November, December or January, as the case may be, and every person bound by such recognizances shall be bound to appear at such session or forfeit his recognizance; provided that, where such recognizance has been entered into prior to the date of this order, not less than ten days' notice to appear at such session shall have been given to such person, either by serving the same personally on him or by leaving the same at the place of residence as of which he is described in the recognizance; and the clerk

to the committing justices or coroner, as the case may be, shall issue such notice as aforesaid, and service on any person of such notice may be proved by affidavit purporting to be sworn before any justice of the peace, or any commissioner to administer oaths in the Supreme Court of Judicature, or any clerk of the peace, or any registrar of a County Court; and any such affidavit shall, until the contrary is shewn, be taken to be sufficient proof of the statements contained therein, and shall be received in evidence in any legal proceeding without proof of the signatures, or of the official character of the person or persons taking or signing the same; and the fee for taking such affidavit shall be one shilling, and any such fee shall be costs in the matter to which it relates.

(8.) If at the summer assizes for any of the counties of Sussex, Berks, Herts, Kent, or Surrey, any prisoner or person charged with an offence with respect to which jurisdiction is by this order conferred upon the Central Criminal Court be remanded for trial at a future time, it shall be lawful for the Court by which he is remanded to order and direct that he be tried either at the next general session of oyer and terminer and gaol delivery to be holden for such county, or at the session of the Central Criminal Court to be holden in the month of October then next following; and in the latter case the prosecutor and the witnesses in attendance shall enter into recognizances for their appearance at such session of the Central Criminal Court; and if an indictment or indictments has or have been found against the prisoner or person, the clerk of assize shall transmit the same, with the depositions and all other things relating thereto, to the clerk of the Central Criminal Court, together with a copy of the order of Court, and such prisoner or person shall be tried upon such indictment or indictments in the Central Criminal Court as if such indictment or indictments had been found in the said Central Criminal Court; and for the purpose of such trial such prisoner may be removed to the gaol of Newgate without writ of *habeas corpus*, but with a copy of the order of Court; and all such other proceedings shall be had and taken as if the prisoner or person had been originally committed for trial subsequent to the commencement of the summer assizes.

(9.) If the Central Criminal Court at its session last held in the month of January cannot finally dispose of, or, for the purposes of justice, is of opinion that it is inexpedient finally to dispose of the case of any prisoner or person committed for trial in any one of

the counties or parts of counties to which this order relates, then the said Central Criminal Court shall order the removal of such prisoner to the gaol of the county or place whence he came in order that he may be tried at the next spring assizes; and the prosecutor and witnesses in attendance at the said Central Criminal Court shall enter into recognizances for their appearance at the said assizes; and if an indictment or indictments has or have been found against the prisoner, the clerk of the said Central Criminal Court shall transmit the indictment or indictments, and the depositions and all other things relating thereto, to the clerk of assize at such assizes, together with a copy of the order of Court; and such prisoner or person shall be tried upon such indictment or indictments as if the same had been found at the said spring assizes; and such prisoner may be removed from the said gaol of Newgate to the gaol whence he came without writ of *habeas corpus*, but with a copy of the said Order of Court; and all such other proceeding shall be had and taken as if the said

prisoner or person had not been removed to the said gaol of Newgate.

(10.) If, in pursuance of the 18th section of the Central Criminal Court Act as applied by this order, any writ of *certiorari* or *habeas corpus* be issued for the removal of any indictment or presentment, or of any person in custody, from the jurisdiction of the justices of the peace for the counties or parts of the counties to which this order relates to the Central Criminal Court, one week's notice shall be given in manner required by that section.

(11.) Except where the context otherwise requires, the terms used in this order shall have the same meaning as that which the same terms have in the Winter Assizes Acts, 1876 and 1877.

(12.) The Order in Council of the 23rd day of October, 1876, conferring jurisdiction upon the Central Criminal Court under the Winter Assizes Act, 1876, is hereby revoked, and this order, unless earlier revoked, shall be in force until the 1st day of March, 1878.

C. L. PREL.

The following is the order relating to the Winter Assize County, No. 1 :—

At the Court at *Osborne House, Isle of Wight*, the 13th day of *August*, 1877.

PRESENT :

The QUEEN's Most Excellent Majesty in Council.

In pursuance of the Winter Assizes Acts, 1876 and 1877, Her Majesty is pleased, by and with the advice of Her most Honourable Privy Council, to order as follows :—

1. The Northern and Salford Divisions (as defined by the Order in Council of the 4th day of May, 1864) of the county of Lancaster, the county of Cumberland and the county of Westmoreland shall, for the purpose of the next winter assizes, be united together and form one county, under the name of the Winter Assize County, No. 1.

2. The said winter assizes for the said winter assize county shall be held at Manchester.

3. The Court at the said winter assizes at Manchester shall have jurisdiction to try any prisoner committed in the said winter assize county who may be brought before it, and shall have the same powers with respect to the trial and passing sentence upon such prisoner as a Court of oyer and terminer and gaol delivery would have had at the assizes in the county where, but for the said Winter Assizes Acts, such prisoner would have been tried; and for the purpose of giving effect to

any sentence, whether it be capital, or a sentence of penal servitude or imprisonment, shall have power to remit the prisoner back to the gaol to which he would have been remitted had he been tried at the assizes in the county where, but for the said Winter Assizes Acts, he would have been tried, there to be dealt with according to law.

4. The sheriff of the county of Lancaster shall alone act for the purpose of the said winter assizes for the said winter assize county; and, subject to the provisions of this order, shall have jurisdiction for that purpose over the whole district constituting the said winter assize county; and precepts and other documents relating to the said winter assizes shall be addressed to him alone.

5. The precepts of the Judges to the said sheriff shall direct him to summon the grand jurors and petty jurors from the county of

Lancaster; and the jurors so summoned shall be deemed to be good and lawful men of the body of the several counties constituting the said winter assize county; and the grand and petty jury formed out of those jurors shall be deemed to be a grand and petty jury respectively of the body of the said counties respectively, and shall have jurisdiction accordingly.

6. The precepts of the Judges to the said sheriff shall direct him to cause the prisoners from all the prisons in the said winter assize county, who, under the provisions of this order, will have to be tried at Manchester, to be brought there; and the sheriff shall cause such prisoners to be brought accordingly without any writ of *habeas corpus*.

7. In all matters not before specifically mentioned, the precepts to the said sheriff shall direct him to issue, and he shall issue, the like notices, precepts, warrants and documents, and perform the same acts (*mutatis mutandis*) as if he were sheriff for the whole of the said winter assize county; and all under-sheriffs, bailiffs, constables and officers in the said winter assize county shall obey accordingly.

8. The said sheriff shall, as to all matters in relation to such winter assizes for which no specific provision is made by this order, have the same power, jurisdiction and responsibility as if he were sheriff for the whole of the said winter assize county, except that this provision shall not authorise the said sheriff to carry sentences into execution outside the county of Lancaster, or to levy, outside the said county, fines imposed or recognizances estreated at the said winter assizes.

9. All justices of the peace, mayors, coroners, escheators, stewards, bailiffs, gaolers, constables, officers and persons having authority, and being under an obligation to attend the assizes for any county comprised in the said winter assize county, or to certify, transmit or deliver to the Court of assize, or the proper officer thereof, any indictment, inquisition, recognizance, examination, deposition or document, shall have the same authority, and be under the same obligation, to attend at the said winter assizes held for the said winter assize county, and to certify, transmit or deliver to the Court of assize, or the proper officer thereof, such indictment, inquisition, recognizance, examination, deposition or document.

This provision shall not apply to the sheriffs of any of the counties constituting the said winter assize county, other than the sheriff of the county of Lancaster.

10. In all indictments and presentments at the said winter assizes, the venue laid in the margin thereof shall, in addition to the

name of the county where the offence is charged to have been committed, contain the words "Winter Assize County, No. 1."

11. Any person who in the said winter assize county, after the date of this order and before the said winter assizes, enters into a recognizance to appear and prosecute, or give evidence, or to appear and answer before a Court of oyer and terminer or general gaol delivery, shall be bound to attend at the said winter assizes for the said winter assize county.

12. In all cases in which the like recognizances have been entered into in the counties constituting the said winter assize county prior to the making of this order, such recognizances shall be deemed to have been entered into for attendance at the said winter assizes for the said winter assize county; and every person bound by such recognizance shall be bound to appear at such last-mentioned winter assizes, or forfeit his recognizance; provided that not less than six days' notice to appear at such winter assizes shall have been given to such person, either by serving the same upon him personally, or by leaving the same at the place of residence as of which he is described in his recognizance, and the clerks to the committing justices or the coroners, as the case may be, in the said winter assize county shall issue such notices as aforesaid; and service on any person of such notice may be proved by affidavit purporting to be sworn before any justice of the peace, or any commissioner to administer oaths in the Supreme Court of Judicature, or any clerk of the peace, or any registrar of a County Court; and any such affidavit shall, until the contrary is shewn, be taken to be sufficient proof of the statements contained therein, and shall be received in evidence in any legal proceeding without proof of the signatures or of the official character of the person or persons taking or signing the same; and the fee for taking such affidavit shall be one shilling, and any such fee shall be costs in the matter to which it relates.

13. Ten days before the day fixed for the opening of the commission at Manchester, a list of the prisoners to be removed for trial at the said winter assizes for the said winter assize county, so far as the same list can then be made out, shall, together with a short statement of the offences with which they are charged, be transmitted, by the gaoler of each prison in which such prisoners may be, to the sheriff of the county of Lancaster; and the said sheriff shall cause to be inserted in one or more newspapers in the winter assize county the said list and statement, and a notice that the persons bound by recognizances to appear and prosecute or give

evidence for or against the prisoners so removed shall appear and prosecute and give evidence at Manchester.

14. It shall be lawful for the gaoler of the gaol in which prisoners who are to take their trial at the said winter assizes for the said winter assize county shall be in custody, three days before the day upon which the said winter assizes for the said winter assize county are appointed to be held, to send, without any writ of *habeas corpus*, such prisoners to the county prison for the hundred of Salford, in the county of Lancaster, for the purposes of their trial, and to take all proper steps for their transmission to the said gaol, and their maintenance by the way; and the gaoler of the said gaol shall receive such prisoners into his charge and custody on their arrival, and shall keep and maintain them in the said gaol until they are either ordered to be discharged or remanded by proper authority, or until they shall have been tried and sentenced, and proper arrangements have been made for their being sent back to the prison from which they were sent for trial.

15. The expenses of, and incidental to, the removal of a prisoner to the county prison for the hundred of Salford for the purposes of his trial, and of his maintenance in such gaol, and of his removal after trial from such gaol to the prison of the county or place in which he shall have been committed for trial, shall be paid by the prison authority of the prison from which he was originally removed; and any difference between the prison authorities as to the amount of such expenses shall be determined by the Secretary of State for the Home Department for the time being, and his decision shall be final.

16. The clerk of the Crown for the county of Lancaster shall be the clerk of the Crown at the said winter assizes for the said winter assize county, and shall have all powers of taxation of bills of costs, expenses of prosecution and witnesses, and all other powers necessary for checking and paying such costs relating to the trial of prisoners that the clerk of assize in the county where such prisoners were committed would have had if such prisoners had been tried at the assizes held in such last mentioned county.

Where any person is committed for trial in the said winter assize county, any Judge of the High Court of Justice, or the committing justice or justices, or any two of the

justices of the county or place from which he is committed, may, upon the application of such prisoner, direct the treasurer of the county or place where the prisoner was committed, to advance to the prisoner a sum not exceeding 20*l.* to enable him to defray the travelling expenses of his witnesses; and the treasurer shall advance such sum, and shall deduct it out of the amount ultimately allowed in respect of such witnesses.

17. In any case where money is ordered by the Court at the said winter assizes for the said winter assize county to be paid in respect of costs and expenses of prosecutors and witnesses, the same shall be paid by the treasurer of the county or place by whom the same would have been payable had a like order been made by a Court of oyer and terminer or gaol delivery in the county where the trial would have taken place but for the Winter Assizes Acts and this order; and every such treasurer, or some known agent on his behalf, shall attend the said winter assizes during the sitting of the Court to pay all such orders.

18. Where the Court at the said winter assizes for the said winter assize county remand a prisoner or adjourn any trial, or otherwise make an order respecting a prisoner committed for trial, but not acquitted or convicted, the Court may make such order with respect to the removal of such prisoner to a prison in the county or place in which he was committed for trial as to the Court seems just, and the prisoner may be removed accordingly without any writ of *habeas corpus*.

19. Nothing in this order shall authorise the trial at the said winter assizes for the said winter assize county of any person who shall have been admitted to bail, and shall not, at the time of the holding of such winter assizes for the said winter assize county, be in custody, unless such person is jointly charged with another person in actual custody.

20. Except where the context otherwise requires, terms used in this order shall have the same meaning as that which the same terms have in the Winter Assizes Acts, 1876 and 1877.

21. The Order in Council of the 23rd day of October, 1876, relating to the same winter assize county, is hereby revoked; and this order, unless earlier revoked, shall be in force until the 1st day of December, 1877.

C. L. PREL.

Similar orders to the foregoing are made for the other winter assize counties, namely :—

The county of York and the county of the city of York, united together under the name of the Winter Assize County, No. 2. Assize town, Leeds.

The county of Lincoln, the county of the city of Lincoln, and the county of Nottingham, united together under the name of the Winter Assize County, No. 3. Assize town, Nottingham.

The county of Derby, the county of Leicester, and the county of Rutland, united together under the name of the Winter Assize County, No. 4. Assize town, Leicester.

The county of Warwick, the county of Northampton, the county of Bedford, and the county of Buckingham, united together under the name of the Winter Assize County, No. 5. Assize town, Northampton.

The county of Norfolk, the county of the city of Norwich, the county of Suffolk, the county of Huntingdon, the county of Cambridge, and so much of the county of Essex as is not included in the Central Criminal Court district, united together under the name of the Winter Assize County, No. 6. Assize town, Ipswich.

The county of Oxford, the county of Worcester, the county of the city of Worcester, the county of Hereford, the county of Monmouth, and the county of Gloucester, united together under the name of the

Winter Assize County, No. 7. Assize town, Gloucester.

The county of Salop and the county of Stafford, united together under the name of the Winter Assize County, No. 8. Assize town, Stafford.

The county of Southampton, the county of Wilts, and the county of Dorset, united together under the name of the Winter Assize County, No. 9. Assize town, Winchester.

The county of Devon, the county of Cornwall, the county of Somerset, and the county of the city of Bristol, united together under the name of the Winter Assize County, No. 10. Assize town, Exeter.

The county of Montgomery, the county of Merioneth, the county of Caernarvon, the county of Anglesea, the county of Denbigh, the county of Flint, and the county of Chester, united together under the name of the Winter Assize County, No. 11. Assize town, Chester.

The county of Glamorgan, the county of Carmarthen, the county of the borough of Carmarthen, the county of Pembroke, the county of the town of Haverfordwest, the county of Cardigan, the county of Brecknock, and the county of Radnor, united together under the name of the Winter Assize County, No. 12. Assize town, Swansea.

LAW JOURNAL REPORTS, 1878.

SUPREME COURT OF JUDICATURE.

GENERAL RULES.

Two paper books only in cases in the Crown Paper are to be hereafter delivered.

It is ORDERED that the party entering a Special Case under Order 58 of Rule 19, at the Crown Office of the Queen's Bench Division, shall, four clear days before the day appointed for argument, deliver two copies of the case to the Judges of the Divisional Court to which such case has been assigned for argument, at the Judges' Chambers in Rolls Gardens, Chancery Lane, such copies to be marked "For the use of the Judges in the Queen's Bench (Common Pleas or Exchequer) Division," and not with the name of any particular Judge, and to be divided into paragraphs and numbered as in the Special Case. Such copies are to be forthwith for-

warded to the proper divisions at Westminster.

It is ORDERED that motions under the 6th section of 38 & 39 Vict. c. 50, shall be made in the Queen's Bench, Common Pleas, or Exchequer Division of the High Court of Justice, only upon the days appointed by those Divisions for hearing appeals from Inferior Courts, and no such motion shall be made by way of appeal from any County Court unless a copy of the Judge's notes, signed by the Judge, shall have been handed to the proper officer in Court, unless otherwise ordered.

BY THE COURT.

22nd January, 1877.

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